

Exploring Controversies through Supreme Court Cases: Appealing to Reason

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Independence means you decide according to the law and the facts.—*Stephen Breyer, Associate Justice of the Supreme Court of the United States*¹

Abortion, affirmative action, gun ownership, discrimination, immigration, the death penalty, presidential authority, government surveillance, and privacy protection—these are among the

most contested public issues in America. In recent years, none of them was the subject of successful federal legislation, but all were the subject of one or more decisions by the Supreme Court of the United States. The central role that the least democratic branch of government plays in deciding controversial public issues makes it imperative that teachers and students understand the difference between the Court's adjudication of legal

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David Mullins, accompanied by his husband Charlie Craig, speaks with the media following oral arguments in the *Masterpiece Cakeshop vs. Colorado Civil Rights Commission* case at the Supreme Court in Washington, D.C., December 5, 2017.

controversies and the elected branches' policy solutions to controversial issues. Students feel strongly about the controversial topics elevated by recent and historic Supreme Court cases, and tackling them in the classroom can raise concerns about student behavior. By employing structured activities such as the ones described in this article and isolating the legal issues from the emotional ones, the dangers can be mitigated (See pp. 345–347). Using Supreme Court cases in social studies classrooms removes the partisan nature and political personalities that often cloud the discussion and allows students to follow Justice Breyer's maxim: They reach their own independent decisions based on reasoned analysis of the law and the facts.

Supreme Court cases provide materials for teaching about contested public issues in relevant and meaningful ways that help students develop critical decision-making skills, gain civic content knowledge, improve communication skills, and develop empathy and tolerance for the viewpoints of others. Within a divided democracy, teaching about controversial issues also increases student political engagement and improves civil discourse. A number of surveys show that teachers believe students should learn about controversial issues in social studies classes to help prepare them to deal with conflict and controversy in civic life. However, many of the same surveys show that teachers do not feel well-prepared to teach these lessons. One such 2009 study, "Teaching Controversial Issues in the Social Studies: A Research Study of High School Teachers," reported that 64 percent of teachers agreed or strongly agreed with the statement, "It is important to teach students how to deal with conflict and controversy."² However, only 35 percent of teachers "felt confident to teach about controversial issues."³ "Overall," the study concluded, "it appears that teachers understood the importance of controversial issues in the social studies but were concerned about limitations, their teaching effectiveness, student behavior, and consequences from the community and district."⁴

This divide between the importance of teaching about controversies and educators' lack of confidence in doing so continues to widen in the wake of the 2016 elections. As political polarization increases, teachers report both an unprecedented need for addressing controversial issues using civil discourse and, ironically, an avoidance of those same issues. A recent study from UCLA's Institute for Democracy, Education, and Access entitled "Teaching and Learning in the Age of Trump: Increasing Stress and Hostility in America's High Schools" found that while a quarter of teachers surveyed reported increased political polarization in their schools, "a number of teachers felt ill-prepared or inadequately equipped to respond to the unique classroom dynamics that grew out of the contentious political environment."⁵ The study further found that many teachers have responded by avoiding controversial issues and current events entirely. The study concluded that "[n]ot only did teachers narrow their curriculum and pedagogy to avoid conflict, but students often silenced themselves as well."⁶ This is antithetical

to a central mission of public schools—teaching students civil discourse, collaboration, and citizenship skills. The result has been increased conflict and incivility and has been linked to the targeting of vulnerable classmates as "the polarized and bellicose dynamics of the national political environment 'spilled into' classrooms and other school spaces."⁷ Teachers are eager to learn new strategies to bridge this gap. Of teachers surveyed, 72.3 percent agreed that "My school leadership should provide more guidance, support, and professional development opportunities on how to promote civil exchange and greater understanding across lines of difference."⁸ One strategy teachers can employ to increase their comfort level inviting these discussions into their classrooms is to focus on legal controversies found in case studies and not on political conflict.

While it would be naïve to believe that the Supreme Court is apolitical, teaching that uses Supreme Court cases instead of policy issues or campaign platforms takes the politicians and partisanship out of the controversy. It allows students and teachers to focus on the legal issues presented, not on the personalities involved. Students are free to form and voice opinions based on the facts and arguments presented, not on preconceived assumptions or confirmation bias in which students interpret new evidence as a confirmation of their existing beliefs. Daniel Bachman, a teacher at Massapequa High School in New York, observed that "the students' favorite case in our Moot Court class was *Masterpiece Cakeshop v. Colorado*,⁹ where students explored First Amendment rights as compared to the rights of same-sex couples. Students discovered that their personal opinions on the issues after finishing the trial didn't necessarily line up with their preconceived notions."¹⁰ Because cases are also about conflicts among real individuals with an actual stake in the decision—in this case, the baker and the same-sex couple—students feel empathy for the litigants and can extrapolate from the facts of the case to consider the impact of the issues on their own lives.

Before discussing specific teaching strategies, we believe it's vital to provide some context about how the Supreme Court conducts its work. While some observers associate the Court closely with contentious culture wars, in reality nearly 50 percent of the Court's opinions are unanimous. While Article III, Section 2 of the U.S. Constitution uses the word "controversies" to define the jurisdiction of the Court, in fact most of the Court's docket is not "controversial" in the sense of widespread public disagreement (or even concern) about the legal issues presented. Controversy in the context of the Constitution is defined as an actual dispute between two or more parties. The Court cannot decide a case where there is no current dispute and cannot render advisory opinions (as high courts can in some countries). Therefore, cases before the Court are not theoretical or rhetorical as political debates often are, but rather have been appealed to the Court by individuals or groups that will be personally affected by the decision.

The Supreme Court controls its own docket. While more than 6,000 parties ask the Court to hear their cases (technically, they petition for *certiorari*) each year, the Court only accepts (grants *certiorari*) between 60 and 70 cases annually, or approximately one percent of these petitions. The Court looks for issues that have been decided differently by lower courts. In response to these conflicting opinions—called “circuit splits”—the Court may grant review in order to promote uniformity of federal law. As with contested public issues, reasonable people—in this case judges—came to different conclusions when faced with the same set of facts and law. This selection process, which considers importance, controversy, and relevance, parallels the way many educators select issues to study in their classrooms.

Not surprisingly, the Court tends to be narrowly divided on many of the same contested issues as the public. Between 15 and 25 percent of the Court’s decisions each term result in 5-to-4 decisions. Most often these are the cases best suited for classroom use. The Court tends to hand down a disproportionately large percentage of these narrowly divided opinions at the end of the term in June; as a result, media coverage of the Court is most intense then. This contributes to the public’s overestimation of the controversial nature of the Court’s docket.

An example of the Court’s handling of contested political and legal issues was its decision in *Gill v. Whitford* (2018).¹¹ This case, which examined the constitutionality of partisan gerrymandering, was argued on October 4, 2017 (the first day of the term) and decided on June 18, 2018 (the last week of the term). Typically, the decision in a case is handed down eight to twelve weeks after the oral argument. The *Gill* decision, announced more than 37 weeks after it was heard by the Court, suggests that members of the Court, like the public, struggle with difficult political and legal issues. The fortunate result of their time-consuming decision-making process is that it provides teachers ample opportunities to use the cases to teach about controversies before the Court hands down a decision.

Readily available resources also encourage case use in the classroom: briefs detailing arguments for petitioners and respondents; amicus briefs providing insight from non-litigants; audio recordings and written transcripts of oral arguments; and ultimately written opinions from the majority, dissenting, and often concurring viewpoints.¹² Given our adversarial system of justice, the cases are already structured in a “pro”-versus-“con” format that makes them classroom-ready for a variety of teaching techniques.

To facilitate the use of these cases in secondary-school classrooms, Street Law—a nonprofit organization that develops programs and teaching materials to educate people about law and government—creates case summaries written specifically for middle and high school students. They are all available free of charge in the Street Law Resource Library.¹³ Seven strategies for using the case studies to teach about the cases are explained below. The strategies vary from basic to complex, and com-

plexity of student work increases as teachers move along the spectrum. Generally, the process focuses on developing student skills in analysis and critical thinking as much as developing knowledge about the outcome of a specific case.

All the strategies are based on five case elements, and all provide classroom-tested opportunities to engage students in discussions and analysis of controversial issues. These elements are like the building blocks of a recipe: the final product is created by combining the ingredients in a variety of ways.

5 Elements of a Case

Facts

Issue(s)

Precedents

Arguments

Decision

Elements of a Case

Facts

The facts of the case explain what happened. The facts introduce the parties involved and also tell the reader what happened at the trial and in a lower court of appeal.

Issue(s)

At the Supreme Court, the focus is on deciding legal issues and not on determining the facts. A case might involve more than one legal issue or question. For example, in a criminal case being argued before the Court, the issue is not whether the defendant was guilty of dealing drugs (a factual question for the trial court to decide) but rather whether the police violated the defendant’s Fourth Amendment rights during a search for the drugs.

Constitutional Provisions and Precedent Cases

Many Street Law case summaries deal with specific provisions of the U.S. Constitution (e.g., the First Amendment, Article II, and the Equal Protection Clause of the 14th Amendment). Where possible, the case summary will provide at least one precedent for each side of the case. Sometimes the same prior decision is useful for both sides, depending on how the precedent is interpreted. Some Supreme Court cases do not deal with the Constitution but instead with the interpretation of a federal statute. These case summaries typically include the relevant portion of the statute and precedent cases but do not include any constitutional provision.

Arguments

The American legal system is an adversarial system. The underlying belief is that the truth is most likely to emerge if each side

has a chance to present evidence (at trial) or argument (on appeal) in support of its position. At the Supreme Court, part of the argument deals with precedent cases already decided by the Court, and with attorneys' efforts to persuade the justices that these precedents require a certain outcome in the present case.

Decision

The decision or outcome of a Supreme Court case is sometimes called the "holding." The Street Law case studies summarize the majority opinion and, where appropriate, the primary dissenting opinion.

Teaching Strategies

Descriptions of Street Law's seven teaching strategies follow, from most basic to most complex. Street Law offers more than 100 classroom-ready case summaries in its Free Resource Library.¹⁴ Teachers can easily modify the case summary documents to implement these strategies because they are provided as editable Word files.

1. Anatomy of a Case

Facts + Issue + Precedents + Arguments + Decision (All Unmarked)

About: This is an ideal strategy for introducing a Supreme Court case to most students. (Note that AP students might start off at a higher level of complexity.) Through this strategy, students will learn about the vocabulary that is used when talking about Supreme Court cases, including majority and dissenting opinions.

How it's done: Students are given the case summary with the subheadings deleted. Their job is to identify each of the elements of the case: facts, issue, constitutional provision/precedent cases, arguments, and decisions. There are various ways to instruct students to do this: underline the facts, put a star next to the issue, draw a box around the constitutional provision or precedent, etc.

2. Choosing Unmarked Opinions

Facts + Issue + Precedents + Arguments + 2 Unmarked Decisions

How it's done: Students are given a handout containing the case facts, issue, constitutional provisions/precedents, arguments, and decisions. The majority and dissenting opinions subheads in the decision section should be deleted and should instead be labeled "Opinion A" and "Opinion B." The students' task is to identify the majority and dissenting opinion and to provide reasons for their answer.

3. Classifying Arguments

Facts + Issue + Select Unmarked Arguments from Each Party

How it's done: In advance, teachers copy, mix up, and paste unmarked arguments into list form. Students are given a handout containing the case facts, issue, and the list of unmarked arguments that the teacher created. Students are tasked with identifying whether the argument supports the petitioner (i.e., the party that is listed first and that lost in the court of appeals) or the respondent (i.e., the side that won in the court of appeals).

4. Judicial Opinion Writing

Facts + Issue + Precedents + Arguments

How it's done: Students are given a handout containing the case facts, issue, precedents, and arguments. Students are not given the decision. Half the class, working in small groups of three to five students, is instructed to write the Court's opinion with the petitioner winning. The other half of the class writes the Court's opinion with the respondent winning. The student-written opinions should apply the constitutional provisions, statutes, and/or precedents and provide a reasoned basis for the opinion.

5. Student Law Firms

Facts + Issue + Precedents

How it's done: Students are given a handout containing the case facts, issue, and constitutional provisions/precedents. Students are divided into small "law firm" teams with three to five students per team. Half the teams are tasked with creating arguments for the petitioner, and the other half are tasked with creating arguments for the respondent.

6. Applying Precedents

Comparison Case = Facts + Issue + Precedents

Precedent Case = Facts + Issue + Precedents + Arguments + Decision

How it's done: Students are provided with two handouts: (1) the facts, issue, and constitutional provisions/precedents of a recent, perhaps yet-to-be-decided case; and (2) a full case summary of a precedent case (i.e., one of the cases listed in the

precedent section of the comparison case summary). Students must decide whether the precedent is analogous enough to command the same outcome in the comparison case, or whether the new case is different enough to be distinguished from the precedent.

7. Moot Court

About: In some classrooms, the increasingly complex use of case studies is the scaffolding needed to conduct a moot court: a simulation of an appellate court argument, most often a U.S. Supreme Court argument.

How it's done: Students are given a handout containing the case facts, issue, and constitutional provisions/precedents. Students prepare to participate in a moot court simulation as attorneys for the petitioner or respondent or as an appellate judge or Supreme Court justice. A second handout containing the Court's decision can be distributed after students have "handed down" their decision in the moot court. (Depending on students' level of sophistication, the arguments for each side can also be included in the material distributed.) When preparing for a moot court, many teachers invite resource people into their classroom to work with student groups during the preparation stage. While it's possible to have a single moot court in a classroom—a panel of justices and two attorneys for each side—this may leave some students out of the simulation. Teachers rely on mini-moot courts to remedy this participation issue. One-third of the class prepares as lawyers for the petitioner, one-third as lawyers for the respondent, and one-third as judges. Then mini-moot courts composed of six students (two lawyers for each side and two justices) can hear cases simultaneously around the classroom.

For our students to thrive—and for our democracy to survive— young people must be able to develop independent thought on controversial issues that is not based solely on partisanship and personality. The case-study method is ideal for fostering independence and critical thinking that allow students to “decide according to the law and the facts,” as Justice Breyer advises. The appeal to reason over unsubstantiated opinion is invaluable not only in the classroom, but also in a larger context as students take on their roles as voters and citizens faced with the challenge of grappling with controversial issues. 🌍

Notes

1. Stephen Breyer, interview by Bill Moyers, *Frontline*, PBS, November 24, 1999.
2. Jeff Byford, Sean Lennon, and William B. Russell, “Teaching Controversial Issues in the Social Studies: A Research Study of High School Teachers,” *The Clearing House: A Journal of Educational Strategies, Issues and Ideas* 82, no. 4 (2009): 165–170.
3. Ibid.
4. Ibid.
5. John Rogers, Megan Franke, Jung-Eun Ellie Yun, Michael Ishimoto, Claudia Diera, Rebecca Cooper Geller, Anthony Berryman, and Tizoc Brenes, “Teaching and Learning in the Age of Trump: Increasing Stress and Hostility in America’s High

Schools” (Los Angeles: UCLA Institute for Democracy, Education, and Access, October 2017), <https://idea.gseis.ucla.edu/publications/teaching-and-learning-in-age-of-trump>.

6. Ibid.
7. Ibid.
8. Ibid.
9. For more information on *Masterpiece Cakeshop, Ltd., et al. v. Colorado Civil Rights Commission et al.*, 584 U.S. ____ (2018), see Supreme Court of the United States slip opinion, www.supremecourt.gov/opinions/17pdf/16-111_j4el.pdf; Oyez.org summary, www.oyez.org/cases/2017/16-111; and Street Law, Inc. classroom-ready case summary, <https://store.streetlaw.org/masterpiece-cakeshop-v-colorado-civil-rights-commission-2018>.
10. Daniel Bachman, e-mail to Cathy Ruffing, August 28, 2018
11. For more information on *Gill et al. v. Whitford et al.*, 585 U.S. ____ (2018), see Supreme Court of the United States slip opinion, www.supremecourt.gov/opinions/17pdf/16-1161_dc8f.pdf; Oyez.org summary, www.oyez.org/cases/2017/16-1161; Street Law, Inc. classroom-ready case summary, <https://store.streetlaw.org/gill-v-whitford-2018>.
12. Court documents and audio are available at SCOTUSblog: www.scotusblog.com.
13. Street Law, Inc., Free Resource Library of Supreme Court-themed lesson plans and case summaries, <https://store.streetlaw.org/resource-library>.
14. Ibid.

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- Street Law, Inc., Using Case Studies in the Classroom, <https://store.streetlaw.org/using-case-studies-in-the-classroom>.
- Street Law, Inc., detailed moot court instructions and recent potential comparison cases, www.streetlaw.org/programs/scotus-in-the-classroom.
- Street Law, Inc., *Classroom Guide to Mock Trials and Moot Courts*, <https://store.streetlaw.org/classroom-guide-to-mock-trials-and-moot-courts>.
- Street Law, Inc., LandmarkCases.org, www.landmarkcases.org.
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