

Lesson Title: Do all judges interpret the Constitution in the same way?

Skills/Strategies and/or Content

Article III, Section 1 of the United States Constitution places the judicial power of the nation in the Supreme Court. Along with the Executive and Legislative branches, this branch is charged with interpreting the Constitution. In this lesson, students will reflect on whether or not all of the justices approach interpretation of the Constitution in the same way and examine specific approaches the justices have taken when performing their role. Students will focus on two prevalent contemporary schools of judicial jurisprudence: originalism and living constitutionalism.

- Students will understand that conflicts exist over how judges interpret the Constitution.
- Students will identify and distinguish between two schools of judicial interpretation- Originalism and Living Constitutionalism.

Materials

- HAND-OUT 1: Relevant sections of the Constitution
- HAND-OUT 2: CASE SUMMARY AND DECISION- *FURMAN*
- HAND-OUT 3: CASE SUMMARY AND DECISION- *HELLER*
- HAND-OUT 4: WORKSHEET- QUOTES FROM *FURMAN*
- HAND-OUT 4: WORKSHEET- QUOTES FROM *HELLER*
- HAND-OUT 5: JUSTICE SCALIA IS SAYING...
- HAND-OUT 6: JUSTICE MARSHALL IS SAYING...
- HAND-OUT 7: WORKSHEET- MEMO FROM JUSTICE MARSHALL
- HAND-OUT 8: WORKSHEET- MEMO FROM JUSTICE SCALIA

Mini-Lesson *This may include: Direct instruction (content/ skills/research strategy); shared Reading (content/ skills); reading a selected portion of text aloud; reading /writing; modeling specific skills and/or strategies; viewing a film clip; making an explicit connection to previous activities; etc.*

1. Students will be asked to share their responses to the following scenario:
A classroom in another school in our district has a posted sign containing the classroom rules. It is an old sign, but all of the students are aware it is on the wall. The teacher often refers to the rules. They were written in 1988- before any of the students in the class were born. The sign includes many familiar rules, such as the requirement to show respect to everyone in the class and the prohibition against gum chewing. Additionally, it contains the following provision: "Students may not listen to radios or CD players while in class." Last week, one of the students took out her I-Pod, put the earplugs into her ears and began listening to her electronic device. As soon as the teacher saw the student, she requested the student turn off the device and go to the Dean. The student complied. When she arrived at the Dean she argued that she had done nothing wrong. What argument could she make to support her position? What counter-argument will the teacher be making?

2. The teacher will explain the following:

Originalism is based on a specific view of what the Constitution is- a view articulated by Chief Justice John Marshall in *Marbury v. Madison*:

"[The constitution] organizes the government, and assigns to different departments their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments. The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing; if these limits may, at any time, be passed by those intended to be restrained?"

Living Constitutionalism is based on the view that the Constitution is a living document that must be interpreted in light of the evolving American experience, as articulated by Justice Oliver Wendell Holmes in *Missouri v Holland*:

"With regard to that we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."

Further Resources

For the teacher:

Originalism: A Quarter-Century of Debate, Steven G. Calabresi (Editor).
(Washington, D.C.: Regnery Publishing, Inc., 2007)

A People's History of the Supreme Court, Peter Irons. (New York: Penguin Books, 2006)

America's Constitution: A Biography, Akhil Reed Amar.
(New York: Random House, 2005)

On Reading the Constitution, Laurence H. Tribe and Michael C. Dorf.
(Cambridge: Harvard University Press, 1991)

For students:

The Words We Live By, Linda R. Monk. New York: Hyperion Books, 2003.

Independent Work Time *This may include independent work, partner work, small group work, research.*

The teacher will give the text of the relevant sections of the Constitution and the facts and holdings of *Furman v Georgia* and *District of Columbia v. Heller*. The students will read this background information.

Working in groups, students will be given selected quotations from the two Supreme Court decisions. They will be asked to read the quotes and respond to the guiding questions.

Following the completion of the activity, there will be a teacher-led discussion wherein students will compare their responses. The teacher will guide the discussion-

- Where does Justice Marshall look to help him make his determination?
- Where does Justice Scalia look to help him make his determination?
- What does Justice Marshall believe are the guiding principles the Court should use when called upon to interpret the Constitution?
- What does Justice Scalia believe are the guiding principles the Court should use when called upon to interpret the Constitution?

Share/Assessment *This may include individual or group share, formal and informal assessment.*

Students will complete an activity based upon the level of their literacy skills. Some will summarize the justices' views on constitutional interpretation in a photograph call-out and others will construct a memo written by the justice to his law clerks explaining what they should consider when advising him about constitutionality.

HAND-OUT 1: Relevant sections of the Constitution

UNITED STATES CONSTITUTION, ARTICLE III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

United States Constitution, Amendment II - Right to keep and bear arms

A well-regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

United States Constitution, Amendment VIII - Excessive bail, cruel punishment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

HAND-OUT 2: CASE SUMMARY AND DECISION- FURMAN

Furman v. Georgia, 408 U.S. 238 (1972)

Facts of the Case

The petitioner, William Henry Furman, was burglarizing a private home when a 29 year-old father of five discovered him in his home. Startled, Furman started to run away, and as he did, he stumbled. His gun went off and he killed the man. He was convicted of murder and sentenced to death. After appropriate appeals, the United States Supreme Court agreed to hear the case.

Question Presented

Does the death penalty in this case constitute cruel and unusual punishment in violation of the Eighth Amendment as applied to the states?

Decision

The Court's answer was yes. On June 29, 1972 the Court issued a 5 to 4 per curiam opinion. Per curiam is a Latin phrase meaning "by the court," and in such a decision no one judge is identified as the author. Instead, the decision is attributed to the court as a whole. The Court held that the imposition of the death penalty in this case constituted cruel and unusual punishment and violated the Constitution.

HAND-OUT 3: CASE SUMMARY AND DECISION- HELLER

District of Columbia v. Heller 554 U.S. ____ (2008)

Facts of the Case

The respondent Dick Anthony Heller, a D.C. special police officer, would like to keep a handgun in his home in Washington, D.C. He tried to register it with the city, but was turned down because the city has banned the registration, and therefore the possession, of all privately owned handguns. He argues that he has a Second Amendment right to have the gun in his home for self-defense because he lives in a high-crime neighborhood. After appropriate appeals, the United States Supreme Court agreed to hear the case.

Question Presented

Does the Second Amendment protect an individual's right to keep and bear arms?

Decision

The Court's answer was yes. On June 26, 2008 by a 5 to 4 decision, the Supreme Court upheld the federal appeals court ruling, striking down the D.C. gun law. Justice Antonin Scalia writing for the majority, stated, "In sum, we hold that the District's ban on handgun possession in the home violates the Second Amendment.

HAND-OUT 4: WORKSHEET- QUOTES FROM *FURMAN*

From the concurring opinion of Justice Thurgood Marshall in *Furman v Georgia*

“Perhaps the most important principle in analyzing ‘cruel and unusual’ punishment questions is one that is **reiterated** [repeated] again and again in the prior opinions of the Court... [is that] the cruel and unusual language ‘must draw its meaning from the **evolving** [developing] standards of **decency** [moral values] that mark the progress of a **maturing** [established and advancing] society.’ Thus, a penalty that was permissible at one time in our Nation's history is not necessarily permissible today.”

- According to Justice Marshall, what ruler should the Court use when measuring whether a punishment is cruel and unusual?
- Why would that ruler result in different measurements over time?

“There is no holding directly in point, and the very nature of the Eighth Amendment would dictate that, unless a very recent decision existed, **stare decisis** [prior court decisions] would **bow** [bend] to changing values, and the question of the constitutionality of capital punishment at a given moment in history would remain open.”

- What does Justice Marshall think about the continuous importance of the rationale (reasoning) of prior court decisions?

“There are no prior cases in this Court striking down a penalty... [just because the public hates it], but the very notion of changing values requires that we recognize its existence. It is immediately obvious, then, that since capital punishment is not a recent phenomenon, if it violates the Constitution, it does so because it is excessive or unnecessary, or because it is abhorrent [strongly objectionable] to currently existing moral values.”

- Does Justice Marshall think Americans have always held the same beliefs about capital punishment?
- How do you know he feels that the Court should use present day ideas to decide if something is unconstitutional?

“...[E]ven if capital punishment is not excessive, it nonetheless violates the Eighth Amendment because it is morally unacceptable to the people of the United States at this time in their history.”

- What words tell you that Justice Marshall does not believe he is bound by the Framers’ definition of excessive punishment when determining if capital punishment violates the Constitution?

HAND-OUT 4: WORKSHEET- QUOTES FROM *HELLER*

From the majority opinion of Justice Antonin Scalia in *District of Columbia v. Heller*

“In interpreting ... [the words of the Second Amendment] we are guided by the principle that “[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.... Normal meaning may of course include an **idiomatic** [expressions that are natural to a native speaker] meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.”

- What does Justice Scalia think about the importance of the language and used by the founding generation?

“Before addressing the verbs “keep” and “bear,” we interpret their object: “Arms.” The 18th-century meaning is no different from the meaning today. The 1773 edition of Samuel Johnson’s dictionary defined “arms” as “weapons of offence, or armour of defence.” 1 Dictionary of the English Language 107 (4th ed.) Timothy Cunningham’s important 1771 legal dictionary defined “arms” as “any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another.” 1 A New and Complete Law Dictionary (1771).”

- According to Justice Scalia, what research materials the Court use when interpreting the words contained in the Second Amendment?

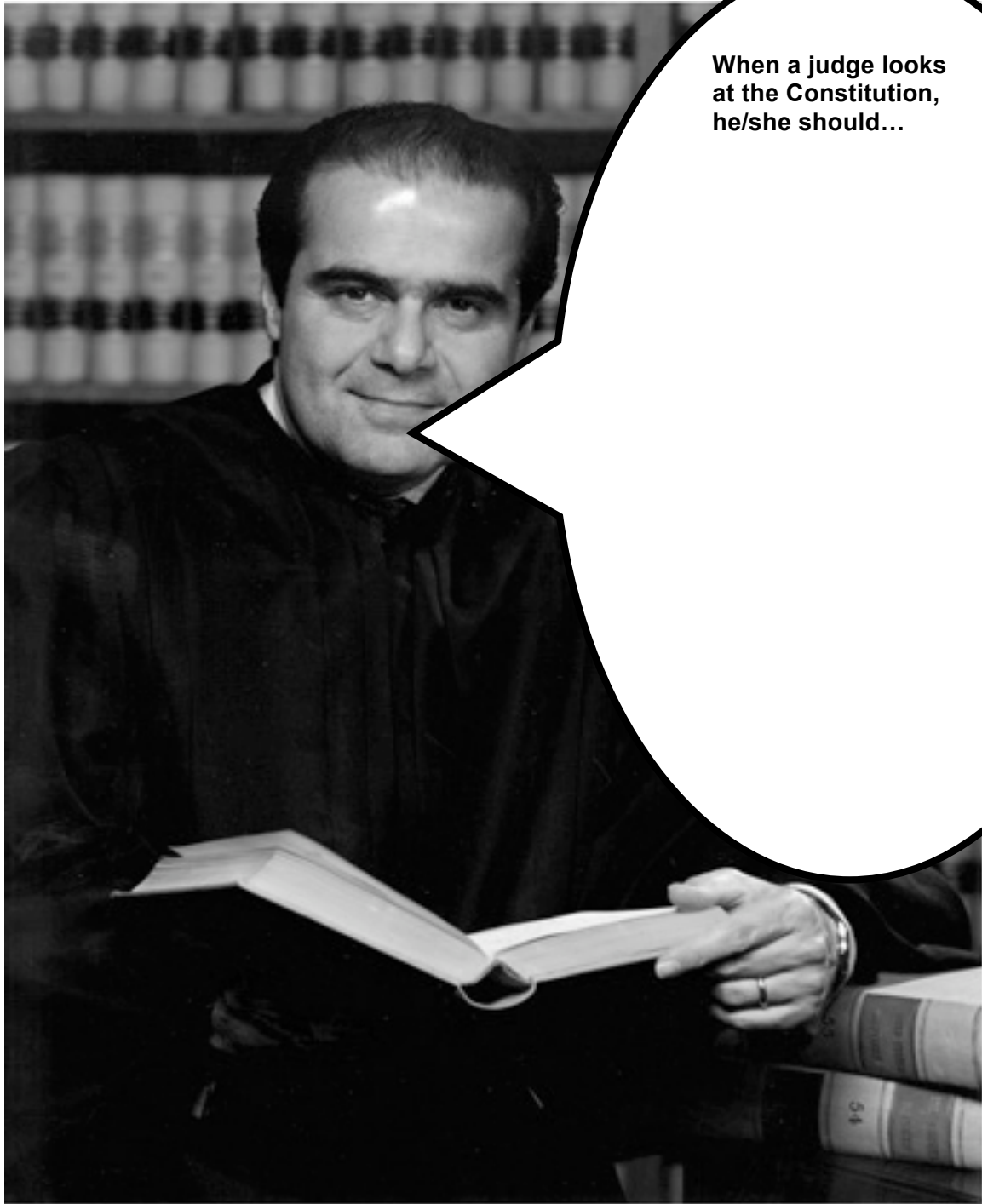
“And even if ‘keep and bear Arms’ were a unitary phrase, we find no evidence that it bore a military meaning. Although the phrase was not at all common (which would be unusual for a term of art), we have found instances of its use with a clearly nonmilitary connotation. In a 1780 debate in the House of Lords, for example, Lord Richmond described an order to disarm private citizens (not militia members) as ‘a violation of the constitutional right of Protestant subjects to keep and bear arms for their own defense.’” The London Magazine or Gentleman’s Monthly Intelligencer 467 (1780).

- What does Justice Scalia think about the importance of the rationale (reasoning) of the history of the right to bear arms?

“In the tumultuous decades of the 1760’s and 1770’s, the Crown began to disarm the inhabitants of the most rebellious areas. That provoked **polemical** [passionate arguments] reactions by Americans invoking their rights as Englishmen to keep arms. A New York article of April 1769 said that “[i]t is a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their own defence’.” A Journal of the Times: Mar. 17, New York Journal, Supp. 1, Apr. 13, 1769.

- How do you know Justice Scalia feels that the Court should not use present day ideas to decide if something is unconstitutional?

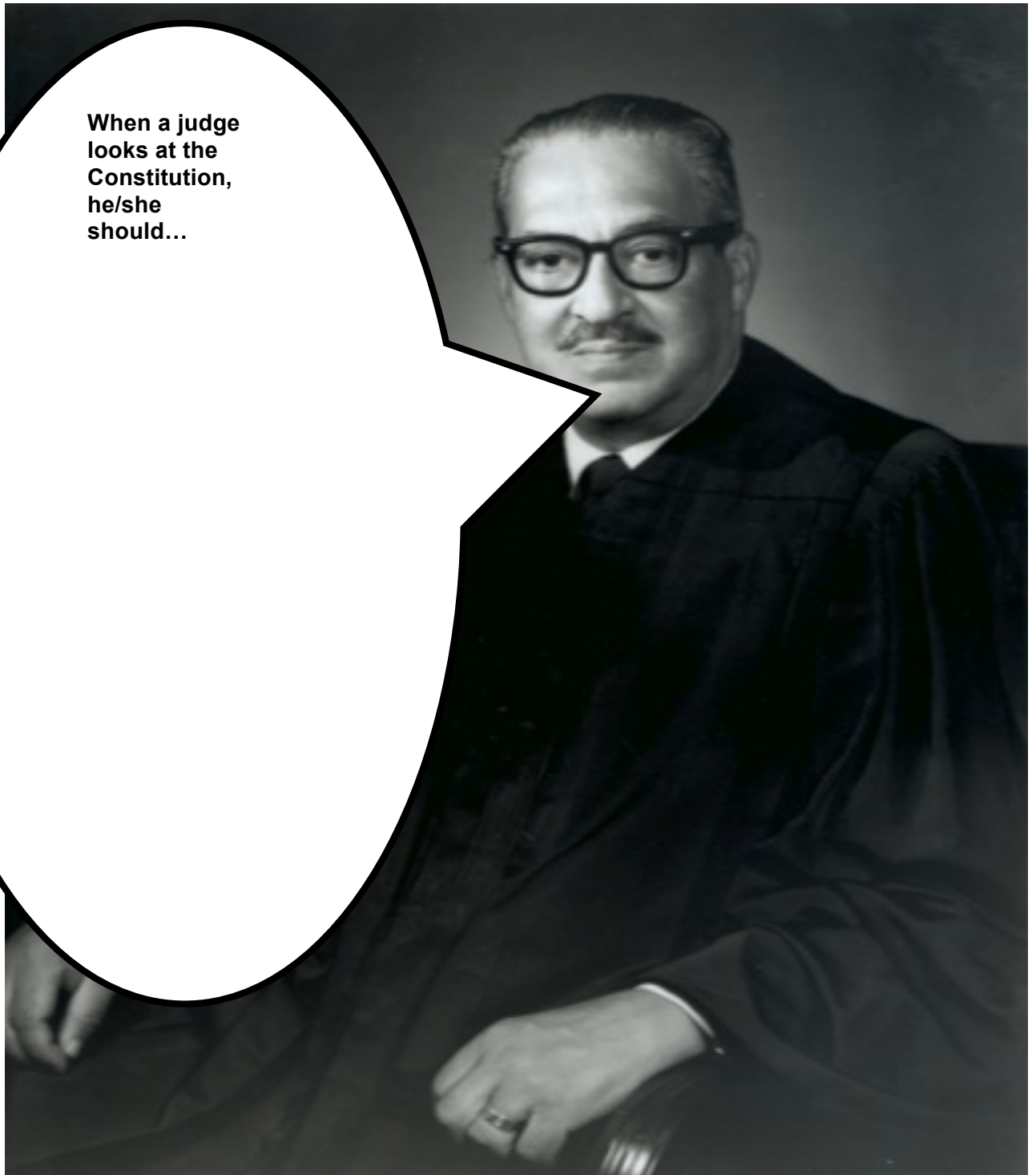
HAND-OUT 5: JUSTICE SCALIA IS SAYING...



Source: The Collection of the Supreme Court of the United States

HAND-OUT 6: JUSTICE MARSHALL IS SAYING...

**When a judge
looks at the
Constitution,
he/she
should...**



Source: The Collection of the Supreme Court of the United States

