# Fighting Chance

Analyzing the Principles of Equal Protection and Due Process in a Mock Supreme Court Case



#### About the Buck Institute for Education

Founded in 1987, the Buck Institute for Education works to expand the effective use of Project Based Learning throughout the world. BIE is a not-for-profit 501(c)3 organization based in Novato, California and is a beneficiary of the Leonard and Beryl Buck Trust. In addition, BIE has received grant support from the Fund for the Improvement of Post Secondary Education (FIPSE), the US Congress Office of Technology Assessment (OTA) and the US Department of Education Dwight D. Eisenhower Professional Development State Grant Program. BIE provides PBL professional development services and curriculum materials to school districts, state departments of education, foundations, and other clients in the United States and abroad.

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### Foreword

Students learn more when they care about what they are learning. Students understand concepts better if they see how these concepts apply to the world outside of school. Students retain information longer if they are actively engaged in the discussion and demonstration of what they are learning.

Too many American classrooms never utilize these principles. But *Project Based Government (PBG)* is built upon them. It addresses the concepts and content defined by the *National Standards for Civics and Government* from the Center for Civic Education, grades 9–12, and the *Curriculum Standards for Social Studies*, developed by the National Council for the Social Studies for high school, in such a way that the material becomes meaningful and engaging to students. *PBG* reverses the traditional method of "teach the concepts first, then give students the opportunity to apply them." Instead, *PBG* places students in an interesting scenario with an open-ended problem and asks them to arrive at a justifiable solution using civics concepts. The project thus "pulls" students through the content. The teacher's role is to clarify, facilitate, and guide rather than "push" unmotivated students toward the learning objectives.

Research has shown project-based curricula to have positive effects on student learning. *PBL* methodology helps teachers build valuable interdisciplinary "21st-century skills" in students, including collaboration, critical thinking/problem-solving, and presentation making. Studies have shown that there are important cognitive benefits with the PBL methodology. We have found that *PBG* works well for diverse students in a variety of school settings. Skilled teachers in alternative education programs, continuation high schools, and other settings have reported success with these materials.

These units were developed by the Buck Institute for Education and pilottested and critiqued by a group of energetic, insightful teachers throughout California. Although too many teachers have been involved to thank each one by name, we are extremely grateful for their time, insight, and contributions to making these units successful. In addition, there have been a number of university professors, nonprofit organization staff, and school district leaders who have contributed to unit development. We have benefited from their observations and suggestions, and we offer a collective "Thank you!"

Please visit the Interact website (www.teachinteract.com) to find out about professional development offerings and conference presentations.

John Mergendoller, Ph.D. *Executive Director, Buck Institute for Education* 

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#### Introduction Chapter One

### Introduction

**Chapter One** 

### What is Project Based Learning?

Project Based Learning (PBL) is an instructional method in which students:

- Engage in a rigorous, extended process of inquiry focused on complex, authentic questions and problems
- Work as independently from the teacher as possible and have some degree of "voice and choice"
- Demonstrate in-depth understanding of academic knowledge and skills
- Build 21st-century skills such as collaboration, presentation, and critical thinking/problem-solving
- Create high-quality products and performances which are presented to a public audience

PBL is often cited as a valuable method by educators promoting differentiated instruction, multiple intelligences theory, learning-styles theory, 21st-century skills, and the "new 3 Rs" of rigor, relevance, and relationships.

In PBL, the project *drives* the curriculum—it provides the structure for teaching and learning. A project is not just an "applied learning activity" that follows a traditionally taught unit of instruction. Nor is it discovery learning in its most basic form, in which students are provided with tools and activities that allow them to "discover" knowledge and skills with minimal guidance from a teacher. Instead, PBL challenges students to solve a problem through the application of content knowledge and collaborative resource-gathering, investigation, discussion, and decision-making.

Each project in *Project Based Government (PBG)* is a complete unit of instruction centered on a scenario that presents students with an engaging, realistic problem with more than one possible reasonable solution. To resolve the problem successfully, students realize they need to understand civics concepts and how government operates. This increases their motivation to learn the curriculum. Coaching students to resolve the problem posed in each unit requires a teacher to weave together a number of instructional components while remaining focused on the civics concepts around which the project is organized.

# Phases of a Project Based Government unit: how learning unfolds

Although structured flexibly enough to allow for student discovery and independent learning, all *PBG* projects follow a series of steps or phases. These phases may sometimes overlap, but can generally be defined as follows:

### Project launch—the Entry Event

At the start of each *PBG* project, students either receive some type of authentic correspondence or have an authentic experience intended to engage them in the project scenario. The "Entry Event" provokes interest and generates curiosity, leading naturally to the next phase.

### Framing the inquiry—Driving Question and Knowledge Inventory

To begin the inquiry and problem-solving process, students as a class analyze their task and write a "Driving Question" that guides the project. The teacher coaches students in the construction of a Driving Question that summarizes the problem to be resolved, which in *PBG* is written according to the model:

How can we, as \_\_\_\_\_, do \_\_\_\_\_ so that \_\_\_\_?

The teacher also leads the class through a discussion and recording of knowledge that the students already have (know) and information that they still require (need to know) in order to arrive at an answer to the Driving Question. This process is repeated periodically throughout the lesson.

### Problem-solving and learning activities

The project scenario unfolds as students receive additional information about the problem to be solved. Students work in teams to conduct independent investigation and complete project tasks while the teacher provides resources and lessons guided by the students' "Need-to-Know List." A Project Log is used to check for student understanding of key civics terms and concepts. The class revises the knowledge inventory periodically and revisits the Driving Question to help stay on track toward a reasonable resolution to the scenario. The teacher monitors students' progress and watches for "teachable moments" when students recognize their need to know more about civics.

### Presentation, assessment, and debrief

The project culminates as students finalize their solution to the problem posed in the scenario. Students prepare authentic products and present them to an audience and/or publicly discuss each group's work. The

teacher uses a rubric to evaluate the students' work and may also choose to administer a test to assess learning. The last step is to debrief the project with students, discussing both civics content and the process by which it was learned.

### **Teaching in the PBL environment**

Although Project Based Learning is designed to foster active, engaged learning, students do not work completely on their own or exclusively with their peers when addressing the problem presented in a scenario. PBL is most effective when accompanied by *project-based teaching*.

In PBL, the teacher guides students through the process of collaborative problem-solving and the creation of high-quality products and performances. Teachers are an important provider of subject-area knowledge and remain responsible for monitoring and assessing student learning, clarifying content-related concepts and misconceptions, assigning students to work groups, and managing what goes on in the classroom. Although traditional tools such as lectures, homework, and quizzes still have a place in this setting, they are used in the meaningful context of solving a problem. The role of the teacher using PBL is to make learning "inevitable" by carefully managing the learning process and promoting a spirit of inquiry.

### Make it a collaborative effort

The timing and extent of a teacher's instructional interventions differ from those used in traditional approaches. Effective teachers in PBL wait for teachable moments, when students are interested and ready to learn, before intervening or providing the necessary content explanations; they present or clarify concepts once students realize they need to understand subject-area content in order to solve the problem. Project Based Learning is most effective when it is a collaborative effort between the teacher and students, with the teacher as the senior partner.

This collaboration begins by engaging students in the problem to be solved. As you launch the unit, it is important not to reveal too much about the problem that students are about to encounter and not to pre-teach the content and take away the motivation to learn that comes after students are "hooked" by the Entry Event. Take the problem seriously. While acknowledging that it is a scenario, point out that the problem is closely modeled on what happens in the real world. Heighten student interest and motivation by emphasizing the important effects their decisions will have (summarized in the "so that" part of the Driving Question written by the class). Model genuine interest and enthusiasm for students to take on the challenge of exploring several possible solutions. The "teacher-as-coach" metaphor applies as students go about the tasks of conducting research, understanding the problem's complexities, and preparing to present their solutions. Like a good coach watching athletes practice, the teacher needs to observe, diagnose, and guide without doing students' work for them. Anticipate some needs before they arise, be prepared to meet them, and watch for new needs as they emerge but wait until they emerge.

One of the biggest challenges for many teachers is to step back and wait for the "need to know" to arise in students. Instead of answering all questions right away, ask, "How could you find that out?" and offer suggestions and resources for further inquiry. If students get stuck at a certain point, act as a "cognitive coach" by modeling thinking strategies. Offer process-oriented comments such as, "How would I approach that issue/task? Well, I might break it down into steps, or I might want to talk with my group about \_\_\_\_\_ or make sure I understood \_\_\_\_\_. Or maybe I'd go back to my Need-to-Know List... "

### **Build classroom culture**

Establishing the classroom culture is also important for successful PBL. Students must know that it is all right to take intellectual risks and offer creative solutions for critiques by their classmates and teacher without fear of ridicule. A healthy spirit of give-and-take needs to be fostered in a PBL classroom, as does the habit of reflection. Both students and teacher need to constantly ask: "What are we learning? How are we learning? And what does it mean?"

Another vital part of classroom culture is collaboration. In PBL students work in small groups, and the key to their success is the ability to work together comfortably and productively. If students are not used to group work, these skills must be taught. If students are not working well together, the teacher needs to know how to intervene and smooth things out. And when students share ideas, ask questions, and present their work, whether it is to their own classmates or a public audience, a serious and respectful tone should be the norm.

### Invest in planning

A teacher using PBL should be skilled in planning and organization. Before beginning a unit, make sure to read all instructions and prepare materials carefully, but do not over-plan and feel bound by a predetermined timetable. It is hard to predict exactly how each class will approach a project and what needs will arise. A certain amount of flexibility is required, as is the willingness to let go of some expectations and control. Students may propose solutions that you had not considered, or they may want to explore issues in greater depth and breadth. A teacher also needs skill in the use of performance-based assessment. This means knowing how to assess skills such as collaboration, communication, and time and task management. You can enhance student development of these skills by providing exemplars, well-written rubrics, and chances to practice with helpful feedback.

Teaching in a PBL environment differs from many traditional classrooms in two other ways. First, it can be noisy. That means a teacher (and his or her school neighbors and administrators) must be willing to accept occasional apparent disorder as the inquiry process at work. Second, a teacher must be willing to personally engage with students in ways other than standing in front of the room, delivering content knowledge as the "sage on the stage." A degree of intellectual and sometimes emotional connection with individual students is often needed to meet the challenges of PBL.

### Teaching Government With Project Based Learning

**Chapter Two** 

Project Based Learning (PBL) is an ideal methodology for teaching young people about democratic government and citizenship. Every level of government, and every citizen who affects or is affected by government, solves problems in the course of fulfilling their duties. Governments must raise and spend money, set policies, create laws, and perform services, all while balancing the needs of a complex, changing society. Usually there is no single "right answer" upon which everyone can agree. Citizens voting in elections, communicating with their government, or working in government must solve problems that are complex and open-ended. And the duties of government and citizens are often accomplished in collaboration with others. The skills built by PBL provide good training for what students will need in their lives as members of a democracy.

In *Project Based Government*, students learn how the terms, concepts, and processes described in textbooks apply to the real world. By solving problems rooted in real life, students are able to grasp a fundamental truth about how democracy works—it is "messy." They see firsthand that each solution to a governmental or political problem almost always has its drawbacks, its winners and losers; that democracy requires debate, disagreement, and ultimately compromise in order to get things done; and that government and politics adapt to changing times that require leaders and citizens to revisit certain basic principles again and again. These themes circulate throughout all the Buck Institute of Education's *PBG* units. Additionally, the units feature glimpses of ways that students, as future citizens, can take part in the process of governing—including serving on the staff of a political officeholder, working on a campaign team, and joining an organized interest group.

### **Preparing Students for PBL**

Before launching the first *PBG* unit, we recommend introducing students to the concept of Project Based Learning. This can be accomplished with a 45-minute activity: **Can We Believe This?** (See Chapter Three). In this activity students encounter a civics-related situation. As they set about solving the problem, they learn the process for how PBL works. In one class period, they gain experience analyzing an Entry Document, writing a Driving Question, and conducting a Knowledge Inventory—learning how to think and act in different ways than they might be used to in more traditional forms of learning.

The *PBG* units may be taught in a sequence, forming the backbone of an entire semester-long course surveying U.S. government and civics, or more commonly, they may be interspersed with other lessons and activities.

By reviewing the *Content Standards* within each unit, and your own state standards documents, you will see that most major standards are addressed by the *PBG* units. What is not addressed may be taught by adding extensions or exploring topics of particular interest and local emphasis. As you plan the order in which the units will be taught, and determine the prerequisite knowledge students will need, consider the following points about each unit:

### A Government for Xlandia

In this unit students are placed in the role of representatives of various democratic nations on a United Nations Task Force. They are asked to advise the leaders of a new nation, just emerging from a dictatorship, about what form of constitutional democracy they ought to build. This unit would be useful near the beginning of a course to provide an overview of constitutional democracy. Alternatively, it could be used near the end of a course to summarize and more deeply reflect upon key points about constitutional democratic government. The unit builds understanding of the basic functions of a constitution, how government power can be limited, and how the U.S. system compares with other democracies. It also asks students to consider the conditions under which democracy takes root and flourishes, and it connects to the study of economics and world history.

### The Better Budget

Students in this unit, acting as a focus group for a congressional representative, are asked to recommend cuts in the federal budget, balancing the views of liberals and conservatives about the proper role of government. Teachers find this unit useful near the beginning of the course since it provides actual examples of the basic services and programs funded by government. It also explores the historical and philosophical roots of liberal and conservative ideology, forming a sound basis for discussion of many issues that typically arise in a high school government course.

### LegiQuest

In this unit students take the role of lobbyists for an interest group representing young people, investigating ways in which legislation might be steered through Congress. The issues under consideration include school bullying, death penalty, teen steroid use, and gun control. This unit can be used to teach the legislative branch of the federal government. It also touches on the roles of the executive branch, the courts, and the states in enacting public policy. By framing the traditional "how a bill becomes law" lesson in the context of actual issues, and by starting farther back in the law-making process, this unit gives students a deep understanding of the realities of legislation.

### **Fighting Chance**

In the role of first-year associates at a law firm, students are asked to recommend whether their firm ought to take a case heading to the Supreme Court. The case involves a qualified woman who was barred from joining the U.S. Army Special Forces and is challenging the rule as discriminatory based on the right to equal protection guaranteed by the 5th and 14th Amendments. This unit may be taught in the context of the Bill of Rights, and/or as a vehicle for learning about the judicial branch of U.S. government, and the Supreme Court in particular.

### On the Campaign Trail

This unit could fit into a course at various points, and it is especially relevant during election years. Students act as media consultants for a local political campaign and must decide how to best "market" a flawed candidate, given local issues and voter characteristics. Ethical dilemmas arise as students learn about the realities of campaigning for office today, providing the teacher and students with an opportunity to critically examine the U.S. election system.

### Not in My Backyard

In this unit on local government, students acting as a city manager's staff must choose the best site for transitional housing for the homeless. They must also defend the city's policymaking process and balance the demands of various interest groups—learning important lessons about how municipal government works. Since the topic of local government is often neglected, or shoehorned into typical high school government courses, this unit offers a way to teach the content effectively while engaging students with its high-interest topic of homelessness. NIMBY could fit at the beginning, middle, or end of a semester. Some teachers may wish to start a course with the study of local government and/or use this unit to launch an exploration of actual local issues in their community.

### What is provided in this unit?

*List of Concepts Taught:* Each unit provides a list of key concepts students should be learning and provides guidance on how to ensure that they do.

**Objectives:** Each unit contains a list of objectives outlining what students will learn and experience.

**Content Standards:** Each unit charts the applied content standards of the *National Standards for Civics and Government* from the Center for Civic Education and *Curriculum Standards for Social Studies*, developed by the National Council for the Social Studies.

**Unit Overview:** Each unit contains an overview that includes the time required, a summary of the problem to be resolved in a scenario, the civics concepts to be learned, the placement in the curriculum of a typical high school civics course, and the Center for Civics Education standards addressed.

A section on how to teach each unit contains:

- A section of **Student Materials** with all student handout masters.
- A section of **Teacher Materials** with a detailed review of the economic concepts and terminology within the unit, which may be used to guide the preparation of lessons for students, plus a glossary of concept definitions, answer keys for unit assignments, and rubrics for major unit products.
- Sequence of the Unit, a quick reference list of each step.
- A Step-by-Step Teaching Guide, with detailed instructions about how to manage each step, plus Resources, sample Driving Questions and Know/Need-to-Know Lists, Content Notes, prompts for Project Log entries, and Potential Hurdles.

At various points within each unit, you will see two types of special **Notes to the Teacher** on effective implementation:

**Content Notes:** The Content Standards section of each unit identifies key concepts students should be learning and provides guidance on how to ensure that they do.

**Potential Hurdles** indicate certain points during the unit when students might become confused or sidetracked and explain how to help them.

### Teaching Strategies for Project Based Government

### **Scaffold learning activities**

Students are supported in a variety of ways in the *PBG* units. In addition to "soft scaffolds" such as conversations with a teacher, "hard scaffolds," such as charts, tables, or worksheets, are provided in each unit to help students learn concepts and organize their ideas. Students practice using civics concepts through oral or written exercises that build knowledge and skills necessary for the culminating task in the unit.

Efficient project-based teaching generally involves selecting content resources for students to use before they embark on solving the problems presented and creating products. These can include civics textbooks, specially prepared handouts, newspaper articles, videos, and online resources. Students should be encouraged to grapple on their own or in small groups with civics concepts and find their own answers to content-related questions as much as possible. Consequently, it is generally best not to assign specific resources but rather to tell students what they can easily access to find the information they need to complete project tasks. It is then up to students and their groups to decide what content resources they are going to pursue.

### Provide clarifying lessons at "teachable moments"

PBL is most effective with continual dialogue between the teacher (as a coach) and students. Effective project-based teachers must actively direct students toward the curriculum goals by asking probing questions in class discussions, circulating and listening to discussions in group work, and taking advantage of teachable moments when students are ready to learn. When these moments arise, the teacher has a key role to play in explaining content-related concepts and clarifying misconceptions. The teacher may offer a quick explanation to individuals or small groups, or recognize when all or most of the class needs to be taught something as a whole via direct instruction.

When lectures are given, they should be short (hence the term used in these materials, "mini-lecture") and organized. Limit lectures to the information students need at that point in the problem-solving process. A mini-lecture should be introduced by talking about it as part of the teacher's role as "coach" for the students' problem-solving process. It is a good idea to refer to the "Need-to-Know" list and say something like, "Many of you said yesterday that you had questions about \_\_\_\_\_, so I have some information that will answer those questions." And, as in all cases when lectures are used, you should use the techniques of good lecturing: engage students by speaking in an interesting style, ask questions, give examples, use visual aids, and pause to have students think, talk, or do some activity.

### Use formative assessments

A key part of your job in project-based teaching is to monitor whether students are learning the concepts the project is designed to teach. A variety of formative assessments will help with monitoring, including individual questioning, pop quizzes, checks for understanding with peers, and Project Logs. Here are strategies for using formative assessment tools:

- Listen to student discussions in small groups or as a whole class, and ask questions to provide a window into students' thinking and reveal confusion or misunderstandings.
- Administer a short pop quiz requiring students to demonstrate their understanding of an economic concept.
- Arrange for peers to check each other's understanding by pairing up to explain an economic concept to another student. Follow this by asking students for a show of hands to report how well they thought they explained and how well they (honestly) thought their partner explained the concept. If this check reveals a knowledge gap or misunderstanding, conduct a short whole-class discussion or mini-lecture to consolidate understanding of the idea or concept.

Project Logs provide a structured way of assessing student understanding and are included in *PBG* units at significant points during the project. You may have students record many things in a Project Log or journal, including notes on the process of learning, comments on how well they or their groups are working, or reflections on content-related topics. Project Logs provide for individual accountability for learning the material and allow you to assess the understanding of each student when students work in groups.

Project Log entries *must be checked soon after they are written* if they are to be used effectively as a diagnostic tool. You need to find out what students do and do not know in order to plan the next day's instruction. Apart from skimming them all, one way to do this quickly is to select a small number of representative samples from a range of students in the class. Or, students could be asked to raise their hands according to how well their entries—or their peer's, if they have swapped and read each other's logs—matched the criteria provided.

Once Project Log entries have been reviewed to assess the degree to which individual students understand the conceptual material being addressed, you can plan further instructional actions such as:

• Talking with the class about the concepts in question by giving another mini-lecture

- Talking with certain students or groups to address their misconceptions and misunderstandings
- Giving additional textbook reading assignments, and/or directing students to online resources and explanations
- Arranging peer teaching between students who are confused about the concept and those who have a solid understanding of it

### Manage small-group work

Although the problems posed in project scenarios can be resolved entirely by individuals or entirely through whole-class effort, Project Based Learning is most effective when students are required to work in small groups. Consequently, all *PBG* unit scenarios place students in the role of a team with three to six members. This gives students the opportunity to discuss their ideas and questions with peers and develops the skills of stating a position, listening to others' positions, respectfully disagreeing with others, and collaborating and compromising. There is no always-applicable guidance for forming groups, and you will have to think about your students and decide who works well together. Generally, we encourage teachers to include students with different interests and abilities in the group so that a range of talents and skills can be applied to the project. It is generally *not* a good idea for students to choose their own groups based on friendship alone.

Coaching and monitoring groups is important. Most groups will need some assistance maintaining a task focus. Groups may also need help maintaining a positive attitude or dealing with group members who are not carrying their weight. Although PBL is predicated on students taking charge of their own learning, teachers need to monitor this process continually and pull groups into impromptu conferences when their process bogs down.

### **Communicate standards of excellence**

Rubrics that specify the characteristics of quality work and exemplars of finished products are included in each *PBG* unit. Students should be given the rubric midway through the project, to guide them as they prepare the required major products and performances. Students should not be given the rubric at the same time they receive the Entry Document at the beginning of the project, as part of a "complete packet of materials" for the whole unit. They need some time to define for themselves what they have to learn to resolve the problems posed by the scenario, and receiving the rubric or other materials too soon short-circuits that process.

# Manage presentation and critique of answers to the Driving Question

All *PBG* units include the preparation of some sort of tangible product and/or performance to communicate an answer to the Driving Question. Students will need guidance in the preparation of these products, as well as the opportunity to practice and receive feedback on their work as much as possible from their peers and teacher. After students' solutions have been presented, the class should compare and discuss them as explained in the debrief phase of each unit.

**Oral presentations** to the class or a panel are a valuable component of many *PBG* units. As teachers know well, you're often not really sure if you understand something until you explain it to others. However, managing oral presentations well presents several challenges. Student groups need time to prepare and practice. The expectations for a good oral presentation should be made very clear, including presentation techniques and proper attire, posture, attitude, and group member participation. The rubrics accompanying each unit provide guidance to students on the use of content knowledge as well as oral presentation skills.

**To help ensure proper participation by all group members,** experienced teachers use several strategies. One is to explain that everyone will be held responsible for understanding all parts of an oral presentation and the visual aids that accompany it—and the rubric and grading criteria will reflect this goal. In addition, groups could be informed that even if they have decided in advance who will say what during the formal part of a presentation, *anyone* may be asked a question about *any part* of the presentation. Or, a teacher could tell students they will be picked at random just before the presentation to deliver various parts of it, thereby putting group members on notice that they each need to be prepared to fully participate.

**On the day of presentations,** if the number of groups is not too large, there may be time for each group to make a presentation. However, a potential problem with this approach is that groups tend to repeat themselves, and by the time the fourth or fifth group has made its presentation there is very little new left to say, and there are very few new questions to ask the group. Also, students in groups presenting nearer the end may have an advantage by hearing previous presentations. This can be avoided if it is possible to send the rest of the class to the library or another room, or have presenting groups go to another location, so each group can present only to the teacher or panel. If all students need to remain together, give student audience members a task. Have them listen to other presentations and make notes of good points made and good answers to questions, as well as how they might have done it differently. Some classes may be ready to assess their peers' performance, using a rubric or other set of criteria while they observe and listen.

### Practice 21st-century skills

To meet the challenges of the changing economy in the United States and across the world, and become participating citizens in a democracy, students need to learn more than basic skills and acquire subject-area knowledge. Accordingly, all *PBG* units provide opportunities for students to learn and practice 21st-century skills, such as collaboration (e.g., working well with others, sharing resources, arriving at consensus), critical thinking (e.g., gathering relevant information, generating and evaluating solutions to problems), and communication (e.g., discussing ideas, writing, making an oral presentation, using technology). You can discuss, teach, and even assess these skills before, during, and at the end of every project.

### Establish group and individually based grading procedures

As students usually work together to create the products and/or performance that culminate a project, you may need to assign a single grade for that product, given to all students working in the group. Of course some students—like some adults—will freeload and allow others to do their work for them. Self-reports, combined with group self-evaluation and group leader reports, can provide some information on how much each student may have worked but not how much each has learned. Students will take more responsibility for their learning, and learn more, if they know their content understanding will be assessed individually; so let them know the group product is not the only component of their grade. Instead of relying on one speaker to make a presentation, they should be asked to divide up the task and be ready for questions about *any* part of it, not just the part they did. But since time is usually short, questioning students during oral presentations can only be a partial assessment strategy. Consequently, teachers may want to create multiple-choice or short-answer tests that can be used to assess individual student understanding at the conclusion of each PBG unit. Additionally, or alternatively, you could require students to turn in individual written assignments along with their group-developed product. You will have to work out what is most appropriate for your own grading system, but the fundamental idea holds: Make sure to assess students on their content knowledge individually in addition to any group assessment you conduct.

### Allow for several possible "right answers"

Part of what engages students in Project Based Learning is knowing that they can make choices and are not simply "doing what the teacher wants." All *PBG* unit scenarios are built around problems for which there can be multiple reasonable solutions. There are also solutions that are clearly wrong; not *every* solution will work. Guidance on evaluating reasonable and unreasonable solutions for each unit is offered in the **Step-by-Step Teaching Guide**.

### Stay within the project scenario

Since the scenarios are hypothetical, students often want to add details, modify what is known, or otherwise *change* the scenario so that it is easier to resolve the problem presented. Such creativity will sabotage the core purpose of the project—it has been carefully developed as a vehicle to teach specific content. All *PBG* units have been developed in close consultation with U.S. high school teachers. It has been tested in their classrooms and revised based on their feedback to ensure that the project, although enjoyed by most students, does not become merely a "fun activity." The project has been created to achieve a serious instructional purpose, and deviating from the project scenario's storyline tends to focus students' attention on irrelevant or less important learning objectives.

### **Consider needs of English language learners**

Students who are learning to speak, read, and write English can benefit greatly from Project Based Learning, but special scaffolding may be necessary. They may need more time to complete tasks, more vocabulary-building, and more peer-to-peer support. Some of the authentic-sounding documents presented in *PBG* scenarios may contain jargon, slang, or cultural references that will need to be explained. When forming small groups, care should be taken to assign students learning English to teams with supportive and skilled members. Finally, oral presentations may present special challenges—ELL students may be allowed to participate to a lesser extent than other group members and/or be given questions to answer later in writing, rather than "on the spot."

### Can We Believe This?

**Chapter Three** 

An Activity to Introduce Students to the Project Based Learning Methodology

### **Overview**

In this activity, students are presented with a problem-solving task focused on a potentially misleading public opinion poll that worries a fictitious congressional representative. In the role of a team of summer interns working for the representative, students investigate the facts surrounding the poll, learn about proper polling methods, and recommend a reasonable solution.

Although this activity teaches something about the political system in the United States today, it is primarily designed for another purpose—to demonstrate the instructional methodology of Project Based Learning. It may be used with two groups of participants: high school students in the classroom and their teachers in professional development workshops. The Buck Institute for Education (BIE) has field-tested this activity successfully with both groups. With students, we recommend using it prior to beginning the first unit a teacher has chosen from BIE's *Project Based Government* materials. The instructions below are written with this use in mind. If the activity is to be used with an audience of teachers, they should experience it in a similar manner to the students, in order to best learn how to implement it.

Project Based Learning may be an unfamiliar process for many students and teachers. In this activity, which requires less than a typical class period to complete, students will become familiar with many of the key elements of the methodology as designed by BIE for its government units. Like the PBG units, the Can We Believe This? Activity begins with a problem-solving scenario (not all projects in PBL begin this way, but it is an effective option). Since Project Based Learning is an inquiry-based process that springs from what students identify they need to know in order to solve the problem, it is important not to "frontload" any information before starting the activity. Do not conduct a discussion, assign reading, or give a lecture about public opinion polling in advance, nor tell students about problem-based learning. It is sufficient to simply explain, "Now we're going to do an activity that will introduce you to one of the ways we're going to learn about government in this course." Then let the first thing students see be the Entry Document, the memorandum that launches the scenario. After the scenario has run its course, the debriefing time is when to discuss the principles and features of Project Based Learning, along with any content-related issues or further work on the topic that the teacher would like.

Project Based Learning has proven effective in teaching content knowledge as well as or better than a traditional lecture/textbook approach. It improves

retention of knowledge and contributes to the acquisition of skills such as collaboration, presentation, and problem-solving. Moreover, it increases student engagement and interest in the subject of civics and government, which is an important building block of democratic citizenship.

### **Content Standards Addressed**

#### National Standards for Civics and Government:

III.E.2. Public opinion and the behavior of the electorate.

Explain how public opinion is measured, used in public debate, and can sometimes be manipulated

### **Materials Needed**

- One copy for each student or pair of students of the Entry Document, the memo from Congressional Representative Gina Amadeo
- One copy for each student or pair of students of the handout, "What Makes a Poll Believable?"
- Chart paper, overhead transparency, or whiteboard/chalkboard

### Procedure

- **1. Read the Entry Document aloud as a whole class** (memo from Gina Amadeo)
- 2. Write an initial "Driving Question" as a whole class (recorded on an overhead, chart paper, or board)

Sample:

How can we, as summer interns for Representative Gina Amadeo, find out if we can believe the results of this poll so that we can decide how to respond and help the reelection campaign?

**3.** Write a list of "What We Know" as a whole class (recorded on an overhead, chart paper, or board)

Sample:

- We are summer interns for congressional representative Gina Amadeo
- There was an item in a newspaper column about a poll saying that 80% of the people in the district believe the voting age should be raised to 20



- The columnist is Chris Blair
- The poll results have Ms. Amadeo worried about reelection
- The last election was close, and 18–19-year-old voters gave Ms. Amadeo strong support
- We need to tell her if these numbers are believable
- We need to tell her what we think she should do about it
- 4. Write a list of "What We Need to Know" as a whole class (recorded on an overhead, chart paper, or board)

Sample:

- What is a Congressional Representative?
- What is a poll?
- Does Blair think the voting age should be raised?
- Who did the reporter talk to, exactly?
- How many people did s/he talk to, when and where?
- What makes poll results believable? \*\*
- What political party does Amadeo belong to?
- What party does Blair belong to?
- How soon is the election?
- Where is this district and what is it like?
- How many 18–19 year olds voted for Amadeo in the last election?
- Discuss what resources could provide answers to our "Need to Know" questions. For example, some answers could be found in textbooks or be given by a teacher, some could be researched elsewhere, and some might need to come from actually talking to people.
- Answer briefly any questions about terminology that students might need to know before moving on, such as what a congressional representative is.
- Distribute the "What Makes a Poll Believable?" handout for students to read, explaining that it will answer some of their "Need to Know" questions. Discuss the handout if necessary for clarification.
- 5. Revisit "Know/Need to Know" Lists as a whole class Point out that we now have more information that can help us solve the problem; you may add items from the "What Makes a Poll Believable?" handout to the "Know" list if it helps students stay focused

Important! \*\* Elicit this or

something like it from students.

### Introduction Chapter Three

- 6. Ask the class: How else can we find out what we need to know? Answer: Talk to Blair ("Well, we can! You're going to be able to have a phone conference call...")
- **7.** Students take 2–3 minutes to plan questions to ask Blair, working in pairs or small groups
- 8. Students have a "live conference call" with Chris Blair and ask questions. Blair is reluctant to talk, but eventually reveals details about the poll (for suggested responses to questions see, "Guidelines for Conducting the 'Live Phone Interview' and Playing Chris Blair" in these materials)
- 9. Revise Driving Question as a whole class

Sample:

How can we, as summer interns for Representative Gina Amadeo, respond to the fact that the results of this poll should not be believed so that we can help the reelection campaign?

**10.** Wrap-up: whole-class discussion; students suggest solutions to the problem

Sample of possible solutions:

- Issue a press release or write a letter to the editor to explain why Blair was wrong
- Ask the editor to write a retraction or at least reprimand Blair
- Ignore it—don't give it more publicity
- Conduct our own poll and publicize the results
- **11.** Debrief: discuss what this activity demonstrates about Project Based Learning (PBL):
  - There is no single *right* answer to this problem—it is "open-ended" but there are *wrong* answers. For example, agreeing with Blair about the poll would not be supportable by evidence.
  - *It is important to be persistent*. During the "phone call," encourage students to find different ways to ask Blair the same question. During the debriefing, point out that persistence is an important "habit of mind" for Project Based Learning.



or





- Frustration is OK—it is an important part of PBL. Ask students if they were frustrated at any time during the process. This often leads to a discussion of how students become frustrated during research assignments when they cannot find the answers easily. Just as BIE trainers do during this exercise, teachers in the classroom should allow for some frustration but should also offer coaching if students are getting too far off track. Focus students back on the "Need to Know" list when they are having difficulty thinking of questions to ask Blair.
- The "Driving Question" and the "Know/Need to Know" lists are important tools for keeping on task and focused on the problem as it evolves.
- Good PBL gets students to ask questions about content. It often helps to write down questions as they come up and have students investigate, rather than give students the answers too quickly. Having students ask questions demonstrates that they are open to learning, and it can lead to "teachable moments." In this activity, the information on scientific polling methods was handed out, but it could have easily been researched by students if there was more time. Additional assignments about the role of public opinion polling in American politics may be given after this activity has sparked students' interest.
- New information leads to shifts in perspective—and new questions. For example, learning that Blair has used unscientific polling methods creates a major shift in the way students think about the problem, and new "Need to Knows" could be identified.
- Decisions are often made under conditions of uncertainty. Just like people in the real world, students do not always have complete information on which to base decisions. Some of the items on the "Need to Know" list in the "Can We Believe This?" activity may not be answered, but that doesn't mean solutions to the problem can't be proposed.

# Guidelines for Conducting the "Live" Phone Interview and Playing Chris Blair

- The role of Chris Blair may be played by a male or female—the teacher, another adult, or a competent student who has been rehearsed.
- Since this should be a mock phone interview, block the students' view of Chris Blair if possible (by standing behind a partition, turning his/her back, etc.), so facial expressions cannot be seen. If the teacher plays the role and is not facing the class, it may be necessary to appoint a student facilitator who calls on other students to ask questions.
- The first student to speak on the "conference call" should introduce the group and state why they are calling, using proper phone manners.
- Blair should be reluctant to provide information at first. He should avoid admitting details of his polling process by saying things like:
  - "I write a weekly column of anecdotes, opinions, and local news items for the 'City Gazette,' which is the biggest daily paper in the district"
  - "I'd rather not discuss details of how I write my column—journalists have the right to privacy, you know"
  - "How about you write me a letter or send me an email—I'm pretty busy right now"
  - "I see where your questions are heading, and please understand I have nothing against young people"
  - "What do you want me to do, hire an expensive polling organization?"
  - "Before I answer that, let *me* ask *you*—why are you so concerned about this anyway? Is Representative Amadeo that worried about reelection?"
  - "I have no particular opinions on this issue—just heard some talk, you know, and thought it might be interesting to take a poll..."
  - "What, do you think I'm out to get Ms. Amadeo? Why would you think that?"
  - "I asked a lot of people"
  - "They were from all walks of life—a real cross-section"
  - "I just asked them what they thought about raising the voting age"
- After 4–5 minutes of questioning and mounting frustration among students, Blair should eventually provide information about how the poll was conducted, but remain defensive until ending the call.

Details about the poll to eventually reveal:

- I talked to about 40 people
- I asked them at a mall in a new suburban area, from 3:30-5:00 on a Monday afternoon
- I didn't ask them any other questions, including where they lived or voted
- I asked people of all ages, down to about age 14, but didn't note how many of each
- I didn't keep track of the people's education level, whether they have voted in the past, their race, sex, employment, or anything else ("But it was a variety of people, I could tell!")
- I told them I was with the newspaper and did not try to hide my opinion by my tone of voice or facial expressions ("Oh, I'm sure they could tell how I felt about this!")
- My exact question was, "If you knew that 18- and 19-year-olds want to lower the driving age to 14 and do away with laws requiring attendance in high school, would you want the voting age to be raised to 20?"

### Memo From Representative Gina Amadeo



### Honorable Gina Amadeo

To:My summer internsFrom:Congressional Representative Gina AmadeoSubject:Troublesome poll results

Did you see Chris Blair's column in yesterday's paper? It said, "According to a poll I took, over 80% of the people in our district believe the voting age should be raised to 20."

If this is true, it's going to have a serious effect on my reelection campaign. In the last election, which was a close race, I got strong support from 18–19-year-old voters, so this has me worried! How am I going to support their right to vote without angering the "80%" who believe the voting age should be raised to 20? I can't afford to anger either of these groups.

I want to know—can we believe Blair's poll? Then tell me what you think we should do!

### What Makes a Poll Believable?

A "public opinion poll" is a way to collect information about public opinion by asking people questions. The most accurate, or "valid," polls are based on the following scientific polling methods:

- 1. The sample of people polled is representative of the total population of voters in the city, district, state, or other group that is of interest.
  - For example, imagine a high school principal wanted to know how many parents in a school of over 1000 students supported a schedule change. The principal would have to report the results from a percentage of parents of students from each grade level, each ethnic group, each academic achievement level, and so on, *in proportion to* the percentage of these students in the whole school.
  - The principal should also be sure to only ask parents and *not* other members of the community.
- 2. The sample of people polled is **random**—they have not been selected because they are a certain type or have certain opinions.
  - For example, the high school principal should not ask *only* those parents who come to football games.
- 3. The number of people polled must be large enough.
  - For example, the high school principal would need to ask *more* than 10 parents out of 1000.
- 4. The questions must be **worded carefully** so people aren't influenced one way or another.
  - For example, the high school principal should not word the question, "If you knew it would totally disrupt sports and extracurricular activities, and possibly lower test scores, would you support the small group of people who want to change the school schedule?"
- 5. The way in which the question is asked must be controlled or "neutral".
  - For example, if the high school principal asked people their opinion when meeting them at Back-to-School Night, she would need to be sure her tone of voice, facial expressions, and body language did *not* influence people.

# Fighting Chance

**Chapter Four** 

### **Purpose and Overview**

### **Purpose and Rationale**

The purpose of this unit is to help high school students understand the principles of the 5th and 14th Amendments as well as the powers of the judicial branch. The unit addresses important core principles of American democracy—primarily the balance between individual rights and the public good, the need for an independent judiciary, the rule of law, the concept of judicial review, and the way the Bill of Rights limits the powers of the federal government. Active citizens of a democracy need to understand how these principles apply to issues of discrimination and the struggle for equal rights that is still being addressed in contemporary American society.

### **Unit Overview**

Two fundamental features of our democracy are the constitutional guarantee of equal rights for all citizens and the protection of those rights by the judiciary. A delicate balance must be struck between the rights of individuals and other reasonable concerns of society. In this unit, which uses the methodology of Project Based Learning, students take the role of attorneys who must recommend whether or not their law firm should take a case that is going to the Supreme Court. The case involves a woman who was denied admission into the Army's Special Forces unit, which she claims violated her right to equal protection of the law under the 5th and 14th Amendments to the U.S. Constitution. Students review the facts of the case, consider pro and con sides of the issue, and analyze the potential effect of precedents established by the courts. As students struggle to balance constitutional issues with the need for an effective military, they also learn how the federal court system works, including the powers and procedures of the Supreme Court.

The lesson starts off when students receive a memo from a senior partner in a fictitious law firm that places them in the role of first year associates who must recommend whether or not to participate in the case of *United States Army* v. *Connolly et al.* when it goes before the United States Supreme Court. The associates are asked to evaluate the likelihood that Lieutenant Amy Connolly will succeed in her claim of gender discrimination based on the Army denying her admission into its Special Forces unit (the Green Berets). They are told that their decision should be based on the strength of Lt. Connolly's case in relation to the 5th and 14th Amendments and an analysis of precedent. They are requested to make an oral presentation to the senior partners.

The associates analyze the relevant Army regulations and read two *amicus curiae* ("friend of the court") briefs supporting opposing sides. They are then asked to review two cases that serve as precedent, *United States* v. *Virginia* and *Rostker* v. *Goldberg*. As they are planning their oral presentation based on a list of questions they may face from a panel of senior partners, a letter arrives from one of the firm's important clients, a women's organization that opposes the firm's involvement in the case. The associates must consider this client's fears about potential negative consequences for women's rights if the firm takes and wins the *Connolly* case. The unit concludes with the associates presenting their recommendation to the senior partners, who ask challenging questions. If desired, the teacher may require a written report as well.

#### 7–10 days (45- to 60-minute periods)

### **Time Required**

7-10 days (45- to 60-minute periods; depends on amount done as homework)

### **Placement in the Curriculum**

Before beginning this unit, students need only the basic understanding that the U.S. government is divided into three branches with a separation of powers. The Buck Institute for Education's *Project Based Government* unit, *A Government for Xlandia*, addresses this content. Teachers who wish to cover most of the judicial branch may do so with *Fighting Chance*. However, the unit takes less time if students are familiar with the concept of judicial review. Also, if the Bill of Rights has already been taught, students will know about the 5th Amendment right to due process, the 14th Amendment right to equal protection, and perhaps the role of precedent in the judicial system. The tables that follow in *Content Standards* show the standards addressed by this unit.

### **Concepts to be Learned**

Fighting Chance is designed to teach the following concepts:

- Due process
- Equal protection
- · Reasonable and unreasonable discrimination
- Judicial review
- Precedent
- Checks and balances
- Role of public opinion in the courts

Teachers can also cover the following using this unit:

- Judicial activism and restraint
- Trends in the current Supreme Court

### **Objectives**

By participating in this unit, students will:

- Understand the importance of existing case law to the court system
- Learn how the federal court system works and how a case reaches the Supreme Court
- Understand the scope and applicability of the 5th Amendment's Due Process Clause
- Understand the scope and applicability of the 14th Amendment's Equal Protection Clause
- Realize that the constitutional rights of individuals must be balanced with other important societal concerns
- Understand the powers of the judicial branch
- Know why the Supreme Court decides to hear cases and how it issues opinions
- Read, write, listen, and make oral presentations more effectively

### **Content Standards**

A democratic system requires that citizens participate in campaigns as staff, volunteers, candidates, and informed voters. Performing these functions requires a sound understanding of the campaign process and the controversies that surround campaigning. This content, which is central to *Fighting Chance*, addresses the following National Standards for Civics and Government, Center for Civic Education, 1994, for grades 9 through 12.

#### Standard Concept

I.A.	Definition and Purpose of Government	*
I.B.	Characteristics of Limited and Unlimited Government	*
I.C.	Nature and Purposes of Constitutions	*
II.C.	American Political Culture	*

II.D.	American Constitutional Values and Principles	*
III.B.	Organization of the National Government	*
III.C.	Organization of State and Local Governments	*
III.D.	The Rule of Law	Х
V. B.	Rights of Citizens	Х

X = a standard that is address in this curriculum

\* = a standard that could be addressed in this curriculum

*Fighting Chance* addresses the following Curriculum Standards for Social Studies, developed by the National Council for the Social Studies, 1994, for high school.

### Standard Concept

VI.	Power, Authority, and Governance	
	Individual Rights, Roles and Status	Х
	The Purpose of Government	*
	Mechanisms Used to Balance Competing Needs and Wants	X
	Applying Political Science Theories to Issues and Problems	*
	Evaluating Government Achievement	*
X	Civic Ideals and Practices	
	Key Democratic Republican Ideals	>
	Citizens' Rights and Responsibilities	>
	Evaluating Selected Public Issues	*
	Public Policy Analysis and Political Actors	>
	Impact of Public Opinion on Public Policy and Decision-Makin	
	Relationship of Policy and Behavior to Democratic Ideals	*
	Participate in Activities for the Common Good	X

\* = a standard that could be addressed in this curriculum

*Fighting Chance* addresses the following 21st Century Learning Skills, developed by the Partnership for 21st Century Skills.

#### **Standard Concept** 2 Learning and Innovation Skills Creativity and Innovation 2A Think Creatively Х Work Creatively with Others Х Implement Innovations -<del>X</del>-Critical Thinking and Problem Solving 2B Reason Effectively Х -<del>x</del>-Use Systems Thinking Make Judgments and Decisions Х Solve Problems Х **2C** Communication and Collaboration Communicate Clearly Х Collaborate with Others Х 3 Information, Media, and Technology Skills 3A Information Literacy Access and Evaluate Information Х Use and Manage Information Х **3C** ITC Literacy Apply technology × Life and Career Skills 4 Flexibility and Adaptability **4**A Adapt to Change Х

	Be Flexible	Х
4B	Initiative and Self-Direction	
	Manage Goals and Time	*
	Work Independently	*
	Be Self-Directed Learners	*
4C	Social and Cross-Cultural Skills	
	Interact Effectively with Others	Х
	Work Effectively in Diverse Teams	Х
4D	Productivity and Accountability	
	Manage Projects	*
	Produce Results	*
4E	Leadership and Responsibility	
	Guide and Lead Others	*
	Be Responsibility to Others	*

X = a standard that is address in this curriculum

\* = a standard that could be addressed in this curriculum

#### Resources

Resources are distributed to the students at different points in the project. (See The Sequence of the Unit for one example.)

All handouts are located in Student Materials.

#### **Lesson Materials**

Because Project Based Learning is grounded in constructivist learning, several "teachable moments" will arise when students readily see a need to know a particular concept. During these moments, teachers can use several techniques to teach the concepts. For this purpose, lesson materials are included so traditional lectures may be used to provide information on more difficult subject matter. Alternatively, a Socratic method may be used in which the teacher uses questioning strategies to guide students toward knowledge and understanding. Teacher Materials includes information on the following areas for potential mini-lectures:

- Structure and Power of the Federal Courts
- Equal Protection Under the Law (5th Amendment Due Process Clause and 14th Amendment Equal Protection Clause)
- Procedures of the Supreme Court and the Limits on Its Power
- Judicial Philosophy and the Current Supreme Court

Lesson materials are located in **Teacher Materials.** 

#### **Resources Include**

- Entry document: Memo from Senior Partner Brandi Bickering, titled
   "New Case"
- Case profile of United States Army v. Connolly et al.
- Memo from Brandi Bickering regarding Army regulations and *amicus curiae* briefs
- Summary of Army regulations on women in combat and the Special Forces
- Amicus curiae brief from U.S. Veterans Association
- Amicus curiae brief from Today's Hope for an Equal Nation
- Chart for comparing amicus curiae briefs
- Memo from Brandi Bickering with questions on precedent
- Short summaries of United States v. Virginia and Rostker v. Goldberg cases
- Extended summaries of *United States* v. *Virginia* and *Rostker* v. *Goldberg* cases
- Memo from Brandi Bickering on presentation requirements
- Memo from Brandi Bickering with attached letter from American Association of Women
- Classroom textbook and other materials that may be selected by the teacher

#### The Sequence of the Unit

Because Project Based Learning depends to a great extent on how a particular group of students goes about the task of constructing knowledge from real-world applications, the sequence of learning will differ in each class. As a result, it is virtually impossible to describe the exact unfolding of this project, even though it has been tested on several occasions. What follows is an example of the sequence of the project spanning several class periods. This particular sequence is used in the *Procedure* section. The **bold** phrases below are cross-referenced in the margin for easier detection.

#### Pre-project planning

0. Prepare for a successful project implementation

#### Launching the Project

1. Read and discuss the **memo from Senior Partner** Brandi Bickering as a whole class

#### Framing the Inquiry

- 2. Develop the initial "Know" list with the whole class
- 3. Develop the initial Driving Question with the whole class
- 4. Develop the **initial "Need to Know"** list with the whole class

#### Problem-solving and learning activities

- 5. Distribute the **case profile** and discuss
- 6. Revise "Know/Need to Know" lists
- 7. Have students make first Project Log entry
- 8. Divide students into groups of first-year associates
- 9. Undertake a mini-lecture on structure and power of federal courts
- 10. Have students make second Project Log entry
- 11. Undertake a mini-lecture on equal protection and due process
- **12.** Read and discuss **second memo** from Brandi Bickering on regulations and interested parties
- **13.** Review the **summary of Army regulations** pertaining to women in combat and Special Forces
- **14.** Have students read the *amicus curiae* briefs from the U.S. Veterans Association and Today's Hope for an Equal Nation

- 15. Have students complete the chart comparing amicus curiae briefs
- 16. Revise "Know/Need to Know" lists
- 17. Read and discuss third memo
- **18.** Have students read the **precedent summaries** of the *VMI* and *Goldberg* cases
- **19.** Have students in their groups discuss the case summaries and **report to the class**
- 20. Revise "Know/Need to Know" lists
- 21. Undertake mini-lectures on the Supreme Court
- 22. Have students make third Project Log entry
- **23.** Read and discuss **fourth memo** from Brandi Bickering outlining presentation requirements
- 24. Have students make fourth Project Log entry
- 25. Have students begin preparing presentations
- **26.** Read and discuss **final memo** from Brandi Bickering with letter from the American Association of Women
- 27. Have students make fifth Project Log entry
- 28. Revise "Know/Need to Know" and finalize Driving Question
- **29.** Have student groups make **oral and/or written presentations** to the senior partners
- **30.** Use **assessment tools and rubrics** to evaluate oral and/or written reports
- **31. Wrap-up and debrief** the project with the whole class
- **32. Manage student reflection on the 21st century** skills practiced and the process of learning in PBL
- **33. Multiple-Choice Test** to assess individual students' knowledge of key political concepts
- **34. Make notes or adjustments to the unit** to improve student learning for the next time the unit is taught

Step-by-Step Teaching Guide

### Step-by-Step Teaching Guide

Each of the above instructional activities is discussed in more depth below, with tips for successful classroom implementation.

#### Pre-project planning

Prepare for a successful project implementation

#### 0. Prepare for successful project implementation.

There are a number of issues that must be considered before embarking on a project with students. These include:

- How much time will be devoted to the project?
- What content resources need to be prepared in advance (textbooks, articles, websites, etc.)?
- Do all students have the skills they need to tackle the project including basic literacy skills as well as the ability to work in teams, make presentations, and conduct research? If not, is it necessary to pre-teach some of these skills, make sure students who need it have adequate support, or deal with these challenges in other ways?
- How will student groups be formed? (See comments in Chapter Two.)
- How will groups report on their progress and be held accountable? Do report forms or other tools need to be developed?
- Is it necessary to arrange access to the library/media center or computer lab?
- Do parents or administrators need to be informed about the process of Project Based Learning and be assured that time spent on the project is focused on standards-specific learning goals?

In addition to considering the above issues, be sure student handouts and clarifying lesson/mini-lecture materials are ready—or at least underway. Finally, **decide if the culminating product will be done as a small group**, **in pairs**, **or individually.** This will affect how you present the task to students, use time, and assess their learning.

# Whole class

### Launching the Project

Meet with the whole class and inform them that in this activity they will take on the role of attorneys at a law firm who must recommend whether or not to take a case that is going to the Supreme Court. The case involves a woman who is denied admission into the Army's Special Forces unit, which she claims violates her right to equal protection of law under the 5th and 14th Amendments to the U.S. constitution.

#### **Daily Directions** Step-by-Step Teaching Guide

#### **Entry Point:**

#### 1. Read and discuss the memo from Senior Partner Brandi **Bickering as a whole class**

Give students the memo from Brandi Bickering, one of the senior partners in the fictitious law firm of Ebbets, Chavez, and Kofax. Have one or more students read it aloud. This memo, addressed to the firm's first-year associates, explains that Lt. Amy Connolly of the United States Army is seeking their help after she was denied a commission in the Green Berets because she is a female. Students are asked to evaluate the strength of her claims under the 5th and 14th Amendments. They are also asked to familiarize themselves with relevant precedent and then recommend whether or not the firm should take Lt. Connolly's case, if and when it goes to the Supreme Court.

#### See entry document, Student Materials.

**Potential Hurdle:** Some of the language appearing in this unit, because it is used by lawyers and judges and concerns technical aspects of the law, may be challenging to both students and teachers. With this in mind, a glossary of legal terms is included in Teacher Materials. Students may also benefit from keeping their own journal of terms.

#### Framing the Inquiry

#### 2. Develop the initial "Know" list with the whole class

The first step in answering the question is to assess what students know about the problem posed in the Entry Document. This can be done as a class by creating a "What We Know" list on chart paper, an overhead transparency, or by using a computer projector. In answering the guestion, students determine what they know about the problem. The "Know" inventory will differ for each class because students struggle with identifying the knowledge they have and defining the body of knowledge they do not have. Students should be coached to identify all of the information the memo from Brandi Bickering provides. Ask students to carefully review the Entry Document and offer items for the list, making sure to only record what is actually stated in the text and not what might be inferred.

Examples of statements that might appear on the initial "Know" list follow. Remember that every class will produce a different list, and every idea should be put on the board. Sometimes seemingly strange ideas that come from a "What We Know" discussion result in the most creative approaches to the problem's solution.



Memo from Brandi Bickering





#### **Potential Hurdle**

Some of the language appearing in this unit, because it is used by lawyers and judges and concerns technical aspects of the law, may be challenging to both students and teachers. With this in mind, a glossary of legal terms is included in Teacher Materials. Students may also benefit from keeping their own journal of terms.



"know" list



#### What do we know?

- We are first-year associates at the firm of Ebbets, Chavez, and Kofax
- Brandi Bickering is a senior partner in the firm
- We are new to the firm
- Lt. Amy Connolly wants to join the U.S. Army Special Forces
- The Army excludes women from its Special Forces
- Lt. Connolly claims her 5th and 14th Amendment rights are being violated
- We will receive a case profile soon
- Lt. Connolly's lawyers have had financial problems so she needs new lawyers
- The Supreme Court is deciding whether it will hear the case during the upcoming term
- We must decide whether or not our firm should take the case
- We should consider precedent
- The case involves women's rights
- If we take the case without a strong chance of success, we will waste time and resources that could help another client
- If we don't take the case and Lt. Connolly wins, we will have missed an opportunity for national publicity, making money for our law firm, and influencing the nation
- We must make our recommendation to the senior partners
- We have adequate financial resources to take the case, regardless of the outcome
- This task will help our careers if we do well





#### 3. Develop the <u>initial Driving Question</u> with the whole class

After discussing the entry document with the students, have them draft a tentative Driving Question. Students should be prompted to start this process by filling specific information into the general Driving Question form:

How can we, as \_\_\_\_\_, do \_\_\_\_\_so that\_\_\_\_?

The initial Driving Question may be far from the Driving Question that will emerge as students think about and work with the problem. This is expected. The Driving Question will evolve as students gain more insight and knowledge about the problem and its underlying issues. Remember, the problem is intentionally ill-defined so that the students must grapple with issues and concepts. It is this struggle that builds knowledge. The initial question may look something like:

How can we, as first-year associates of Ebbets, Chavez, and Kofax, decide if Lt. Connolly can win and recommend to our senior partners whether or not to take the case so that we start our careers off well and use our expertise to help those in need?

#### 4. Develop the <u>initial "Need to Know" list</u> with the whole class

The next step in this process is to coach students to identify information they need to know in order to provide a solution to the Driving Question. Again, being careful that students pay close attention to all parts of the Entry Document, create a class list of "What We Need to Know." If students are missing a key piece of information about the problem, the content, or their task, ask questions to elicit items for the list.

Without a doubt, students will suggest things they need to know that, in reality, they do not need to know. Now is not the time to filter these questions out. Rather, allow students to see their irrelevance once they discover additional information.

The knowledge inventory will differ for each class because students struggle with identifying the knowledge they have and defining the body of knowledge they do not have. An example of the type of items that might appear on the initial need to know list follows. Remember that every class will produce a different list and every idea should be put on the board. Sometimes seemingly strange ideas that come from a "need to know" discussion result in the most creative approaches to the problem's solution.

#### What do we need to know?

- What is a law firm? A senior partner? A first-year associate?
- Who is Amy Connolly and is she qualified?
- What are the 5th and 14th Amendments?
- Does the Army's exclusion of women violate the 5th and 14th Amendments?
- Why does the Army exclude women from its Special Forces?



Whole class

Step-by-Step Teaching Guide

- What are the Special Forces?
- Why does Amy Connolly want to join the Special Forces?
- What is the Supreme Court and will this case get there?
- How does the Supreme Court decide whether or not to hear a case?
- What are oral arguments? Are they important to the case?
- How do we evaluate the strengths of Lt. Connolly's case?
- If Lt. Connolly is suing the Army, why is the case named *United States Army* v. *Connolly et al.*?
- What is a case profile?
- What is precedent?
- What is "et al."?
- How much will taking this case cost the firm?
- Does Lt. Connolly want this to affect all women or just her?

#### Teachable Moments and Dialogues

Project Based Learning is most effective with continual dialogue between the teacher (as a coach) and students. When students are left to discover knowledge or problem solutions on their own, without teacher coaching or use of Project Logs, they may flounder or stray off track. To prevent this, teachers must actively direct students toward the curriculum goals by asking probing questions in class discussions, circulating and listening to discussions in group work, and evaluating the Project Log with meaningful and useful comments. Teachers may take advantage of teachable moments by giving mini-lectures using the lesson materials provided with this unit.

The lesson materials provided in Teacher Materials are meant for teachers to use to supplement their knowledge of the subject. It is not mandatory to use this lecture material. Much of the material can be used as needed or if questions arise that require a mini-lecture. Teachers should use their own judgment about when and how to provide students with information. For example, the first two mini-lectures—one on the structure of the federal courts and the other on the right to equal protection—do not need to be given in that order or directly following each other. See the notes throughout the *Procedures* section on when and how to present lesson material to students.

Lesson materials for mini-lectures are located in Teacher Materials.

#### **Problem-Solving and Learning Activities**

#### 5. Distribute the <u>case profile</u> and discuss

The first resource students receive is the case profile, which provides background on Amy Connolly and the case's history. Have students read this profile and discuss it as a class.

#### 6. <u>Revise "Know/Need to Know"</u> lists

In addition to providing more information about Lt. Connolly, the case profile may generate questions from students about the structure of the court system. This is a good time to revisit and revise the "Know/Need to Know" lists. Examples of what might be added include:

#### What else do we know?

- Amy Connolly is 22 years old
- She is a great student, leader, and athlete
- She is an honors graduate of West Point
- She performed in the top 10% in a combat simulation
- She is seeking a commission with the Green Berets
- She meets all other requirements for a commission with the Green Berets except gender
- Women are expressly barred from joining the Special Forces
- Lt. Connolly claims that the exclusion of women violates the 5th and 14th Amendments
- Lt. Connolly brought suit in the U.S. District Court for the District of Columbia
- The district court found that the Army did not violate the 5th and 14th Amendments and that Lt. Connolly *could* be excluded from the Green Berets
- Lt. Connolly appealed the decision of the district court
- The court of appeals for the District of Columbia found that the Army *could not* exclude Lt. Connolly based on her gender
- The Army has appealed the decision of the court of appeals to the Supreme Court





Whole class



Revise Know/Need to Know



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Step-by-Step Teaching Guide

#### What else do we need to know?

- What is West Point?
- What is the Due Process Clause?
- What is the Equal Protection Clause?
- What are the Green Berets, and what are their "important objectives?"
- What does it mean to seek a commission with the Green Berets?
- What are the other requirements for a commission with the Green Berets?
- What is the district court for the District of Columbia?
- What does it mean to "appeal" a decision?
- What is the court of appeals for the District of Columbia?

To avoid any initial confusion, some of the items placed on the need to know list may be discussed briefly at this point before going further into the unit. If students ask why Lt. Connolly would file this case with the U.S. District Court for the District of Columbia (Washington, D.C.) rather than a military court, explain that military courts only hear cases where a military rule or code has been violated. In this case there has been no violation of military law—it is the *constitutionality of the military's policy* that is being challenged. Since Washington, D.C. is where the Army is headquartered, that is the district court that must hear the lawsuit.

Students also may be confused by the order of names on the case and ask why the parties have "switched places." You could have the students brainstorm as to why this might be. Guide them to the conclusion that the name of the party that appears first is the party that is bringing the action. In the original claim the *plaintiff*—the party suing or filing the charges—appears first, and the *defendant*—the party being sued or being charged with the crime—appears second. When the case is appealed, the *appellee*—the party seeking the appeal—appears first, and the *appellant*—the party who won in the lower court—appears second.

This would be a good time to have students conduct independent or assigned research on the Green Berets, their objectives within the U.S. Army, and the kinds of tasks they are called upon to perform.



Individual

#### 7. Have students make <u>first Project Log entry</u>

Throughout the project each student keeps a Project Log that will help the student and teacher follow the construction of knowledge. Suggestions for

Project Log entries appear throughout this unit, but teachers can make up their own questions and assign them as needed. To ensure that students stay focused on the underlying political issues and understand the content, the log should be checked periodically by the teacher. The log can also serve as an important assessment of how students or groups use problem-solving skills, develop new questions or "Need to Know" items, manage time and tasks, and work together as a team. Teachers who wish to do this may ask students to keep track of the problem from the beginning by recording the Driving Question and "Know/Need to Know" lists in their logs. Students should note any changes that need to be made as the project unfolds.

The first content-related Project Log entry can be introduced after the class is familiar with the role they are playing and after reviewing the case profile. At this point students should be asked to reflect on the problem as they see it in this early stage. These entries will be useful in tracking how the students' thinking changes as they learn more about the constitutional issues involved in this case.

Potential Questions to Ask: What is your first reaction to the case of Lt. Amy Connolly? Is she right? Should she win?

#### 8. Divide students into groups of first-year associates

Students may now be placed in small groups to discuss their Project Log entries and their initial reactions to the case. These groups are the teams of first year associates who will eventually make the presentation to the senior partners. There should optimally be three to five students per group. If you wish to conduct a class discussion at this point, be careful not to let it go too long or get too deep into issues that will be explored later. Students should come away with the basic sense that there may be legitimate arguments on both sides of this case. While students may not have an understanding of the 5th or 14th Amendments, they should be able to see that fairness to an individual and the need for national security are going to be the major issues here.

#### 9. Undertake a mini-lecture on structure and power of federal courts

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A mini-lecture on the structure of the federal courts may be given now to provide a general overview of the setting for this case. Information for this lesson can be found in Teacher Materials.

**Potential Questions** What is your first reaction to the case of Lt. Amy Connolly? Is she right? Should she win?



Divide students into groups of first-year associates







Mini-lecture on structure and power of federal courts



Whole class

Step-by-Step Teaching Guide

Second Project Log Entry

Individual

#### Potential Question

What does "discrimination" mean to you? Based on this definition, are there times when discrimination is acceptable? Why or why not?









Whole class





#### 10. Have students make second Project Log entry

As a warm-up to learning about equal protection under the Constitution, have students write a Project Log entry in which they reflect on the meaning of discrimination.

**Potential Question to Ask:** What does "discrimination" mean to you? Based on this definition, are there times when discrimination is acceptable? Why or why not?

Another brief discussion, in small groups or as a class, may now be conducted. Most students will probably have a negative view of the word "discrimination" at first, especially if they can point to a time in their own lives when they, or people they know, have suffered from discriminatory practices. Coach them to see that the word itself is neutral—"recognizing differences among things or people"—even though discrimination in practice is often unfair or the result of prejudice. Ask for or provide examples of when discrimination might be acceptable—such as not allowing 10-year-olds to drive a car, or not allowing non-citizens to enter a country without a passport. Conclude by explaining that the Constitution, and the courts that interpret it, attempts to define when it is or is not acceptable to discriminate among groups of people in our society.

#### 11. Undertake a mini-lecture on equal protection and due process

A mini-lecture on equal protection and due process may be given now, covering the 5th and 14th Amendments. Information for this lesson is included in Teacher Materials. Because a thorough understanding of this material is essential to the unit's success, check and re-check for student understanding throughout its presentation.

### 12. Read and discuss <u>second memo</u> from Brandi Bickering on regulations and interested parties

Students should now be given the second memo from Brandi Bickering and the attached Army regulations regarding women in the Special Forces. Read the memo aloud as a class.

#### 13. Review the <u>summary of Army regulations</u> pertaining to women in combat and Special Forces

Have students read the summary of Army regulations, and review them together as a class.

Step-by-Step Teaching Guide

#### 14. Have students read the *amicus curiae* briefs from the U.S. Veterans Association and Today's Hope for an Equal Nation

Also attached to the memo are *amicus curiae* briefs from two interested parties, both fictitious: the U.S. Veterans Association, and a women's rights advocacy group, Today's Hope for an Equal Nation (THEN). Have students read the briefs and discuss them in their groups. To lessen the reading load, half of the group members may take one brief while the other half reads the other brief.

#### 15. Have students complete the <u>chart comparing *amicus*</u> *curiae* briefs

Ask students to compare and contrast the amicus curiae briefs point by point, using the short series of questions in the memo to guide them through this process. A chart is included to help students record their responses to the guestions in the memo and better organize their thoughts. A teacher's key to this chart is included in Teacher Materials.

#### 16. Revise "Know/Need to Know" lists

After these readings have been completed, revisit and revise the "Know/Need to Know" lists.

Several items from the "Need to Know" list may be checked off or moved onto the "Know" list, and new items should be added. Check to see if students want to revise the Driving Question as well. Examples of what now might be added to the "Know/Need to Know" lists include:

#### What else do we know?

- A veterans group thinks Lt. Connolly should not be admitted into the **Special Forces**
- A women's rights group thinks she should be admitted
- Both sides raise some good arguments

#### What else do we need to know?

- Will the effectiveness of Special Forces units be harmed if women are included?
- Will it cost a lot of money for the Army to include women in **Special Forces units?**





Chart Comparing Amicus Curiae Briefs





**Revise Know/Need** 



Step-by-Step Teaching Guide

- Is THEN right—that including women in Special Forces units will not harm the effectiveness of the units?
- What is "morale"?
- Are women serving in combat roles already, and how has that been going?
- What has happened in the past when women or other new groups have been integrated into the Army? Into police and fire departments, or sports teams?
- What do the American people think about women being in combat roles?

It may be helpful at this point for students to think about the integration, or lack thereof, of other groups into the military and other institutions. Discussions may address the treatment of African American soldiers, from the Civil War through World War II, when segregated units were the norm. Another topic could be America's debate over the integration of homosexuals into the military in the 1990s, which resulted in the "Don't Ask, Don't Tell" policy and its repeal in 2011. Independent research could be conducted by students on these topics or on the history of women in the military. Similarly, students may investigate the history of integrating women into other formerly all-male institutions, such as police and fire departments, beginning in the 1970s. A brief summary of such a case, *U.S.* v. *City of Buffalo* (1978), is included in the lesson materials on Equal Protection in Teacher Materials.

Some students may relate more easily to a team sport situation. Point out instances in high school, college, and professional sports where women have been allowed or denied the opportunity to play alongside men. As examples, consider the recent, though limited, success of women in the men's Professional Golf Association; the short period in which women played professional minor league baseball during WWII and again in the 1990s; or women playing on NCAA football teams beginning in 1997. High school sports provide plenty of examples, on both sides of the issue, of the challenges and results of including both sexes on a team. Since the briefs mention the concept of morale within Special Forces units, clarify the meaning and importance of this concept by asking students to consider experiences they have had in which group morale played a role in the success of a team effort.

Third Memo



17. Read and discuss third memo

The next resource to give students is the third memo from Brandi Bickering, which contains a list of guiding questions for the task of evaluating precedent.

Step-by-Step Teaching Guide

## 18. Have students read the <u>precedent summaries</u> of the VMI and Goldberg cases

At the same time, distribute copies of the two case summaries, *United States* v. *Virginia* and *Rostker* v. *Goldberg*. The *United States* v. *Virginia* case (also known as the *VMI* case, short for Virginia Military Institute) involves an all-male military academy. The other case, *Rostker* v. *Goldberg*, involves the all-male military draft. There are two versions of the case summaries in Student Materials—a short summary and an extended summary, either of which may be used depending on how much the teacher wishes students to read. The extended summaries are taken directly from Supreme Court records, so they provide a good opportunity to show students how the Court writes its opinions.

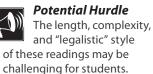
**Potential Hurdle:** The length, complexity, and "legalistic" style of these readings may be challenging for students. Some students may be able to read their cases as homework, but others may need to be given time in class. You may choose to give one case to half the members of each group and the other case to the other half. It may also be effective to break each case into smaller parts, jigsaw the groups to create pairs of "specialists" for their part of the text, and then have students return to their small groups to teach each other the parts they have read. Then the group can analyze each case as a whole. To assist students in understanding the key points in these cases, focus them on the following issues:

- In VMI, the court found that excluding women from a military school was unconstitutional. Students should recognize the similarities between VMI and Lt. Connolly's case. They both address women in a military setting, the need to stop applying archaic notions of a woman's ability, and the lack of comparable alternatives for women excluded from male-only institutions. Students must be directed to see the glaring difference in these cases, however—that VMI deals with education, not combat. This alone gives students plenty of ways to differentiate the two cases if they wish to argue that VMI cannot be used to attack the Army's policy on Special Forces.
- The Goldberg case should be used to direct the students' attention to two ideas. First, students should see that the court is hesitant to get involved in military policy, especially in situations pertaining to combat. Second, they should begin to speculate about the far-reaching effects of this case—the possibility that women may become eligible for the draft if they are allowed into the Special Forces.





Individual



Step-by-Step Teaching Guide

Report to the Class



#### 19. Have students in their groups discuss the case summaries and report to the class

After students have had a chance to discuss their answers to the guiding questions in their groups, have them report to the whole class and discuss their responses. Make sure students understand that there is no right answer. In fact, legal scholars will differ in their opinions on these same questions.

Note also that the lesson material on equal protection in Teacher Materials contains a brief summary of another case students may find helpful—*U.S. v. City of Buffalo* (1978). This case concerns the integration of women into a city fire department. It is critical to point out that while this case is remarkably similar to the *Connolly* case, there is one significant difference. In the firefighter case, the court of appeals required the police and fire departments to change their entrance requirements, which were found to be unfairly biased against women because of physical strength tests that went beyond the requirements of the job. In contrast, Lt. Connolly meets all of the existing standards for the Special Forces and is not seeking a variation.

Revise Know/Need to Know



Whole class

#### 20. Revise "Know/Need to Know" lists

After these readings and discussions have been completed, you may wish to revisit and revise the "Know/Need to Know" lists. Examples of what might be added include:

#### What else do we know?

- Supreme Court justices use complicated language
- Different justices write the opinions of the court
- The VMI case could be a precedent for the Connolly case, but there are differences
- In the *Goldberg* case the court said it was *okay* to draft only men because the military needs more combat troops, which can only be male

#### What else do we need to know?

- What does "the opinion of the court" mean?
- What is a dissenting opinion?
- How do the justices decide who gets to write an opinion?
- Why does the court pay attention to precedent cases?
- Does the court have to pay attention to what the President, Congress, or the American people think?
- What did the lawyers say during oral arguments in these cases?
- Will there be a military draft anytime soon?

Step-by-Step Teaching Guide

#### 21. Undertake mini-lectures on the Supreme Court

A mini-lecture on "Procedures of the Supreme Court and the Limits on Its Power" should be given now. Depending on how much you wish to cover during this unit, an optional lesson is also provided on "Judicial Philosophy and the Current Supreme Court." This should be updated as current events dictate.

#### 22. Have students make third Project Log entry

After learning about how the Supreme Court decides whether or not to hear a case, students may make a Project Log entry speculating about whether or not the court will grant a writ of certiorari for the Connolly case.

**Potential Questions to Ask:** Do you think the Supreme Court will grant a "writ of cert" for the Connolly case? Why or why not?

#### 23. Read and discuss fourth memo from Brandi Bickering outlining presentation requirements

Students should now receive the fourth memo from Brandi Bickering, which outlines the presentation requirements. The memo also states that the Supreme Court has just announced that it will hear the case this term. It explains that the first-year associates will be expected to answer a variety of questions before the senior partners. A list of potential questions is included and should be used as the basis for their preparations. The outline makes clear that while the students will present their recommendations in groups, each student must be prepared to answer any and all questions that may come from the partners.

#### 24. Have students make fourth Project Log entry

A fourth Project Log entry should be used to have students reflect on their solution to the problem at this point, to bring them back to the "big picture," and to check for their understanding of key issues and concepts.

Potential Questions to Ask: With the information you have right now, what would you recommend to the senior partners? What are the deciding factors in your recommendation? What guestions do you still need to think about? What 5th and 14th Amendment issues are you thinking about?

After students have answered these Project Log questions, check to make sure that they have not gotten bogged down in the details and instead are focusing on the key constitutional questions. The basic issue is: Does the right to equal protection override concerns about the effectiveness of Special Forces units, or is this a case of reasonable discrimination? Also remind students that their presentations as first-year associates at a law firm should be given within the context of the central problem to be solved:

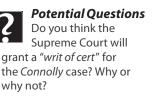
Mini-lectures on the Supreme Court













Memo











**Potential Questions** 

With the information you have right now, what would you recommend to the senior partners? What are the deciding factors in your recommendation? What questions do you still need to think about? What 5th and 14th Amendment issues are you thinking about?

Should the law firm *take* the case? Allow students to wrestle with the details for a while and identify what is relevant and what is not relevant in making their recommendation. If there are common questions that need to be addressed, or factual errors and misconceptions that need to be corrected, a class discussion should be conducted and/or some lesson material may need to be re-taught.

#### **Begin Preparing** Presentations







#### Potential Hurdle

Make sure students are aware that the ideas set forth in the letter are simply considerations to be guestioned and scrutinized before being accepted or rejected but they should be taken seriously.

#### 25. Have students begin preparing presentations

Students should now begin preparing their presentations in their groups. Give students ample time to discuss in detail their responses to the presentation questions. Emphasize that all students are responsible for all information in their presentations.

#### 26. Read and discuss final memo from Brandi Bickering with letter from the American Association of Women

Once the students are somewhat invested in their presentation plans, distribute the final memo from Brandi Bickering. This memo contains a letter from one of the firm's important clients, another women's advocacy group, warning that there may be unwanted consequences for women's rights if the firm takes and wins the Connolly case. Students must weigh these concerns when making their decision about whether or not to take the case. Again, be sure to guide students to the realization that there is no single right answer. The task is to *convince* the senior partners of their position.

**Potential Hurdle:** Make sure students are aware that the ideas set forth in the letter are simply considerations to be questioned and scrutinized before being accepted or rejected—but they should be taken seriously. Remind students of the importance of the role of precedent in our legal system. To evaluate the potential effect of a Connolly victory on other rights won by the feminist movement, coach students to examine the differences between this case and other situations. For example, the right to maternity leave from the workplace could be viewed differently because it is based on actual biological differences between the sexes, and moreover, it is not designed to exclude women from opportunities or deprive them of life, liberty, or property. The same is true for affirmative action programs and Title IX protections for equal educational opportunity, including sports programs. On the other hand, it is possible to argue that if the court declares that there should be "total equality" in the military, other women's rights could be attacked as examples of discrimination that go too far and cause unacceptably harmful effects on society. The military's policy of only drafting men could also be affected, and students should be challenged to consider the readiness of the American people to accept women's absence from the home and higher numbers of female casualties during wartime.

Step-by-Step Teaching Guide

#### 27. Have students make fifth Project Log entry

A fifth Project Log entry should be used to have students speculate about the potential long-term and far-reaching effects of the *Connolly* case and reflect on the conflicting views of feminists regarding recognition of differences between men and women.

#### **Potential Questions to Ask:**

- Do you think that Americans may be willing to accept women joining the Special Forces but not making them eligible for the draft? Why or why not?
- Are there differences between signing up for the Special Forces and being drafted into military service, and should this matter? Explain.
- Does the total equality of men and women before the law require us to ignore all physical differences between men and women? Why or why not?

These questions are designed to allow students to examine the potential legacy of a Supreme Court ruling in favor of Lt. Connolly. There are no right answers, but it is an important exercise that allows students to see the complexity and difficulty of setting public policy. No court decision exists within a box, and there will always be unforeseen applications of any ruling. Let students explore the possibilities for a while, but remind them that they will need to explain their thinking clearly to the senior partners when they make their recommendation.

#### 28. Revise "Know/Need to Know" lists and finalize Driving Question

At this time the "Know/Need to Know" lists should be revisited and revised, and the Driving Question should be finalized. The final Driving Question should look something like this:

How can we, as first-year associates in the law firm of Ebbets, Chavez, and Kofax, evaluate the strength of Amy Connolly's claim that her 5th and 14th Amendment rights have been violated and evaluate the potential impact of this case so that we can recommend whether or not our firm should argue the case before the United States Supreme Court?



Individual



**Potential Questions** 

Do you think that Americans may be willing to accept women joining the Special Forces but not making them eligible for the draft? Why or why not?

Are there differences between signing up for the Special Forces and being drafted into military service, and should this matter? Explain.

Does the total equality of men and women before the law require us to ignore all physical differences between men and women? Why or why not?



Revise Know/Need to Know and Finalize Driving Question



Step-by-Step Teaching Guide

Remind students that oftentimes decisions must be made while some degree of uncertainty remains. Therefore, only those "Need to Knows" that are critical to the solution will need to be addressed before concluding this unit.

Oral and/or Written Presentations



## 29. Have student groups make <u>oral and/or written presentations</u> to the senior partners

Each student group of first-year associates makes a presentation, lasting no more than five minutes, to the senior partners, followed by an additional three to five minutes for questions and answers. If it is not possible to bring in other adults to hear the presentations as "senior partners," the teacher alone may play the role of Brandi Bickering or another partner. If this is the case, be sure to ask questions from various points of view, as if the firm were arguing the case before the Supreme Court. Remind students that any member of their group may be asked any question, so each member must be familiar with the entire proposal as well as all of the potential questions from the memo outlining the presentation requirements. In addition, the senior partners will be free to ask students to dig deeper into a subject if necessary.

Assessment Tools and Rubrics

# 30. Use <u>assessment tools and rubrics</u> to evaluate oral and/or written reports

Assessment tools and rubrics are provided in Teacher Materials to help in assessing the final presentation. They also can be used to guide students in meeting the expectations of the assignment. Potential questions for those playing the role of senior partners can be found in Teacher Materials as well.

When assessing students, remember that Project Based Learning is most effective when the students are placed in realistic situations. As a consequence, if students begin to alter the authenticity of the situation, the learning environment can easily be reduced to fun and games. This negates much of the validity of the technique and knowledge gained from the unit. To prevent this digression, it should be stressed that responses must be accurate and reflect knowledge gathered from available resources. In other words, students cannot fabricate data and scenarios. They cannot give bogus answers to questions posed in the problem.

Students also must be coached to see that "I don't know" is a legitimate answer to a question. This makes the classroom authentic. When presented with a problem outside the classroom, there often may be more information available but limited time to seek out resources. This is one of the lessons that Project Based Learning teaches. To enable students to gain this insight, they must learn when to say they do not have the data to give an accurate answer. In other words, there are a limited number of answers because information is limited. *Students cannot make up answers. They must use the information that is provided.* 

Step-by-Step Teaching Guide

#### 31. Wrap-up and debrief the project with the whole class

It is critical that the wrap-up and debriefing section of the unit not be ignored. This is the part of the unit where students, as a class, reflect on the experience and are given feedback on both the process and content of the unit. It is imperative that incorrect knowledge or statements be corrected at this point in the project. How the debriefing is conducted is less important than the fact that it is conducted.

#### **Process Debriefing**

It is key that students have a chance to discuss how they undertook the problem-solving process and how they felt about the process. This should be more than a celebration of "being done." By surfacing the skills and attitudes the students developed during the unit, it should be made clear that they have gained more than just new knowledge about government. If the unit has been challenging, enjoyable, or frustrating, it is important to give students the chance to say why—both as a reflection on themselves as learners and so the teacher can improve the process, if need be, the next time the unit is taught. Ask students a series of questions, such as:

- How do you think you did?
- Were there strategies or arguments you left out that you wish you had used?
- Is it difficult when there is not one right answer to the problem? How does it feel to go through the problem without specific direction?
- To successfully develop a solution to the problem, what skills and attitudes did you need while you were working?

#### **Content Debriefing**

It is also vital that students have an opportunity to discuss what they have learned once the project's scenario has ended, since this helps improve retention of knowledge. This is a good time to summarize the key understandings about U.S. government that are highlighted by Fighting Chance. It is also an opportunity to extend students' thinking about the issues raised during the unit into other areas of government, their community, or their own lives. In addition, the teacher should use this time to correct any misunderstandings or factual errors that were evident during the presentations. Sample questions include:

- Are there other examples of alleged discrimination in our community, state, or nation, and are they constitutional or not?
- Why might the Supreme Court be more willing to take on the controversial subject of women in the military than Congress or the President?







Step-by-Step Teaching Guide

our differences?

Manage student reflection on the 21st century



# 32. Manage student reflection on the 21st century skills practiced and the process of learning in PBL

 Is total equality between all persons a good thing? Should everyone be treated exactly the same under the law? When do we need to recognize

Students should have a chance to discuss the process of learning in PBL and to reflect on the 21st century skills of critical thinking, collaboration, and presentation that they used in the project. This part of the debrief could be done with a series of questions, for example:

- Did you find it to be difficult when there are several possible "right answers" to the Driving Question? Why?
- How does it feel to go through some parts of the project without specific directions, to make some of your own decisions?
- How much do you think you learned in terms of skills like working as a team and making a presentation?

Finally, ask students for feedback on how the project was structured, with questions such as:

- Did you need more resources to help you solve the problem—more lecture time, more readings, more time on the computer?
- Did you need more help in learning how to work together in your group?
- Did you have enough time for each step of the unit?
- Are there any suggestions you would make for improving how the unit is taught?

Multiple-Choice Test

> Make notes or adjustments

> > to the unit



# 33. Multiple-Choice Test to assess individual students' knowledge of key political concepts

The multiple-choice test for this unit may be found in the **Teacher** *Materials,* in "Assessment Tools."

# 34. Make notes or adjustments to the unit to improve student learning for the next time the unit is taught

### **Teaching Tips**

#### Do's and Don'ts

In reading through this project, changes will inevitably come to mind. In this section, we highlight changes that have worked—and those that have not worked. Please do not try the ideas that have failed, even though the temptation may be great!

#### Ideas to Try

Have students seek out an organization in their local community that excludes a particular group and evaluate the legitimacy of this exclusion (e.g., senior living communities; Girl Scouts and Boy Scouts; single-sex schools, etc.).

For the advanced classroom, students may benefit from an in-depth evaluation of the various levels of scrutiny by which the courts evaluate discrimination claims. Have them do additional research on related issues from recent history, such as homosexuals in the military, segregation of military forces, resurrection of segregated extracurricular activities in some southern high schools, and other issues that deal with segregation and equality. A potential culminating question for this discussion is whether or not gender claims should continue to be evaluated under heightened scrutiny. What would be the benefits and drawbacks of reducing or increasing the scrutiny level?

Invite other adults—such as other teachers, administrators, parents, or local attorneys—to play the roles of the senior partners. Prepare them by providing all the handouts the students received and the "Potential Questions from Senior Partners" list found in Teacher Materials.

To avoid redundancy in students' presentations, you can be creative in the way you divide the class. Some teachers have students make presentations in a separate room while the rest of the class does something else. Others have students listen to the other groups and take notes on key points made, reflect on their own answers to questions posed, or evaluate each other.

To reduce the number of presentations made by small groups and save time, divide students into two larger groups and have each take one side of the issue. This could be structured as a debate, which is not unimaginable in a law firm. Students could question each other, but make sure to still have "senior partners" ask questions as needed. Since this format makes it harder to assess individuals, the final written recommendation might need to be submitted individually, or other assessments will be needed.

When students examine the VMI and Goldberg cases, you could have them write a legal brief instead of simply answering the questions in Brandi Bickering's memo. You can find many print and Internet-based resources that guide law school students in how to write a brief.

Create an alternative scenario for this unit by using a mock Supreme Court hearing of oral arguments as the culminating activity. One group of students could play the roles of lawyers for the Army, and another group could argue for Amy Connolly, with nine justices asking questions. This scenario would require substantial revision of the memos used to guide students throughout the unit, however, so be aware of how much time and care would need to be taken and do not let the process overshadow the content to be learned.

Videos can supplement this unit effectively, if used judiciously. To illustrate the intensity of combat and the unique issues surrounding it, students could view clips from films such as *Blackhawk Down* or *Hamburger Hill*. Films such as *Navy Seals* or *G.I. Jane* can give students an impression of the demands placed on members of the Special Forces—although the latter film can bias students on the issue of women in combat, so be careful about showing it in its entirety before the unit unfolds. Episodes from the NBC television program *The West Wing* also address issues of military combat, women in the military, and the appointment of Supreme Court justices.

#### Ideas Not to Try

This unit can easily get off task if students become mired down in the politics of the issue without staying focused on their role and goal. Continually remind students that they should be creating a set of arguments in response to specific questions. It is not up to them to determine military policy, even though they must evaluate it. This unit should not be undertaken as a mock trial activity. The unit is focused on a potential Supreme Court hearing, not a trial with prosecution and defense lawyers, witnesses, and evidence.

Extensions to Unit

#### **Extensions to the Unit**

- Case studies have students analyze legal questions and reach their own conclusions. They can take on different forms, such as legal cases based on court opinions, hypothetical situations involving some sort of conflict, or real-life situations taken from the news. Have students brainstorm public issues over personal or civil rights that interest them and involve a conflict where one side (the petitioner) feels their rights are being denied by another group (the respondent). These can be related to school, home life, or their community. To set up the case study divide students into small groups with 2–3 students playing the role of the petitioners, the respondents, and at least three students playing the role of judges. Have all students research the facts of the case. From this research, have students prepare a case study or moot court using the following guide:
  - Each set of attorneys answer the following questions:
    - · What does your side (petitioner or respondent) want?
    - What are the arguments that favor your side? What are the arguments against your side?

- What are the legal precedents (lower court or previously decided cases) and how do they affect your side?
- What's at stake here for your side and for society?
- Justices prepare for the case as follows:
  - Review the facts of the case and develop 5–7 questions to ask the attorneys (the constitutional basis for their position, the legal precedents, and the potential impact on society of a decision either way on this case).
  - · Conduct the case study with the following steps.
  - · Attorneys present their oral arguments to the judges.
  - Judges ask relevant questions and take notes during oral arguments.
  - After both attorneys have presented their case, the justices convene in "closed door" session to arrive at a decision. Their decision should summarize the facts of the case, state which argument they felt was the most persuasive, and state their legal decision. If any of the judges disagreed with the majority, they can state a dissenting opinion.
- From the evidence presented in *Fighting Chance*, have the class conduct a moot court on *United States Army v. Connelly, et al.* Use the guide above to conduct the moot court.
- Provide students with some background on the Civil Rights movement of the 1950s and 1960s. Discuss with them some of the Constitutional rights that were expanded at this time—equal protection, rights of citizens, rule of law, equal opportunity—and the connection that they had to the Civil Rights movement. Then have students look at women's efforts for Civil Rights in the late 19th and early 20th centuries (including the fight to ratify the 19th Amendment) and the feminist movement of the 1960s and 1970s (including the effort to ratify the Equal Rights Amendment). Now have students compare and contrast these two movements examining the extent of rights for African Americans and women when the movements first began, the events that transpired to have their rights recognized and become accepted, and the overall accomplishments of both movements.
- Hold a debate on whether women should be more involved in ground combat with other members of your class. Consider conducting the debate in a public presentation, such as an evening forum on various topics or on a blog that presents each side's views and asks for public comment.

Structure and Power of the Federal Courts

### **Teacher Materials**

Structure and Power of the Federal Courts

The United States operates under a dual court system, with both federal and state courts. State court systems vary, and the federal system is discussed below.

#### **Types of Federal Courts**

Article I courts, also known as legislative or special courts

These courts were created to carry out the powers of Congress enumerated in the Constitution. Examples of these courts include the Claims Court, which hears lawsuits against the federal government, Courts of Military Appeals, and the District of Columbia Courts. Judges in these courts hold fixed terms of office, in contrast to the lifelong terms of all other federal judges.

Article III courts, also known as constitutional courts

Article III of the Constitution, in addition to creating a Supreme Court, gives Congress the power to create inferior courts. The constitutional courts are the mainstay of the federal court system, handling cases that involve the interpretation and application of a provision in any federal law or treaty or in the Constitution. There are three levels of constitutional courts:

- **District courts** are the first level, and they decide 80–90% of all federal cases. These courts have *original jurisdiction*, which means they are the "trial courts" that hear a case for the first time. There are 94 district courts in the 50 states, the District of Columbia, and the territories of Puerto Rico, Virgin Islands, Guam, and Northern Mariana Islands. Serving in these district courts are more than 640 judges. Cases are tried by judge and jury and may include civil, criminal, or constitutional cases. These courts also may empanel grand juries to issue indictments—orders that charge (not convict) an individual with a crime. Constitutional courts also use *magistrates*—individuals who serve as judges—to issue warrants, hold preliminary hearings, and set bail.
- **Courts of appeal,** also known as **circuit courts**, have *appellate jurisdiction*, meaning they hear cases on appeal from district courts and regulatory commissions. The United States is divided into 12 geographic regions, or circuits, presided over by almost 180 judges. Most cases are heard by a panel of three judges, except in cases of extreme importance, when all judges of a circuit court hear a particular case "en banc."
- The United States Supreme Court is the highest level of the federal constitutional courts. Also known as the "highest court in the land" or the "court of last resort," it is the only court specifically mentioned in

the Constitution. It consists of eight associate justices and one chief justice, making nine total. Although this number is set by Congress and may be changed, the long-standing tradition makes this unlikely, as President Franklin Roosevelt found in the 1930s when he unsuccessfully attempted to add three more justices. The Supreme Court has both original and appellate jurisdiction. It has original jurisdiction over controversies between two or more states and cases brought against ambassadors. It has appellate jurisdiction over cases coming out of the courts of appeals and the state supreme courts, which comprise over 98% of its cases.

#### How a Case Is Appealed

The losing party in a case can appeal the decision to the next highest court. In order for a court to grant the appeal—that is, agree to overturn the decision of the lower court—here must be an error in the procedures followed by the last court to hear the case, or an error in how the law was interpreted. The court of appeals will only reverse a decision if the trial court (judge, jury, attorney[s], or other procedure) committed an error or misinterpreted the law, including the Constitution. Only rarely are appeals granted on the basis of new evidence. Whoever loses at the court of appeals can then appeal to the Supreme Court, where the same rules apply.

#### **Powers of Constitutional Courts**

Constitutional courts have three key powers:

- Judicial review of acts of the legislature to determine their constitutionality. If a law is found to be unconstitutional, the courts may disallow its enforcement. The Supreme Court assumed this power, an important feature of the U.S. system of checks and balances, in the 1803 case of *Marbury v. Madison*. In this landmark decision, the first chief justice, John Marshall, ruled that the Judiciary Act of 1789 passed by Congress conflicted with the Constitution—and the Supreme Court had the right to say so. Since 1803 more than 1000 state laws and more than 120 federal laws have been struck down.
- Interpret the meaning or proper application of broadly worded laws of Congress and the Constitution.
- **Overrule earlier Supreme Court decisions**: For example, the 1896 decision in *Plessy* v. *Ferguson* that allowed "separate but equal" schools for black and white students was overturned by the 1954 ruling in *Brown* v. *Board of Education of Topeka*, when the Court declared segregated schools to be inherently unequal.

#### What the Courts Can and Cannot Do

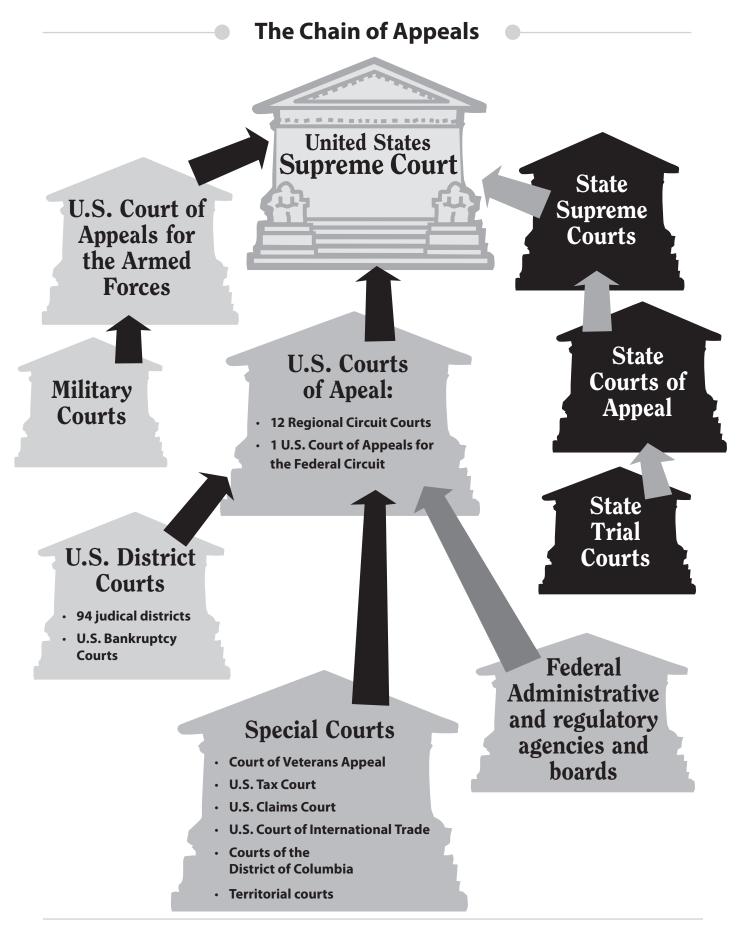
Judicial power is passive. Courts cannot reach out and take cases—they must be brought to the court. Once a case is rightfully before the court, judges actively interpret the laws and, in so doing, significantly influence the lawmaking and enforcement processes of the legislative and executive branches. Evidence of such judicial law-making can be seen when the courts strike down a law by finding it to be unconstitutional.

Judges and justices are also professionally bound by the concept of *stare decisis* (from the Latin, "stand by a decision"). This concept binds judges and justices to previous decisions of the courts so as to provide continuity among the courts and over time. If a similar case has already been decided, the courts will tend to rely on that earlier decision for guidance and direction. These previous cases are known as precedent. Judges and justices are free, however, to break the ties of the past and make their own rulings, as in the *Plessy v. Ferguson* and *Brown v. Board of Education* cases. There is no constitutional or legal requirement that a court follow *stare decisis*.

The court's decision can have significant impact beyond the case being presented. For example, after the Supreme Court decided *Brown* v. *Board*, many new cases ensued that addressed issues such as busing to achieve racial integration in schools, and affirmative action to achieve greater equality in the workplace and in higher education.

#### **Teacher Materials**

The Chain of Appeals



### **Equal Protection Under the Law**

#### **Discrimination and Its Constitutional Limits**

Discrimination is the practice of classifying or treating groups of people differently. While some discrimination is inevitable and even necessary, such as age restrictions for driving or drinking, the Constitution prohibits discrimination that is unreasonable. Constitutional prohibitions can be found in the 5th and 14th Amendments.

The 5th Amendment's Due Process Clause prohibits the federal government from unreasonable discrimination, stating:

• No person shall be ... deprived of life, liberty, or property, without due process of law.

The 14th Amendment extends the 5th Amendment's prohibition to the state governments with its Equal Protection Clause:

• [N]or shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The 14th Amendment was ratified in 1868 as a direct result of the reconstruction efforts following the Civil War. In 1866 Congress passed a series of bills promising citizenship, medical care, and education to freed slaves and war refugees. When Andrew Johnson became President following the assassination of President Lincoln, he vetoed the legislation, thereby infuriating the Republican-controlled Congress. Congress overrode President Johnson's veto and went on to draft the 14th Amendment, to remove the ability of the state governments from again threatening the citizenship and basic rights of the newly freed slaves.

It is important to note that there is no Equal Protection Clause in the 5th Amendment:

• The Equal Protection Clause of the 14th Amendment has *no counterpart in the Constitution applicable to the federal government;* it is limited to state action. Nevertheless, it is clear that grossly unreasonable discrimination by the federal government violates the Due Process Clause of the 5th Amendment (*Bolling v. Sharpe,* 347 U.S. 497, 1954). Thus, there are really two equal protection guarantees. The court applies the same standards under either constitutional provision. (Quoted from barbri Bar Review, Harcourt Professional Educational Group, 2001.)

#### The Meaning of Due Process

"Due process" refers to the constitutional guarantee that the federal government (5th Amendment) and state governments (14th Amendment) cannot deny any individual life, liberty, or property without the use of fair procedures and fair laws. When discussing due process, there are two considerations to be made: (1) Is the *procedure* fair that is used to take the life, liberty, or property; (2) is the *law itself* fair that allows the government to take the life, liberty, or property?

In order to ensure that the procedure is fair (known as procedural due process), the government must honor the Bill of Rights; provide reasonable notice to the person whose life, liberty, or property is in question; and provide the individual a right to be heard. Procedural due process is violated with illegal searches or unfair court proceedings.

The second consideration comes because it is not enough that the procedures the government follows are fair. The laws that allow the government to take life, liberty, or property also must be fair. This concept is known as substantive due process. Substantive due process violations occur when such things as blanket bans on firearms, apparel, or procedures (such as abortions) are enacted. In short, the difference between procedural and substantive due process can be illustrated as follows: A law prohibits possession of narcotics (substantive), and the police generally must obtain a warrant before conducting a search for narcotics in one's home (procedural).

#### Discrimination by the Government: How the Courts Decide

If a person sues the government claiming that he or she has been the subject of unreasonable discrimination, the court must first determine whether there was actually discrimination. To do so, the court looks at whether the group (or class) to which the plaintiff(s) belongs (i.e., race, gender, sexual orientation, or age) was treated differently. If the court finds there was discrimination, this is not necessarily a bad thing. For example, a 10-year-old may sue in state court, complaining that the state has refused to issue a driver's license on the basis of age. According to the definition, this is age discrimination. However, it is unlikely that the court would find this discrimination to be unreasonable. Deciding that is the second step in the process.

Once discrimination has been established, the court must identify the test that will be used to determine whether the discrimination was unreasonable. Over time, the Supreme Court has established **four tests** to determine the constitutionality of government discrimination. A court will apply one of the following tests, based on the classification and/or the right allegedly violated.

**1. Strict scrutiny:** Discrimination based on race or national origin is almost never allowed

A court will apply **strict scrutiny**—i.e., look very closely—if a class is deemed to be suspect. A class of people is considered suspect if it has historically suffered unequal treatment on the basis of race or national origin. Once a suspect class has been established, the court will apply strict scrutiny when determining whether the discrimination was reasonable. The government, in the rare exception when the defendant bears the burden of proof, must show that the there was a compelling purpose for the discrimination. This type of case typically has been seen in the area of affirmative action (see *UC Regents v. Bakke*, 1978; *Richmond v. Croson*, 1989; and *Adarand v. Pena*, 1995). It is almost impossible for the government to show a purpose that is compelling enough to overcome the presumption of invalidity.

2. Heightened, or intermediate scrutiny: Discrimination based on gender is only sometimes allowed

If the classification or treatment is not based on race, then the courts will ask whether it was based on gender. Gender is considered a quasi-suspect class by the courts. In a case involving a quasi-suspect class, the court will apply heightened scrutiny when determining whether the discrimination was reasonable. In order for the plaintiff(s) to prove the discrimination is unreasonable, he or she must show that the classification or treatment lacks an exceedingly persuasive justification for an important government objective. If the court finds that there are, in fact, important government objectives at stake, the plaintiff must then show that the classification or treatment is not substantially related to the achievement of these important objectives. This means the plaintiff must show one of two things: 1) There is no goal or interest advanced by the classification (usually not the case since the governmental objective may be as simple as safety, as in the age requirement for a driver's license); or 2) assuming there is an important purpose served by the classification, such as safety, the classification does not help the government achieve its stated goal. For example, a law in the name of safety may require all persons to be at least 5'0" in height before being able to drive, but the courts would likely find that such a restriction fails to promote safe driving if studies showed that people shorter than 5'0" do not pose a greater risk behind the wheel than people over 5'0".

Heightened scrutiny is very subjective because it essentially allows the judge(s) to use individual definitions of reasonableness in determining whether a classification is unconstitutional. The burden still lies with the person challenging the classification. This level of scrutiny is not as intense as strict scrutiny, due to the recognition of certain biological differences between the sexes. For example, a six-week maternity leave for women but no comparable paternity leave for men has been upheld,

and the courts have approved the male-only military draft. However, classifications cannot be based on archaic notions of women being the "fairer sex," and the government cannot use social or cultural concepts of a proper "woman's place" to deny women equality of opportunity. The Supreme Court used the concept of "archaic notions" to decide the 1979 case of *Orr* v. *Orr*, in which it ruled that a state law authorizing alimony payments only for wives was a violation of the Equal Protection Clause of the 14th Amendment. However, the court has recognized the existence of "inherent differences" between the sexes, including height and weight tendencies, different responses to criminal defendants (*J.E.B.* v. *Alabama*, 1994), and the heavier burden of childbirth and child-rearing on women (*Michael* v. *Superior Court of Sonoma County*, 1981). The Supreme Court limited the use of these recognized differences in 1996 in the *VMI* case when it ruled that:

 Inherent differences between men and women should be recognized and at times celebrated, but they may not be used to place artificial constraints on an individual's opportunity or perpetuate the legal, societal, and economic inferiority of women.

Heightened scrutiny can be applied to the case in *Fighting Chance*. Lt. Connolly essentially must show that the Army's exclusion of women is not required in order for the Special Forces to preserve and advance the national interests of the United States. Lt. Connolly will meet this requirement by showing that the exclusion of women is based solely on the outdated idea that women are not capable of performing in high-stress, high-danger, and high-performing situations such as combat and covert operations. She can also argue, as in the *VMI* case, that inherent differences between men and women are being used to place "artificial constraints" on her opportunity to advance her military career. In effect, this takes away her right to equal protection of her "property" (i.e., her job).

**3. Fundamental rights:** Discrimination that denies basic constitutional rights is almost never allowed

The courts have created a niche for plaintiffs who allege that their **fundamental rights** have been impaired. The courts apply strict scrutiny if a right is at issue that is *explicitly mentioned* in the Constitution (e.g., First Amendment liberties and voting) or is *implicit* in the Constitution (e.g., travel, political association, or privacy). Although this is the same test used for race-based classifications, the court only looks at the right or liberty allegedly being violated, rather than the class of people involved. For example, in 1978 the First Amendment's right to association and speech guaranteed the right of the Nazi Party to participate in a town parade in Skokie, Illinois, despite the fact that a large majority of the town's population was Jewish.

#### 4. Rational basis: Discrimination is allowed in some cases

In all other cases where there is an allegation of discrimination, the courts apply a **rational basis** test. The courts will allow the discrimination if it has a *reasonable relationship* to a proper purpose of the government. The plaintiff in this case must show that there is no reasonable relationship between the law and the government objective, or that the government objective is outside of its constitutional authority. For example, the courts used the rational basis test to uphold laws banning polygamy, laws establishing a minimum marital age, and a law prohibiting felons from obtaining a teaching credential.

#### **Discrimination by a Private Entity**

The U.S. Constitution, including the 5th and 14th Amendments, only protect the individual against government action. In order for the protections of the 5th and 14th Amendments to apply, the federal or state governments (or their agents) must have engaged in discriminatory actions or practices. While there are state and federal laws in place that prevent a private party from discriminating against a person based on gender, race, age, sexual orientation, etc., such private discrimination is not barred by the 5th and 14th Amendments. If an individual suffers discrimination by an entity other than the government, he or she can look to three areas in the Constitution for relief:

- The Commerce Clause of Article I, which gives Congress the authority to "regulate commerce with foreign nations, and among the several states." This has come to be interpreted to allow congress to dictate employment guidelines for all businesses whose goods directly or indirectly affect interstate commerce.
- The power of Congress to attach "strings" to federal grants and contracts that eliminate private discrimination under the spending and taxing power of Article I
- The judiciary's tendency to broadly interpret the 13th Amendment in order to eliminate the last remnants of slavery

Generally, however, an individual will look to federal or state laws that govern discrimination in the private sector, such as the federal Civil Rights Act of 1866, federal Civil Rights Act of 1964, federal Civil Rights Act of 1968, federal Age Discrimination in Employment Act of 1967, federal Americans with Disabilities Act of 1990, or state employment laws. Therefore, if a person is claiming discrimination by a private entity—an employer, business, or organization—he or she will sue under *state and federal statutes* designed to protect the individual. He or she may not claim protection under the Constitution and will *not* have the tests described above applied to their case. For example, if a disabled person is suing a private company, such as a restaurant, for lacking access to its facilities, he or she will use the Americans with Disabilities Act of 1990 as the basis for the claim, rather than the 5th and/or 14th Amendments.

# Example of a Discrimination Case: Women and Police and Fire Departments

The police and fire departments of Buffalo, New York, were sued in a series of cases that eventually were consolidated in the case of U.S. v. City of Buffalo (1978). Among the 5th and 14th Amendment claims of discrimination based on race, color, and national origin were claims based on the absolute prohibition of women as either police officers or firefighters. The court of appeals ruled that any time there is shown to be a disproportionate impact on a protected class (a class based on national origin, color, race, religion, or gender), the defendants must show that the methodology that appears discriminatory is "significantly correlated with important elements of work behavior which compromise or are relevant to the job(s)." The defendants offered no conclusive evidence that the exclusion of women bore any relationship to the performance of the position's duties. When the defendants argued that the minimum height, weight, and physical strength requirements may exclude women, the court ruled that such prerequisites cannot be used because the assumption of strength and each requirement must in itself bear a direct correlation to the performance of a specific task. In other words, the actual, specific duties of a police officer or firefighter must require the height, weight, or degree of physical strength demanded by the gualifying tests. For example, a fire department would have to show that a person had to be 5'10" tall, weigh 180 pounds, and bench-press 250 pounds in order to drive a fire truck, handle a hose, or raise a ladder.

Procedures of the Supreme Court and the Limits on Its Power

# Procedures of the Supreme Court and the Limits on Its Power

Nearly 10,000 requests for Supreme Court decisions are made each year. Only about 100 of these cases are scheduled for oral arguments. Written opinions are issued in 80 to 90 of the cases. An additional 50 to 60 cases are resolved without written opinion or oral argument.

### How the Court Decides Which Cases to Hear

When a party requests a Supreme Court decision, it files a petition for a *writ* of certiorari, or a *writ of cert* (from the Latin, "order to be made certain"). These requests are reviewed by the Supreme Court's law clerks and then by the justices themselves. When deciding which of the cases on their docket to hear during the upcoming term, justices operate under the "Rule of Four." This means that in order for the Supreme Court to decide a case, four justices must agree to do so. The Supreme Court will only grant a *writ of certiorari* when there are special and important reasons to do so, typically agreeing to hear cases that meet one or more of the following criteria:

- The issue or controversy has been decided differently by different courts, resulting in legal uncertainty, such as when a federal court of appeals disagrees with a district court, or when two courts of appeals have decided similar cases differently.
- The issue or controversy reflects a new development in technology or culture that has not been heard by the Supreme Court in the past. For example, new computer technology used for music file-sharing has raised new copyright issues, which the Court addressed in *MGM* vs. *Grokster* (2005).
- Changes in culture and/or society's values require the Court to reexamine an issue. For example, changing views about race led to several Court decisions in the second half of the 20th century that expanded civil rights for African Americans and other minorities.

Once the justices accept a case, they decide whether to ask for more information and oral arguments from the attorneys. If these are not needed, they quickly may issue an unsigned brief stating the court's decision, based on the briefs submitted by and on behalf of both parties.

The court's decision to deny a decision may mean a number of things:

• **The case lacks a substantial federal issue**. For example, challenges to election results are usually left to state courts, since states operate their own voting systems.

- **One or more parties lacks standing**. For example, a woman who believes her father was unfairly fired from a job because of his age cannot be given standing as plaintiff in a case because she is too distant from the alleged harm.
- The Court agrees with the lower court.
- The case is a political "hot potato" that the Court does not want to touch. For example, the Court would probably avoid cases involving research on human cloning until the issue has been further addressed by Congress and the states.

If the Court denies the *writ of cert*, the decision of the previous court stands as law, but the law is only as broad as that court's jurisdiction. For example, if the Supreme Court denies *cert* for a case coming out of the court of appeals for the Ninth Circuit, the ruling of that court remains in effect, but no court outside the states in the Ninth Circuit is bound by that ruling.

### How a Case is Argued Before the Court

The remainder of the Court's work is completed during each "term," which begins on the first Monday in October of each year and runs through the end of June or beginning of July. The Court hears cases Monday through Thursday, with a quorum of six justices present. To prepare for oral arguments, the justices read the attorneys' briefs as well as the *amicus curiae* briefs filed on behalf of the litigants. The justices then hear 30-minute oral arguments from each side. Most, if not all, of this time is consumed by questions from the justices, who are free to interrupt. At their Friday conference, the justices discuss the cases for which they have heard oral arguments that week.

### How the Court Makes Its Rulings

A simple majority is needed for Supreme Court decisions. In the case of a tie, the previous decision stands, although opinions, while not binding, may be published. A tie can occur when there is an even number of justices due to a justice recusing him or herself based on a conflict of interest, or when a justice has not been replaced. If the Court issues a written opinion, it will be one of four types:

#### 1. Unanimous opinion

This expresses the opinion of all nine justices. Approximately one-third of all cases are decided with a unanimous decision.

#### 2. Majority opinion

Only this opinion is considered the official decision of the Court. It serves as binding precedent for all other courts. All other opinions—i.e., minority opinions—are merely persuasive in their applications to future cases and do not carry any power of law.

Procedures of the Supreme Court and the Limits on Its Power

#### 3. Dissenting opinion

A dissenting opinion expresses the opinion of the minority of justices who disagree with the majority's decision. More than one justice may choose to write a dissenting opinion if he or she has different reasons for disagreeing with the majority. A dissenting opinion is simply a public statement of disapproval and has no force of law. However, if the Court later overturns itself, it may draw on the minority opinion for reasoning, as do attorneys in future cases.

#### 4. Concurring opinion

Members of the Court may issue a concurring opinion, which is written by one or more justices who agree with the majority's conclusion but disagree with its reasoning.

#### Authoring the Opinions

The choice of which justice or justices write the opinions is based on seniority within the Court. If the chief justice votes with the majority, he or she assigns someone in the majority to write the opinion. If the chief justice is in the minority, the most senior justice among the majority assigns the opinion. Assigning the opinion is a key power of the chief justice. It enables him or her to get the right "slant" on the issue. The majority opinion writer must be careful not to alienate the others in the majority so they do not change their minds and either write a concurring opinion or side with the minority. The majority opinion writer, therefore, must structure the argument in such a way as to keep the support of at least four other independent-minded justices. The threat of a dissenting opinion can sometimes convince the majority to bend a bit on certain areas of the decision. While any justice is free to write his or her own opinion, the majority opinion is the only one that is considered the official decision of the Court.

#### **Purposes of Opinions**

The Court's reasons for publishing a written opinion are often complex. Most likely, the court wants to communicate to the public its reasoning on a particular issue so as to eliminate as much controversy and speculation as possible. The Supreme Court also may publish its opinion to resolve similar cases brewing in the lower courts with the precedent established by the decision. Finally, the Court may publish its opinion in an effort to drop "hints" to Congress, the states, or the President that they should take certain actions in response to ongoing cases or controversies. Published opinions are issued throughout the term, but a significant number are issued in June or July, at the end of each term.

### Limits on the Power of the Supreme Court

The U.S. Constitution established a system of democratic government with a separation of powers, in which each branch of government may "check and balance" the others. Accordingly, the power of the judicial branch, including the Supreme Court, is limited by the legislative and executive branches.

#### 1. Lack of enforcement power

Once the courts have decided a case, there is a significant shortfall in their ability to enforce their decision. In fact, the judicial branch has no authority to enforce its decisions—it relies on the executive branch for enforcement power. The executive branch, whether it be the President, a governor, or other officials, may simply choose to not carry out the court's decision. For example, as President Andrew Jackson famously said when he disagreed with the chief justice of the Supreme Court, "John Marshall has made his decision. Now let him carry it out." The Court had found in 1832 that the State of Georgia did not have any jurisdiction over the Cherokee Nation. Georgia and President Jackson ignored the Court's decision. A few years later Georgia evicted the Cherokees and forced them to march west on what became known to the Indians as the "Trail of Tears," where about twenty-five percent of them died before reaching their new lands in Oklahoma.

State and local governments also hold enforcement power and may simply refuse to comply with a court. For example, in 1954 the Supreme Court ordered an end to racial segregation in schools with its decision in *Brown v. Board of Education of Topeka*. However, the case came before the Court again in 1955, in what is known as "Brown II," because the 1954 ruling was not having the desired effect. The Court tried again, ordering the states to comply with its charge to desegregate "with all deliberate speed." Even then, it was not until Richard Nixon's presidency in 1970 that many schools in the South were forced into compliance by National Guard troops and additional court rulings on busing. This was a powerful reminder to the nation that the Supreme Court, to enforce a widely unpopular decision, must rely on the executive branch to take action (like dispatching the National Guard) or the legislative branch to control funding to encourage compliance.

#### 2. Public opinion

In the short run, the Supreme Court does not follow the immediate ups and downs of the political landscape because its members were appointed by previous presidents for life terms and likely will serve on the bench long past the tenure of newly elected officials. In the long Procedures of the Supreme Court and the Limits on Its Power

run, however, the Court generally will reflect public opinion because the justices are people of their times, they are appointed by presidents who were elected by the people, and, most importantly, they ultimately rely on public support for enforcement of their rulings.

#### 3. Congressional influence

Congress plays a considerable role in limiting the power of the courts because it is constitutionally required to confirm the appointment by the President of all federal judges and justices. It also has the power to impeach and remove any judges found guilty of misconduct or incompetence. Additionally, Congress controls the jurisdiction and structure of the federal courts, a power that recently had momentous influence. In 1979 the Democratic-controlled Congress created 152 new district and appeals court positions. This action, coupled with resignations and retirements, allowed President Jimmy Carter, a Democrat, to appoint 40% of all federal judges during his single term in office.

The legislative branch may also end-run the decisions of the courts. Congress may amend the Constitution itself, if three-quarters of the states ratify the amendment, making it impossible for the courts to strike down a law or action as unconstitutional. Additionally, state and local governments can enact laws or amend state constitutions in response to an unpopular Supreme Court decision. This happened in July 2005 after the Court ruled that local governments may use the power of eminent domain to take private property for use by private developers as a way to increase tax revenues and improve "blighted" areas in a community. In the weeks that followed, several state and local governments began to create laws to prevent this from happening.

#### 4. Legal and customary restraints

The courts are subject to a breadth of other restraints contained within the U.S. system of justice. The first of these is the passive nature of the court system. Courts may not reach out and take a case—they must be brought to the courts. Secondly, the courts are bound by an internal set of rules that include the custom of *stare decisis*. Literally translated as "stand by a decision," this means the courts generally try to follow what has been decided in precedent cases. This concept is used by justices to create continuity between the various courts as the members change over time. While this concept is not binding, as seen when the court overrules previous decisions such as *Plessy v. Ferguson*, it is persuasive to justices. Finally, the courts are bound by the text of the Constitution. Ultimately, the court's role is to interpret the Constitution. It cannot find something to be unconstitutional if it is specifically allowed in the Constitution or is not addressed at all.

## Judicial Philosophy and the Current Supreme Court

#### Judicial Activism v. Judicial Restraint

Although the courts have long had the power of judicial review, there is ongoing debate about the extent to which the courts should use this power. **Judicial activism** is the philosophy that the courts should take an active role in solving social, economic, and political problems. This belief is rooted in the idea that courts should act as the "guardian" of the people, especially protecting those in the minority from the tyranny of the majority. For example, the Supreme Court in the 1960s acted to protect the rights of citizens accused of crimes by requiring states to provide an attorney to people who could not afford one.

**Judicial restraint** is the philosophy that, because most judges are unelected, lifetime-appointed officials, it is more democratic to allow the states and the other two branches of the federal government to solve social, economic, and political problems. This belief is rooted in the idea that judges should limit their use of judicial review, merely interpreting the laws rather than making them. Under the philosophy of judicial restraint, courts should act only in those situations where there are clear constitutional questions.

Historically, there have been both periods of judicial activism and judicial restraint. Since the 1930s, the U.S. has seen a period of judicial activism by courts dominated by both conservatives and liberals. Prior to 1937, liberals complained about the conservative Court being too activist when it struck down various reform-minded laws promoted by President Franklin Roosevelt (e.g., minimum wage, bans on child labor, National Recovery Act). Later, conservatives began to complain about the Court being too activist, especially with the advent of the Chief Justice Earl Warren Court (1954–1969). Conservatives' complaints focused on such issues as:

- Expanding the rights of the accused (e.g., the *Miranda* decision requiring police to notify the accused of their rights)
- Civil rights (e.g., forced busing to achieve integration in schools)
- Civil liberties (e.g., prohibiting school-sponsored prayer)
- Striking down death penalty laws as a violation of the 8th Amendment

The Burger Court (1969–1986) was less activist than the Warren Court, but still upset conservatives with decisions such as *U.C. Regents* v. *Bakke*—allowing some forms of affirmative action—and *Roe* v. *Wade*, in which the Court ruled that a woman's right to an abortion is protected under the Constitution's implied "right to privacy." The Rehnquist Court (1986–2005) was often accused

of being too activist when it overturned precedents favored by liberals. Liberals also complained about the Supreme Court's decision to intervene in the 2000 Presidential election, since election laws have primarily been under the jurisdiction of the states. The Roberts Court (2005–present) is believed to have moved away from activism and toward judicial restraint.

### Liberals, Conservatives, and Swing Votes

In recent years, there have been three distinct voting blocs on the Supreme Court, reflecting the judicial philosophy and political views of its members.

### The Liberal Bloc

Current members include:

- Sonia Sotomayor (born 1954, appointed 2009 by President Barack Obama)
- *Elana Kagan* (born 1960; appointed in 2010 by President Barack Obama)
- *Ruth Bader Ginsburg* (born 1933; appointed in 1993 by President Bill Clinton)
- Stephen Breyer

(born 1938; appointed in 1994 by President Bill Clinton)

These justices are more likely to favor judicial activism, viewing the Constitution as a "living document" whose fundamental principles can be applied in ways that adjust to fit changes in society. They have been more likely to rule, for example, in favor of restricting the use of the death penalty, expanding the rights of criminal defendants, and expanding the federal government's right to regulate the private sector to protect workers and the environment. Liberal justices have historically tended to favor more assertive expansion of civil rights for women and racial minority groups, and they have allowed the federal government to override state governments in conflicts over the issue. Liberal justices are more likely to be wary of government support of religion, and take a more "progressive" view of issues such as the regulation of sexual and "moral" behavior, abortion, and gay rights.

### **The Conservative Bloc**

Its members include:

- Antonin Scalia
   (born 1936; appointed in 1986 by President Ronald Reagan)
- Clarence Thomas (born 1948; appointed in 1991 by President George H. W. Bush)

- John Roberts, Jr. (born 1950; appointed in 2005 by President George W. Bush)
- Samuel Alito, Jr.

(born 1950; appointed in 2006 by President George W. Bush)

These justices are more likely to favor judicial restraint. They believe that the Constitution should not be broadly re-interpreted to find new applications to fit changing times. Some are "strict constructionists," who think the courts should adhere to the "original intent" of the framers of the Constitution. They oppose, for example, abolishing the death penalty as a violation of the 8th Amendment's ban on cruel and unusual punishment because it was not regarded as such for most of the nation's history. Historically, members of this bloc have favored the rights of the private sector and the states over those of the federal government. Conservative justices tend toward "traditional" views on the role of religion in government and on "moral" issues such as gay rights, abortion, and sexual behavior.

### The Moderate Bloc

Its sole current member, after the 2005 resignation of Sandra Day O'Connor, is:

Anthony Kennedy

(born 1936; appointed in 1988 by President Ronald Reagan)

Justices in the moderate bloc are considered "swing votes" who could join with either the liberal or conservative blocs depending on the circumstances, and who cast the deciding vote on split decisions. These justices, arguably, are the most influential since they are constantly courted by the liberals and conservatives to join in their opinions.

### **Internet Resources**

- Information on the Judicial Branch and court system: www.supremecourtus.gov www.uscourts.gov www.calbar.org
- Resources pertaining to the Special Forces:
   www.goarmy.com
- Case histories can be found on a number of websites, including: http://www.law.cornell.edu/supct/ www.findlaw.com
- Articles supporting and opposing Title IX equal education/sports programs: writ.news.findlaw.com/grossman/20020618.html www.csmonitor.com/2002/1227/p01s01-usgn.html www.foxnews.com/story/0,2933,76998,00.html
- Articles supporting and opposing affirmative action for women: www.now.org/issues/affirm/talking.html www.foxnews.com/story/0,2933,123434,00.html
- Articles supporting and opposing women in combat roles: http://opinionator.blogs.nytimes.com/2010/02/15/ womens-work/?ref=opinion http://www.theatlanticwire.com/politics/2010/02/pros-and-cons -of-allowing-women-in-combat-roles/25482/
- Articles on the role of women in all aspects of the military: http://mldc.whs.mil/download/documents/meetings/ 201004/WICBriefPRINT.pdf http://www.army.mil/article/52957/
- Public law that repeals the ban on gays in the military (Don't Ask, Don't Tell): http://dont.stanford.edu/regulations/PLAW-111publ321.pdf

Potential Questions for "Senior Partner" Panel Members

## Potential Questions for "Senior Partner" Panel Members

## General questions for all students, regardless of their recommendation on the case:

- What is Amy Connolly's claim that her right to due process is being denied? Which of these rights—life, liberty, or property—does she feel is being denied due process?
- Is this case only about one woman, Amy Connolly? What if she decides next week that she's going to become a doctor instead of joining the Special Forces? Are other women potentially affected by this case and if so, how?
- If Connolly wins, will this case become a precedent that could affect women's rights to equal educational opportunities under Title IX? Explain.
- If Connolly wins, will this case become a precedent that could affect hiring preferences for jobs in which women are underrepresented, and are currently addressed through affirmative action programs? Explain.
- If Connolly wins, will this case become a precedent that could affect women's rights regarding maternity leave from a job? Explain.
- If Connolly wins, will this case affect the military draft, which now is only for men? Will it affect the issue of the draft if she loses? Explain.
- Why do you think the Supreme Court granted a *writ of cert* for, or agreed to hear, this case?
- How do you think the Supreme Court will rule on this case, and why?

## For students who recommend that the firm should *not* take the case:

#### 5th and 14th Amendment Issues

- Do you think Amy Connolly's 5th and 14th Amendment rights are being denied? (If yes, ask students to explain why they recommend the firm should not take the case. If no, have them explain why they think her claim is unjustified.)
- It can be argued that Lt. Connolly is in, fact, being discriminated against, but that the discrimination is outweighed by some other interest. Is this your argument? If so, what is the "other interest" that justifies the discrimination?

Potential Questions for "Senior Partner" Panel Members

#### Morale, Readiness, and Effectiveness Concerns

- The military did not integrate African Americans into the Army for a long time—until after WWII. Isn't this case about the same issue?
- Won't the Special Forces be trained so well to function as a team that having a woman member will not be a distraction?
- If a male soldier does treat a woman differently or commits sexual harassment, isn't that just an isolated problem to be handled by his commanding officers? Why should that possibility outweigh the right to equal protection?
- Isn't the Veterans Association exaggerating because they have old-fashioned views of women?
- If the standards for the Special Forces were *not* lowered, *then* would you be OK with letting women in—if they qualified by passing all the physical and psychological tests? Explain.
- If captured, couldn't men also be the victims of forms of torture as bad as rape?

#### Logistical Concerns

• There probably would *not* be huge numbers of women who qualify for the Special Forces, so it would not cost very much to provide separate housing and bathrooms, would it? Isn't this a small price to pay when it comes to equal rights?

#### Precedent

- Does the VMI case support Lt. Connolly's claim? Why or why not?
- Despite what the majority ruled in the *Goldberg* case, doesn't the Supreme Court have to overrule the military if the Constitution is being violated?
- Haven't police and fire departments included women in recent decades, with no harm done? Explain whether or not the issues in these cases are similar to those the *Connolly* case.

#### Long-Term Effects

- In what way will this case affect other women's rights? Aren't maternity leave, Title IX, and affirmative action different?
- Will this case *make it more likely* that women will be drafted? Explain.
- Why shouldn't there be total equality between men and women?

## For students who recommend that the firm *should* take the case:

#### 5th and 14th Amendment Issues

- Why do you think Amy Connolly is being denied her right to equal protection under the 5th and 14th Amendments?
- It can be argued that Lt. Connolly is, in fact, being discriminated against but that the discrimination is outweighed by some other interest. What interests did the Army suggest are being served by their male-only policy—and why do these arguments fall short, in your opinion?
- Amy Connolly is an exceptional woman, and not very many others would be able to qualify for the Special Forces. Why should the military change its policy for so few?

#### Morale, Readiness, and Effectiveness Concerns

- After World War II, the military finally integrated African Americans into the Army. But this case is about gender, not race—isn't that different? Why or why not?
- Shouldn't we trust the military's judgment about how to make sure the Special Forces units are as effective as they can be? Explain.
- You could argue that, ideally, men and women should be able to work together effectively in a Special Forces unit, but won't there always be problems that are serious enough to worry about? Explain.
- Isn't the organization Today's Hope for an Equal Nation being blind to the fact that men and women are not equal in some very important ways?

#### Precedent

- The VMI case was about education. I can see how education should not be denied to women, but don't the mitigating issues of national security, and life and death go way beyond the ruling in VMI?
- Didn't the Supreme Court, in the *Goldberg* case, say that it does *not* want to overrule the judgment of Congress and the military in cases like this? Why do you feel the current Supreme Court will see this case differently?
- While it's true police and fire departments include women in all areas of their operation, isn't combat against an enemy different? Explain whether or not you feel the issues in these cases are similar to the *Connolly* case.

Potential Questions for "Senior Partner" Panel Members

#### **Public Opinion Concerns**

• Do you think the country is really ready to see women in combat roles? Shouldn't we wait until the majority of people are in favor of this?

#### Long-Term Effects

- Why won't this case affect other women's rights, such as maternity leave, Title IX, and affirmative action?
- Isn't this going to open the door for women to be drafted? Why or why not? Is that *ok* with you?
- Are you saying that there should be total equality—that women should never be treated differently than men? Aren't there some circumstances when women should be treated differently? Explain.

## Glossary

**Amicus curiae:** From the Latin, "friend of the court." A person or organization with strong interest in or views on the subject matter of an action but not a party to the action. This individual or group may petition the court for permission to file a brief, ostensibly on behalf of a party but actually to suggest a rationale consistent with the petitioner's own views. Such *amicus curiae* briefs are commonly filed in appeals concerning matters of broad public interest.

**Appellant:** The party who takes an appeal from one court or jurisdiction to another.

**Appellee:** The party in a case against whom an appeal is taken—that is, the party who would be averse to setting aside or reversing the judgment. Sometimes also called the "respondent." It should be noted that a party's status as appellant or appellee does not necessarily bear any relation to his or her status as plaintiff or defendant in the lower court.

**Brief:** A written statement prepared by the counsel arguing a case in court. It contains a summary of the facts of the case, pertinent laws, and an argument of how the law applies to the facts supporting counsel's position. A *legal brief* is a document containing a brief statement of facts of the case, issues, and arguments. It is used most commonly on appeal but also at the trial level when requested by the trial judge. An *appellate brief* is a written argument by counsel that is required to be filed with the appellate court on why the trial court acted correctly (appellee's brief) or incorrectly (appellant's brief). A *trial brief* is a document prepared for and used by the attorney at trial that contains, among other things, issues to be tried, a synopsis of evidence and witnesses to be presented, and the case and statutory authority for the position of counsel at trial.

**Case profile:** A summary of the facts and legal issues of a case, typically for internal use by a law firm or team of lawyers.

**Commission** (in reference to military): An official document issued by a government that confers on the recipient the rank of commissioned officer in the armed forces. Also; the rank and powers so conferred.

**Defendant:** The person defending or denying the party against whom relief or recovery is sought in an action or suit against the accused in a criminal case.

**Due Process Clause:** The part of the 5th and 14th Amendments that prohibits the government from depriving people of life, liberty, or property without a fair and adequate legal process. Procedural due process means the government must follow established rules and procedures. Substantive due process—which the Supreme Court recognized in the late 19th century means the laws themselves must be fair.

**Equal Protection Clause:** The part of the 14th Amendment requiring the states to apply laws equally to all persons or classes of persons. This means the government cannot make unreasonable distinctions between different groups of people. The Supreme Court has held that the 5th Amendment's Due Process Clause requires the federal government also to guarantee the right to equal protection.

**Et al.:** An abbreviation of the Latin *et alii*, "and others" (pronounced "ett all" and sometimes written in the plural as *et als*.). It is often affixed to the name of the person first mentioned when there are several plaintiffs in a case.

**Judicial Review:** The power of the courts to decide whether the executive and legislative branches of government are properly following the Constitution. The courts interpret the meaning of the Constitution and have the power to disallow or require changes in laws and procedures.

**Jurisdiction:** A comprehensive term embracing every kind of judicial action. It is the power of the court to decide a matter in controversy, and it presupposes the existence of a duly constituted court with control over the subject matter and parties. Jurisdiction defines the power of the courts to inquire into facts, apply the law, make decisions, and declare judgment.

**Litigant:** A party to a lawsuit (i.e., plaintiff or defendant), usually referring to active parties, not nominal ones.

**Oral argument:** The presentation of reasons for affirmance, reversal, modification, etc. by the appellee and appellant before an appellate court. A statement before the court in support of or objection to a motion or other legal relief sought.

**Party** (to a lawsuit): A person concerned or taking part in any affair, matter, transaction, or proceeding. A party to an action is a person whose name is designated on record as plaintiff or defendant. The term, in general, means one having the right to control proceedings, make defense, adduce and cross-examine witnesses, and appeal from judgment.

**Plaintiff:** A person who brings an action; the party who complains or sues in a civil action and is so named on the record. A person who seeks remedial relief for an injury to rights it designates in a complaint. The prosecution in a criminal case.

**Precedent:** A previously judged case or decision of a court, considered as furnishing an example or authority for an identical or similar case arising afterwards or a similar question of law. Courts attempt to decide cases on the basis of principles established in prior cases. Prior cases that are close in facts or legal principles to the case under consideration are called precedents. Also, a rule of law established for the first time by a court for a particular type of case and thereafter referred to in deciding similar cases.

**Stare decisis:** From the Latin, "stand by a decision" (pronounced "star-ay de-see-sus"). To abide by, or adhere to, previously decided cases. The policy of courts to stand by precedent and not disturb settled points of law.

**Writ of certiorari:** In Latin, *writ* means "order," and *certiorari* (pronounced "sir-shur-airy") means "to be made certain." A *writ of certiorari* is an order by the appellate court that is used when it has the ability to decide whether or not to hear an appeal from a lower court. If the *writ* is denied, the court refuses to hear the appeal and, in effect, the judgment stands unchanged. If the *writ* is granted, it has the effect of ordering the lower court to certify the record and send it to the higher court to hear the appeal.



## Amicus Curiae Compare and Contrast Chart

	U.S. Veterans Association	Today's Hope for an Equal Nation
Impact on morale, effectiveness, and readiness of Special Forces units if women are admitted	All of these things will be compromised because the male soldiers will feel compelled to protect the women, making the women soldiers less able to perform assigned tasks, thereby creating a more dangerous situation for all soldiers. Additionally, the sexual tensions that will inevitably arise will further deteriorate the team spirit and readiness of the unit.	If there is any impact at all, it will be, at most, temporary. The fact that some male soldiers may be distracted by the presence of women reflects only on the lack of focus of those particular soldiers and not on the ability of the whole unit. Lt. Connolly should not be denied her commission because a fellow soldier's mind may wander to inappropriate places. The rigorous training involved in becoming a Green Beret guarantees that Lt. Connolly will be an effective soldier who will not need special protections or considerations.
Hardships suffered if women are admitted into Special Forces	The Army will have to establish separate living quarters in even the most limited of spaces due to heightened privacy concerns. There will also be the overall diminished ability of the Special Forces to perform duties, as discussed above.	None
Professional hardships suffered if women are excluded from serving in Special Forces	None	Lt. Connolly's career would be greatly harmed. Service in the Special Forces provides a soldier with unparalleled experience and elite status for which there is no substitute. Service as a Green Beret often paves the way to higher ranks and public offices. The level of combat seen in Special Forces assignments is a significant advantage in moving up the ranks of command.

	U.S. Veterans Association	Today's Hope for an Equal Nation
Potential violation of civil rights if women are excluded from serving in Special Forces	The admission of women into Special Forces will create a personal rights violations on both men and women's privacy.	Women are guaranteed the right to equal protection under the 5th and 14th Amendments. The current ban preventing women from serving in Special Forces denies them the same equality as men in serving their country as well as advancing their military career. Advancement in the military is often determined by service in ground combat and Special Forces. If those avenues are closed to women, their opportunities for advancement are severely limited and this is an unfair denial of a valuable property right.
Relaxing current standards for Special Forces eligibility	This is inevitable. If Lt. Connolly is admitted, other women will also want to join the Special Forces. When those women cannot meet the rigorous standards, they will sue, saying that the standards unduly discriminate against women. The standards may then be relaxed, and as a result, the elite nature and effectiveness of the Special Forces will be negated.	This is not an issue in the present case, nor is this an argument that needs to be considered at this time. Lt. Connolly meets all current standards, and there are likely other women who also meet these standards. No one is looking to change the requirements, and this notion of relaxed standards should not be considered.
Unique risks faced by female members of Special Forces	The unique risk of sexual assaults against women poses a danger to female soldiers that is not acceptable. The risks are even greater because some enemy forces have cultural norms against the idea of women serving in combat. American society is not ready for such consequences. Additionally, male soldiers will compromise their own safety, and that of the entire unit, to prevent harm from coming to their female colleagues.	All soldiers face the risk of capture, torture, and even sexual assault. As long as a female soldier is willing to accept these risks as a part of the assignment, she should not be prevented from pursuing her goals. If some enemy forces are hostile to the idea of women in combat, this is a minor factor and it is far outweighed by the enemy's general hostility toward all American soldiers.

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Component and Its Recommended Value	Exceeds Standards (score 4–5)	<b>Meets Standards</b> (score 3)	Does Not Meet Standards (score 1–2)
erstanding of the Issues to	Explains clearly and accurately the problem faced by the law firm	Explains clearly and accurately the problem faced by the law firm	<i>Does not</i> explain clearly and accurately the problem faced by the law firm
be Considered (20%)	<ul> <li>Shows <i>careful</i> consideration of the proper balance among the issues of:</li> <li>the law firm's own interests</li> <li>the strength of the case</li> <li>constitutional rights of women and national security concerns</li> </ul>	<ul> <li>Shows some consideration of the proper balance among the issues of:</li> <li>the law firm's own interests</li> <li>the strength of the case</li> <li>constitutional rights of women and national security concerns</li> </ul>	<ul> <li>Shows <i>little or no</i> consideration of the proper balance among the issues of:</li> <li>the law firm's own interests</li> <li>the strength of the case</li> <li>constitutional rights of women and national security concerns</li> </ul>
	Solution to the problem is <i>completely</i> <i>consistent</i> with the scenario as presented; has not altered the parameters of the problem and/or "made up" facts to avoid grappling with key aspects of the content	Solution to the problem is <i>generally</i> <i>consistent</i> with the scenario as presented; has <i>not</i> altered the parameters of the problem and/or "made up" facts to avoid grappling with key aspects of the content	Solution to the problem is <i>not consistent</i> with the scenario as presented; <i>may have</i> altered the parameters of the problem and/or "made up" facts to avoid grappling with key aspects of the content
II. Overall Quality of Argument (20%)	States and defends recommendation clearly and persuasively, using logic, reason, and sound legal thinking instead of political and/or emotional arguments	States and defends recommendation clearly, using logic, reason, and sound legal thinking instead of political and/or emotional arguments	Does not state and defend recommendation clearly and/or persuasively, using logic, reason, and sound legal thinking; <i>relies too much</i> on political and/or emotional arguments
	Discussion of issues, terms and concepts is <i>sophisticated</i> ; shows <i>originality</i> and/or <i>thoughtfulness</i> ; shows <i>independent thinking</i> about what has been gathered from the teacher, textbook, or other resources	Discussion of issues, terms and concepts is <i>basically sound</i> , but <i>may lack</i> <i>originality and/or thoughtfulness</i> ; may have some of the flavor of "repeating back" what has been gathered from the teacher, textbook, or other resources	Discussion of issues, terms and concepts is <i>vague</i> and/or <i>simplistic</i> ; has the flavor of "repeating back" what has been gathered from the teacher, textbook, or other resources

Component and Its Recommended Value	<b>Exceeds Standards</b> (score 4–5)	<b>Meets Standards</b> (score 3)	<b>Does Not Meet Standards</b> (score 1–2)
<ul> <li>III. Knowledge and Understanding of Constitutional Issues, Precedent, and the U.S. Judicial System (50%)</li> <li>role of 5th and 14th Amendments; reasonable vs. unreasonable discrimination</li> <li>balance between women's rights and state interests</li> <li>risks associated with women in Special Forces</li> <li>precedent; application of VMI and Goldberg cases</li> <li>possible effects of this case on future cases</li> <li>levels of the federal court system; the appeals process; why the Supreme Court agrees to hear cases</li> </ul>	Prepared speech and answers to questions include <i>all</i> relevant information about constitutional issues, precedent, and the U.S. judicial system All information is <i>accurate</i> and <i>complete</i>	Prepared speech and answers to questions include <i>most</i> relevant information about constitutional issues, precedent, and the U.S. judicial system All information is accurate and complete, or <i>nearly so</i> ; inaccuracies are <i>not significant</i>	Prepared speech and answers to questions <i>do not adequately</i> include relevant information about constitutional issues, precedent, and the U.S. judicial system <i>Significant</i> information is <i>inaccurate</i> and/or <i>substantially incomplete</i>
IV. Quality of Oral Presentation and Optional Written Memo (10%)	Oral presentation is <i>well organized</i> within five-minute time frame so <i>all</i> relevant issues and information are given appropriate attention	Oral presentation is <i>adequately</i> <i>organized</i> within five-minute time frame so most relevant issues and information are given appropriate attention; <i>may be too brief or too rushed</i> <i>in some parts</i>	Oral presentation is <i>not well organized</i> within five-minute time frame; several relevant issues and information are <i>not</i> given appropriate attention; <i>too brief</i> <i>and/or rushed in key parts</i>
	Oral presentation uses <i>highly</i> effective techniques of oral communication; voice is <i>clearly understandable</i> and speaking style is appropriate; <i>substantial</i> eye contact is made; notes are used <i>minimally</i>	Oral presentation uses <i>adequately</i> effective techniques of oral communication; voice is <i>audible</i> and speaking style is appropriate; <i>some</i> eye contact is made; notes are <i>not</i> simply read aloud	Oral presentation <i>does not</i> use effective techniques of oral communication; voice may <i>not be clearly understandable</i> and speaking style may be <i>inappropriate</i> ; eye contact is <i>not made</i> <i>much of the time</i> ; notes, if used, <i>may be</i> <i>simply read aloud</i>
	Oral presentation is conducted with a "professional" tone, posture, and appearance	Oral presentation is conducted with a "professional" tone, posture, and appearance	Oral presentation is <i>not</i> conducted with a "professional" tone, posture, and appearance
	If submitted, written recommendation is <i>free of</i> significant errors in mechanics and grammar; ideas are <i>well organized</i> , <i>clearly understandable</i> ; style is <i>appropriate</i> to the audience (i.e., senior partners in a law firm)	If submitted, written recommendation has <i>few</i> significant errors in mechanics and grammar; ideas are <i>for the most</i> <i>part</i> organized and understandable; style is <i>generally</i> appropriate to the audience	If submitted, written recommendation has <i>several</i> significant errors in mechanics and grammar; ideas are <i>not</i> <i>clearly</i> organized and understandable; style is <i>not</i> appropriate to the audience

#### **Teacher Materials**

Assessment Tools

## **Test for Fighting Chance**

**Answer Key** 

- 1. Which of the following is the *best* definition of the 5th Amendment's due process clause?
  - (A) Fair procedures and fair laws
  - B Constitutional guarantee to legal counsel
  - C All persons are entitled to being treated equally
  - D Everyone has the right to a fair trial
- 2. The 14th Amendment was written primarily to
  - A provide more authority to the Supreme Court.
  - (B) prevent state governments from denying basic rights to newly freed slaves.
  - C reinforce the equal protection clause of the 5th Amendment.
  - D prevent the federal government from denying anyone of due process.
- 3. The 14th Amendment was passed during what period of American history?
  - A The Constitution Convention
  - B The Civil War
  - C The Revolutionary War
  - (D) The Reconstruction period
- 4. What is the purpose of the 5th Amendment's due process clause?
  - A Prevents the states from reinstituting slavery.
  - B Provides the definition of a U.S. citizen.
  - C Prohibits the federal government from unreasonable discrimination.
  - D Protects citizens from unreasonable search and seizure.
- 5. Article III of the U.S. Constitution gives Congress the power to
  - (A) create inferior courts.
  - B make all laws necessary and proper to carrying out the duties of government.
  - C establish the Supreme Court.
  - D overrule Supreme Court decisions.
- 6. Why is the power of judicial review so important to the checks and balance system?
  - A It allows Congress to evaluate the performance of judges.
  - (B) It allows the courts to rule acts of Congress unconstitutional.
  - C It allows the Supreme Court to overrule its earlier decisions.
  - D It allows Congress to select federal judges.
- 7. In which of the following cases did the Supreme Court break precedent and overrule a previous decision?
  - A Marbury v. Madison
  - B Plessy v. Ferguson
  - C United States v. Virginia
  - (D) Brown v. Board of Education

### **Teacher Materials**

**Assessment Tools** 

- 8. Which of the following are examples of reasonable discrimination?
  - A Denying a driver's license to people less than 5 feet tall.
  - B Rejecting a terrorist organization's request for a parade permit.
  - C Setting a minimum age for marriage.
  - D Excluding foreigners from coming into the country.
- 9. Which of the following cases would the Supreme Court most likely *not* grant a *writ of certiorari*?
  - A Two lower courts decided the case differently.
  - (B) The issue involved determining innocence or guilt.
  - C The issue involves new development in technology or culture.
  - D The issue reflects a change in society's values.
- 10. Judicial restraint and judicial activism are hotly contested positions on how courts should use the power of judicial review. By definition, which of the following might be considered an act of judicial restraint?
  - (A) Declaring a municipal ban on handguns unconstitutional.
  - B A woman's right to an abortion is protected by the "right to privacy."
  - C Forcing busing to achieve integration.
  - D Prohibiting school-sponsored religious activities.
- 11. Which of the following is a definition of judicial activism?
  - A The courts should only interpret the laws, not make new laws.
  - B The courts should base their rulings on the original intent of the Constitution's framers.
  - C The courts have a role in solving social, economic, and political problems.
  - D The courts should strike down any laws that try to reform society.
- 12. What was Lt. Amy Connelly's main argument against the Army's policy of excluding women from Special Forces?
  - A The Army didn't grant her special considerations because she is a woman.
  - B The policy violated her right to due process and equal protection under the law.
  - C The policy considered her too young to join Special Forces.
  - D The Army had honored the prejudices of its male members against women.
- 13. What was the basis for the Army's denial of Lt. Connelly's entry into Special Forces?
  - A The male members of Special Forces would object to her admission.
  - B She did not meet the physical performance requirements.
  - C Women face unique risks in combat that are different from men.
  - D Women are excluded from direct combat roles.

- 14. In the 1996 case of *United States* v. *Virginia,* what did the Supreme Court say about the Virginia Women's Institute for Leadership as a viable alternative to Virginia Military Institute?
  - (A) The Women's Institute did not provide equally rigorous military training for women.
  - B Obtaining a degree from Women's Institute was comparable to a degree from the Virginia Military Institute.
  - C The Women's Institute lacked the historical benefit and prestige of the Virginia Military Institute.
  - D Women were equally qualified to attend either college.
- 15. The major difference between the *United States* v. *Virginia* (VMI) and U.S. Army v. Connelly was
  - A The *Connelly* case requested special facilities to be provided to protect women's privacy. None were requested in the *VMI* case.
  - B Lt. Connelly was drafted into the Army but the female cadets in the *VMI* case had volunteered.
  - C The *VMI* case involved education and the *Connelly* case involved combat.
  - D The state of Virginia proved that the discrimination at VMI served important governmental objectives. The Connelly case was not based on discrimination.
- 16. What was the Supreme Court's ruling in Rostker v. Goldberg?
  - A Because the Vietnam War was over and the military draft was discontinued, the plaintiff had no case for gender-based discrimination.
  - B Because women were excluded from combat, it was not a violation of due process to exclude them from the draft.
  - C Congress should permit men as well as women to register for the draft.
  - D Only Congress, and not the president, has the power to raise and regulate armies.
- 17. According to the United States Army, how did the Supreme Court's ruling in the *Goldberg* case justify excluding Lt. Connelly from Special Forces?
  - A Congress's decision to exclude women from the draft violated the due process of men.
  - B Excluding women from the draft had nothing to do with whether they served in combat, as other non-combat roles could be given to them.
  - C Military policy could supersede an act of Congress.
  - (D) Excluding women from combat barred them from the draft and it should also bar them from being in Special Forces.

#### **Teacher Materials**

Assessment Tools

- 18. What was the central argument from the Veterans Association in their *amicus curie* brief to the Supreme Court?
  - A Women face the same risks as male soldiers if captured.
  - B The due process clause of the 5th and 14th Amendments doesn't extend into the military.
  - C Allowing women into Special Forces would compromise the effectiveness of the unit.
  - D Women have other avenues for advancement in the military and don't need to be in combat.
- 19. The central argument of Today's Hope for an Equal Nation (THEN) contended that Lt. Connelly's 5th and 14th Amendment rights were violated. According to THEN, what hardships do women face if they are excluded from Special Forces?
  - (A) It limits their ability to advance through the military ranks.
  - B They could be interrogated more harshly if captured.
  - C It would limit their ability to serve in other roles in the military.
  - D They have been accepted by their male colleagues in all other areas of the military.
- 20. What was the central concern of the American Association of Women in their memo to Lt. Connelly's law firm?
  - A Ebbets, Chavez and Kofax were only considering the case for the financial gain.
  - B Women would lose many hard fought rights if women were allowed to serve in combat.
  - C The court would rule the due process clause of the 5th and 14th Amendment did not apply to the military.
  - D Fundamental differences between men and women could be negated by a Supreme Court ruling.

## Memo from the Senior Partner

## Ebbets Chavez & Kofax

ATTORNEYS AT LAW, LLP

To: First-Year Associates FROM: Brandi Bickering, Senior Partner RE: New Case

Congratulations on joining our firm. I know you have barely had time to get settled here, but we need you to get to work right away on an important task. As you may know, there is a significant case involving the U.S. military that has been in the news recently—*United States Army* v. *Connolly et al.* Lieutenant Amy Connolly claims that her 5th and 14th Amendment rights have been violated because the Army excludes women from the Special Forces. The United States Supreme Court is now deciding if it will hear the case and schedule oral arguments for the upcoming term. I will send a case profile for your reference.

Lt. Connolly is seeking new representation, as her previous attorneys had to abandon the case due to financial problems. Our law firm must now decide whether or not to take the case. Before we dedicate ourselves to such exhaustive preparations and financial commitments, we must determine whether Lt. Connolly has a fighting chance to prevail in her claim against the military. Although our firm can certainly afford to take the case, financially speaking, win or lose, we do not want to take a case without a strong chance of success. That would waste time and resources that could be used to assist another client. However, if we don't take the case and Lt. Connolly wins, we will have missed an opportunity for national publicity, financial gain, and most importantly the chance to influence our nation's definitions of constitutional liberty and equity.

Your task is to recommend to the senior partners whether or not to take Lt. Connolly's case. In making this recommendation, you should consider the strengths of Lt. Connolly's case in terms of the 5th and 14th Amendments, precedent, and the concerns of our society.

This task, if done well, can start your career off with a bang. I look forward to hearing your recommendation.

## **Case Profile**

## EBBETS CHAVEZ & KOFAX

ATTORNEYS AT LAW, LLF

## FACTS:

Lt. Amy Connolly is 22 years old and an honors graduate of West Point Military Academy. She is a brilliant student with great academic, leadership, and military promise. Lt. Connolly is also an exceptional athlete and was in the top 10% of her class in the combat simulation performed as part of West Point's graduation requirements. She is seeking a commission with the Army Special Forces, also known as the Green Berets. Lt. Connolly meets all requirements for commission with the Green Berets, including physical performance requirements. However, because women are expressly barred from serving in the Army Special Forces, Lt. Connolly is barred from joining the Green Berets.

### **ISSUE:**

Lt. Connolly alleges that the Green Beret's policy of excluding women is a violation of the 5th Amendment's Due Process Clause and the 14th Amendment's Equal Protection Clause.

## **CASE HISTORY:**

The case arose when Lt. Connolly applied for training with the Army's Green Berets. When her application was rejected based on her gender, Lt. Connolly brought suit in the U.S. District Court for the District of Columbia. The trial court found that Lt. Connolly's 5th and 14th Amendment rights were not violated, saying the Army demonstrated "exceedingly persuasive justification for the important governmental objectives" served by the Green Berets. The trial court went on to say that the Army's exclusion of women was "substantially related to the achievement of those genuinely important objectives."

Lt. Connolly appealed the district court's decision to the U.S. Court of Appeals for the District of Columbia. The appeals court found that the exclusion of all women, regardless of ability, was in violation of the 5th and 14th Amendments because the military could not show that the "important objectives" of the Green Berets were "substantially related" to their exclusion of women. The Army appealed this decision to the United States Supreme Court. The Supreme Court will soon announce if it has granted a *writ of certiorari*.

## Second Memo

## Ebbets Chavez & Kofax

ATTORNEYS AT LAW, LLP

To: First-Year Associates FROM: Brandi Bickering, Senior Partner RE: Regulations and Policies, *United States Army* v. *Connolly et al.* 

After reviewing the documents that were submitted to the lower courts in the *Connolly* case, I have attached a few excerpts that may help you in your task. First, I have located and attached the specific Army regulations that are at the heart of this case. Second, you will find excerpts from *amicus curiae* briefs submitted by interested parties, which will provide you with some of the arguments on either side of this issue. A chart for keeping track of the two sides is also attached.

When reviewing the *amicus curiae* briefs, please consider the following:

- 1. What does each organization have to say about the impact of admitting women on the readiness, effectiveness, and morale of the Special Forces units?
- 2. What hardships does the Veterans Association say will be required if women are admitted into the Special Forces? Are these reasonable concerns?
- 3. According to Today's Hope for an Equal Nation, what hardships do women face if they are excluded from the Special Forces? Are these reasonable concerns?
- 4. What does each organization say about relaxing the current rigorous standards imposed by the Special Forces?
- 5. What does each organization say about the unique risks faced by female soldiers if captured?

Please review these documents carefully and consider the information when making your recommendation.

Attachments

## Summary of Army Regulations

## Summary of United States Army Regulation 611-1

1. The exclusion of Lt. Connolly is based on Army Special Forces requirements. According to Army Regulation 611-1, paragraphs 4–7 (www.usarec.army.mil/hq/sfas): "It is current Army policy that female officers may be designated in any branch or field assignment except Infantry, Armor, and Special Forces."

Special Forces requirements include the following:

- Must be an active-duty male soldier
- Must be U.S. citizen
- Must be able to swim 50 meters wearing boots and battle dress uniform\* prior to beginning the Special Forces Qualification Course
- Must be a high school graduate or have a general equivalency diploma (GED)
- 2. The more general regulations regarding women in combat are summarized below. This policy appears to be the guiding force behind Army Regulation 611-1.

In 1994 the Army changed its policy on the assignment of women personnel. Up to that time, the so-called "Risk Rule" applied, which automatically precluded women from entering certain positions that were perceived as dangerous. The changes were as follows:

- The Risk Rule was rescinded, but women were still precluded from engaging in "direct ground combat."
- The new direct combat rule states that "service members are eligible to be assigned to all positions for which they are qualified, except that women shall be excluded from assignment to units below the brigade level whose primary mission is to engage in direct combat on the ground."
- Direct ground combat is defined as "...combat engaging on the ground with individual or crew served weapons, while being exposed to hostile fire and to a high probability of direct physical contact with the hostile force's personnel....Direct ground combat takes place well forward on the battlefield while locating and closing with the enemy to defeat them by fire, maneuver, or shock effect."
- \* Battle dress uniforms are Army-issued uniforms and gear, including helmet, shirt, coat, pants, duffel bag, and side-arm. Gear may vary according to assignment (e.g., desert, snow, or jungle).

No. 00-929699

# SUPREME COURT OF THE UNITED STATES

## UNITED STATES ARMY, Defendants-Appellants,

v.

## LIEUTENANT AMY CONNOLLY et al., Plaintiffs-Appellees

On Appeal from the United States Court of Appeals for the District of Columbia BRIEF FOR THE UNITED STATES ARMY, AS *AMICUS CURIAE* 

ERIC KARROS

National Commander, United States Veterans Association

### INTRODUCTION AND SUMMARY

Pursuant to Rule 29(a), Fed. R. App. P., the United States Veterans Association hereby submits this *amicus curiae* brief.

[TEXT OMITTED—only the relevant sections of the brief are included for your reference]

The continued exclusion of women from the Special Forces is essential to the function and purpose of this elite combat force so vital to our national security. The members of the military's Special Forces serve a unique purpose by voluntarily placing themselves into unthinkably dangerous situations that require the utmost physical and psychological endurance. Allowing women into these elite units will compromise their effectiveness (the ability of the cohesive unit to complete a given mission), readiness (the availability of each individual member of a unit for immediate service), and morale (the overall mental cohesiveness and spirit of the unit exhibited in the unit's confidence and willingness to perform an assigned mission).

The admission of women into the Special Forces will create enormous hardship on these units including privacy concerns, inevitable distraction, and a relaxation of rigorous standards. The units will have to arrange for separate housing for its female soldiers to allow for greater privacy, at great cost to the military. The mere presence of women in such a male-intensive unit will serve as a distraction to the men. Few women will meet the rigorous physical requirements for admission to the Special Forces. If women are admitted, equality in numbers within these units will be expected and the standards will be relaxed to accommodate the less-able female soldiers. All changes will have the same result: a serious weakening of the unit's ability to effectively engage in intense combative situations. To ignore the physical, sociological, and psychological differences between men and women will only set up for disaster those women admitted into these units. According to a number of military studies, women are not able to perform at the same level as men in strenuous physical activities, and they respond differently to intense and stressful situations. These facts, combined with a man's tendency to protect a woman in a dangerous situation to the detriment of the unit or himself, will result in a unit that is no longer able to fulfill its purpose. Instead, it will become a liability to itself and to the greater good it is serving.

Finally, the special risks for women in the Special Forces cannot be ignored. Frequently, these units operate well inside enemy lines. Due to the secretive nature of their missions, Special Forces soldiers must complete their tasks without the possibility of back-up or retrieval if they fail. Women in these roles, if captured, could be subject to unique forms of torture, rape, and molestation. These concerns are only heightened when missions take place inside the borders of nations whose soldiers and citizens might be especially hostile toward the idea of women serving in the military.

No. 00-929699

# SUPREME COURT OF THE UNITED STATES

### UNITED STATES ARMY, Defendants-Appellants,

v.

## LIEUTENANT AMY CONNOLLY et al., Plaintiffs-Appellees

On Appeal from the United States Court of Appeals for the District of Columbia BRIEF FOR THE UNITED STATES ARMY, AS *AMICUS CURIAE* 

> KRISTA HILMAN Today's Hope for an Equal Nation

### INTRODUCTION AND SUMMARY

Pursuant to Rule 29(a), Fed. R. App. P., Today's Hope for an Equal Nation (THEN) hereby submits this *amicus curiae* brief.

[TEXT OMITTED—only the relevant sections of the brief are included for your reference]

THEN strongly urges this Court to find that the exclusion of women from the Special Forces is a violation of the 5th and 14th Amendments. The defenders of Army policy argue a diminished readiness, depleted morale, crumbling standards, and patriarchal notion of protecting a woman's virtue. However, this issue really comes down to whether or not a *qualified* woman has the right to volunteer for the Special Forces. The 5th and 14th Amendments to the United States Constitution say she does.

The 5th and 14th Amendments guarantee that all persons shall receive equal protection of life, liberty, and property from undue government interference. In this case, the federal government's military policies dictate not only in what capacity Lt. Amy Connolly can serve her country, but they subsequently limit her ability to advance through the military ranks. It is well established that the most senior leaders in the military are chosen, in part, due to their service and performance in direct ground combat or Special Forces. If these avenues are closed to women, their opportunities for advancement are severely limited. Since our nation's leaders in business, government, and other fields are frequently drawn from the highest ranks of the military, this is an unfair denial of a valuable property right.

Numerous studies have been conducted on the likely result of integrating women into combat situations. Many of these studies have reached the conclusion that there will be only a small, and most likely temporary, effect on military readiness, morale, and cohesiveness. This minimal effect, if any at all, has already been demonstrated as women have joined other male-dominated professions, including police and fire departments. For several years now, women have also served in a variety of new roles in the military. They have been accepted by their male colleagues and have contributed to our military's effectiveness. As warfare becomes more reliant on technology and strategically targeted strikes, the risks once considered for barring women from service become no more than the notions of a time long-since passed. For the court to sustain the military's exclusion of women, it must find genuine differences between the sexes that are best served by this policy. Here the differences, while real, have been overstated to reflect overbroad generalizations and outdated ideas of women, which cannot be the basis for such a policy.

Women engaged in direct combat who are captured may face the risks of rape and other sexual assaults. While the risks *may* be greater for women, they are no more dangerous or violent than many other forms of torture *any* soldier may experience. Although these risks are real, they are known and accepted by any female soldier who places herself in these situations. A recognized risk cannot be a reason to exclude qualified and consenting women who deserve a chance to serve in their country's most elite combat force.

## **Chart Comparing** *Amicus Curiae* Briefs

Use this chart to compare and contrast the views of the two organizations submitting amicus briefs, as outlined in my memo. Be aware that "None" may be an acceptable response. — B. Bickering

	U.S. Veterans Association	Today's Hope for an Equal Nation
Impact on morale, effectiveness, and readiness of Special Forces units if women are admitted		
Hardships suffered if women are admitted into Special Forces		
Professional hardships suffered if women are excluded from serving in Special Forces		

	U.S. Veterans Association	Today's Hope for an Equal Nation
Potential violation of civil rights if women are excluded from serving in Special Forces		
Relaxing current standards for Special Forces eligibility		
Unique risks faced by female members of Special Forces		

## **Third Memo**

## Ebbets Chavez & Kofax

ATTORNEYS AT LAW, LLP

To: First-Year Associates FROM: Brandi Bickering, Senior Partner RE: Precedent for *United States Army* v. *Connolly et al.* 

You will, of course, need to consider precedent in determining whether or not we should accept this case. Attached is relevant case law for the *Connolly* case. As I have noted earlier, the 1996 decision in *United States* v. *Virginia* (*VMI*) may help us with our current case. An older case, *Rostker* v. *Goldberg* (1981) (*Goldberg*), may also be of use. The Supreme Court is going to want to know whether or not *VMI* and/or *Goldberg* apply to Lt. Connolly's situation and why.

In examining *VMI*, keep in mind these questions:

- 1. *VMI* addressed only education and not the Special Forces. Is this distinction important? Why or why not?
- 2. What did the Supreme Court say about the lack of a truly parallel program, despite the existence of Virginia Women's Institute for Leadership (VWIL)? Is this important to our case? Why or why not?
- 3. What did the Supreme Court say about whether the exclusion of women from the Virginia Military Institute was based on real gender differences or archaic notions about women? Is this discussion helpful to our case? Why or why not?
- 4. Is there anything else in the majority opinion or the dissenting opinion that we should consider or could use when preparing our case?

In examining *Goldberg*, keep in mind these questions:

- 1. The court found that the military's policy of excluding women from combat was reason enough to justify the exclusion of women from the draft. Did they consider whether or not this exclusion was based on inherent differences between men and women?
- 2. If women are allowed into the Special Forces, will this open the draft to women as well? Why or why not? What would be the consequences of not drafting women?
- 3. Is there anything else in the majority opinion or the dissenting opinions that we should consider or could use when preparing our case?

The VMI Case

## SHORT SUMMARY OF THE VMI CASE

### **CASE HISTORY**

Founded in 1839, the Virginia Military Institute (VMI) was a male-only college dedicated to preparing "citizen soldiers" for leadership in civilian life and in the military. In 1990, a female high school student applied for but was denied admission, as many others had been in recent years. She contacted the U.S. Attorney General's office, which filed a lawsuit against the state of Virginia and VMI, claiming the woman's 14th Amendment right to equal protection of the laws was being violated.

The district court hearing the case ruled in VMI's favor. The case was appealed to the Fourth Circuit Court of Appeals, which reversed the lower court and ordered Virginia to do something to fix the constitutional violation. In response, Virginia proposed a parallel program for women: the Virginia Women's Institute for Leadership (VWIL), located at another college. This satisfied the district court and the appeals court, which noted that although the VWIL degree lacked the historical benefit and prestige of a VMI degree, the educational opportunities at the two schools were sufficiently comparable.

In 1996 the case was appealed to the U.S. Supreme Court, which overturned the ruling of the appeals court and required VMI to admit females.

### **MAJORITY OPINION OF THE SUPREME COURT**

The Supreme Court based its decision on the following reasoning:

1. The government must have an "exceedingly persuasive justification"—i.e., a very strong argument—in order to discriminate by gender. Federal and state governments are denying the right to equal protection, the Court said, "when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in, and contribute to society based on their individual talents and capacities." To justify a discriminatory policy, the government must prove that the policy is necessary for "important governmental objectives. The justification … must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females. The heightened review standard … means that categorization by sex may not be used to create or perpetuate the legal, social, and economic inferiority of women."

#### The VMI Case

Virginia claimed that VMI's rigorous training program would be harmed if women were admitted, but the Court disagreed. The Court admitted that some modifications in housing and training programs would be needed for women. However, it did not accept Virginia's argument that VMI's training methods are "inherently unsuitable to women" because of "gender-based developmental differences" and "typically male or typically female tendencies." A government that controls the "gates to opportunity" may not "exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females.' The State's justification for excluding all women from "citizen-soldier" training for which some are qualified ... does not rank as "exceedingly persuasive."

2. In order to not violate the constitution, the government must provide an equal opportunity when it sets up a separate program for women. The Court said, "VWIL affords women no opportunity to experience the rigorous military training for which VMI is famed. Kept away from the pressures, hazards, and psychological bonding characteristic of VMI's adversative training, VWIL students will not know the feeling of tremendous accomplishment commonly experienced by VMI's successful cadets. Virginia maintains that methodological differences are justified by the important differences between men and women in learning and developmental needs, but generalizations about "the way women are," estimates of what is appropriate for most women, no longer justify denying opportunity to women whose talent and capacity place them outside the average description. VWIL does not qualify as VMI's equal. The VWIL program is a pale shadow of VMI in terms of the range of curricular choices and faculty stature, funding, prestige, alumni support and influence."

GINSBURG, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, KENNEDY, SOUTER, and BREYER, JJ., joined. REHNQUIST, C. J., filed an opinion concurring in the judgment. SCALIA, J., filed a dissenting opinion. THOMAS, J., took no part in the consideration or decision of the case. (*Editor's Note: Justice Thomas did not participate in this decision because his son was a student at VMI*.)

#### **DISSENTING OPINION OF JUSTICE SCALIA**

"Today the Court shuts down an institution that has served the people of the Commonwealth of Virginia with pride and distinction for over a century and a half. To achieve that desired result, it rejects (contrary to our established practice) the factual findings of two courts below, sweeps aside the precedents of this Court, and ignores the history of our people. It rejects the finding that there exist 'gender-based developmental differences' supporting Virginia's restriction of the 'adversative' method to only a men's institution, and the finding that the

The VMI Case

all-male composition of the Virginia Military Institute (VMI) is essential to that institution's character. As to precedent: it drastically revises our established standards for reviewing sexbased classifications. And as to history: it counts for nothing the long tradition, enduring down to the present, of men's military colleges supported by both states and the federal Government.

The question to be answered ... is whether the exclusion of women from VMI is 'substantially related to an important governmental objective.' It is beyond question that Virginia has an important state interest in providing effective college education for its citizens. That single-sex instruction is an approach substantially related to that interest should be evident enough from the long and continuing history in this country of men's and women's colleges. But beyond that, as the Court of Appeals here stated: 'That single-gender education at the college level is beneficial to both sexes is a fact established in this case. If Virginia were to include women in VMI, the school would eventually find it necessary to drop the adversative system altogether.''

Nos. 94-1941, 94-2107

# SUPREME COURT OF THE UNITED STATES

### UNITED STATES, PETITIONER,

v.

## VIRGINIA *et al.* VIRGINIA *et al.*, PETITIONERS

ARGUED JANUARY 17, 1996 Decided JUNE 26, 1996

Virginia Military Institute (VMI) is the sole single-sex school among Virginia's public institutions of higher learning. VMI's distinctive mission is to produce "citizen-soldiers," men prepared for leadership in civilian life and in military service. Using an "adversative method" of training not available elsewhere in Virginia, VMI endeavors to instill physical and mental discipline in its cadets and impart to them a strong moral code.

#### FROM THE COMPLETE OPINION:

VMI has notably succeeded in its mission to produce leaders; among its alumni are military generals, members of Congress, and business executives. The school's alumni overwhelmingly perceive that their VMI training helped them to realize their personal goals. VMI produces its "citizen-soldiers" through "an adversative, or doubting, model of education" which features "physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values." In 1990, prompted by a complaint filed with the Attorney General by a female high-school student seeking admission to VMI, the United States sued the Commonwealth of Virginia and VMI, alleging that VMI's exclusively male admission policy violated the Equal Protection Clause of the Fourteenth Amendment."

In the two years preceding the lawsuit, the District Court noted, VMI had received inquiries from 347 women, but had responded to none of them. "Some women, at least," the court said, "would want to attend the school if they had the opportunity." The court further recognized that, with recruitment, VMI could "achieve at least 10% female enrollment"—"a sufficient 'critical mass' to provide the female cadets with a positive educational experience."

The District Court ruled in VMI's favor. The Fourth Circuit reversed and ordered Virginia to remedy the constitutional violation. In response, Virginia proposed a parallel program for women: Virginia Women's Institute for Leadership (VWIL), located at Mary Baldwin College, a private liberal arts school for women. The District Court found that Virginia's proposal satisfied the Constitution's equal protection requirement, and the Fourth Circuit affirmed. Although the Court of Appeals acknowledged that the VWIL degree lacked the historical benefit and prestige of a VMI degree, the court nevertheless found the educational opportunities at the two schools sufficiently comparable.

#### THE SUPREME COURT, IN OVERRULING THE DISTRICT COURT AND COURT OF APPEALS, HELD:

- 1. Parties who seek to defend gender-based government action must demonstrate an "exceedingly persuasive justification" for that action. Neither federal nor state government acts compatibly with equal protection when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in, and contribute to society based on their individual talents and capacities. To meet the burden of justification, a state must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives." The justification ... must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females. The heightened review standard applicable to sex-based classifications does not make sex a proscribed classification, but it does mean that categorization by sex may not be used to create or perpetuate the legal, social, and economic inferiority of women.
- 2. Virginia's categorical exclusion of women from the educational opportunities VMI provides denies equal protection to women.
  - a. Virginia contends that single-sex education yields important educational benefits and that provision of an option for such education fosters diversity in educational approaches. A purpose genuinely to advance an array of educational options is not served by VMI's historic and constant plan to afford a unique educational benefit only to males. However well this plan serves Virginia's sons, it makes no provision whatever for her daughters.

- b. Virginia also argues that VMI's adversative method of training provides educational benefits that cannot be made available, unmodified, to women, and that alterations to accommodate women would necessarily be so drastic as to destroy VMI's program. It is uncontested that women's admission to VMI would require accommodations, primarily in arranging housing assignments and physical training programs for female cadets. It is also undisputed, however, that neither the goal of producing citizen soldiers, VMI's raison d'etre, nor VMI's implementing methodology is inherently unsuitable to women. The District Court made "findings" on "gender-based developmental differences" that restate the opinions of Virginia's expert witnesses about typically male or typically female "tendencies." Courts, however, must take "a hard look" at generalizations or tendencies of the kind Virginia pressed, for state actors controlling gates to opportunity have no warrant to exclude qualified individuals based on "fixed notions concerning the roles and abilities of males and females." The notion that admission of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school, is a judgment hardly proved, a prediction hardly different from other "selffulfilling prophecies" once routinely used to deny rights or opportunities. Women's successful entry into the federal military academies, and their participation in the Nation's military forces, indicate that Virginia's fears for VMI's future may not be solidly grounded. The State's justification for excluding all women from "citizen-soldier" training for which some are qualified, in any event, does not rank as "exceedingly persuasive."
- 3. The remedy proffered by Virginia—maintain VMI as a male-only college and create VWIL as a separate program for women—does not cure the constitutional violation.
  - a. A remedial decree must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in the position they would have occupied in the absence of discrimination. The constitutional violation in this case is the categorical exclusion of women, in disregard of their individual merit, from an extraordinary educational opportunity afforded men. Virginia chose to leave untouched VMI's exclusionary policy, and proposed for women only a separate program, different in kind from VMI and unequal in tangible and intangible facilities. VWIL affords women no opportunity to experience the rigorous military training for which VMI is famed. Kept away from the pressures, hazards, and psychological bonding characteristic of VMI's adversative training, VWIL students will not know the feeling of tremendous accomplishment commonly experienced by VMI's successful cadets. Virginia maintains that methodological differences are justified by the important differences between men and women in learning and developmental needs, but generalizations about "the way women are," estimates of what is appropriate for most women, no longer justify denying opportunity to women whose talent and capacity place them outside the average description. In myriad respects other than military training, VWIL does not qualify as VMI's equal. The VWIL program is a pale shadow of VMI in terms of the range of curricular choices and faculty

stature, funding, prestige, alumni support and influence. Virginia has not shown substantial equality in the separate educational opportunities the State supports at VWIL and VMI.

b. The Fourth Circuit failed to inquire whether the proposed remedy placed women denied the VMI advantage in the position they would have occupied in the absence of discrimination. The Fourth Circuit plainly erred ... for "all gender based classifications today" warrant "heightened scrutiny." Women seeking and fit for a VMI-quality education cannot be offered anything less, under the state's obligation to afford them genuinely equal protection.

GINSBURG, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, KENNEDY, SOUTER, and BREYER, JJ., joined. REHNQUIST, C. J., filed an opinion concurring in the judgment. SCALIA, J., filed a dissenting opinion. THOMAS, J., took no part in the consideration or decision of the case. (*Editor's Note: Justice Thomas did not participate in this decision because his son was a student at VMI.*)

# EXCERPTS FROM JUSTICE SCALIA'S DISSENTING OPINION:

Today the Court shuts down an institution that has served the people of the Commonwealth of Virginia with pride and distinction for over a century and a half. To achieve that desired result, it rejects (contrary to our established practice) the factual findings of two courts below, sweeps aside the precedents of this Court, and ignores the history of our people. As to facts: it explicitly rejects the finding that there exist "gender-based developmental differences" supporting Virginia's restriction of the "adversative" method to only a men's institution, and the finding that the all-male composition of the Virginia Military Institute (VMI) is essential to that institution's character. As to precedent: it drastically revises our established standards for reviewing sex-based classifications. And as to history: it counts for nothing the long tradition, enduring down to the present, of men's military colleges supported by both states and the federal Government.

The virtue of a democratic system with a First Amendment is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly. That system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution. This most illiberal Court ... today it enshrines the notion that no substantial educational value is to be served by an all-men's military academy—so that the decision by the people of Virginia to maintain such an institution denies equal protection to women who cannot attend that institution but can attend others. Since it is entirely clear that the Constitution of the United States—the old one—takes no sides in this educational debate, I dissent.

The all-male constitution of VMI comes squarely within such a governing tradition. Founded by the Commonwealth of Virginia in 1839 and continuously maintained by it since, VMI has always admitted only men. And in that regard it has not been unusual. For almost all of VMI's more than a century and a half of existence, its single-sex status reflected the uniform practice for government-supported military colleges. Another famous Southern institution, The Citadel, has existed as a state-funded school of South Carolina since 1842. And all the federal military colleges—West Point, the Naval Academy at Annapolis, and even the Air Force Academy, which was not established until 1954—admitted only males for most of their history. Their admission of women in 1976 came not by court decree, but because the people, through their elected representatives, decreed a change. In other words, the tradition of having government-funded military schools for men is as well rooted in the traditions of this country as the tradition of sending only men into military combat.

The question to be answered, I repeat, is whether the exclusion of women from VMI is "substantially related to an important governmental objective." It is beyond question that Virginia has an important state interest in providing effective college education for its citizens. That single-sex instruction is an approach substantially related to that interest should be evident enough from the long and continuing history in this country of men's and women's colleges. But beyond that, as the Court of Appeals here stated: "That singlegender education at the college level is beneficial to both sexes is a *fact established in this case*" (emphasis added). The evidence establishing that fact was overwhelming—indeed, "virtually uncontradicted" in the words of the court that received the evidence. Students of both sexes become more academically involved, interact with faculty frequently, show larger increases in intellectual self-esteem and are more satisfied with practically all aspects of college experience (the sole exception is social life) compared with their counterparts in coeducational institutions. Attendance at an all-male college substantially increases the likelihood that a student will carry out career plans in law, business and college teaching, and also has a substantial positive effect on starting salaries in business. Women's colleges increase the chances that those who attend will obtain positions of leadership, complete the baccalaureate degree, and aspire to higher degrees." But besides its single-sex constitution, VMI is different from other colleges in another way. It employs a "distinctive educational method," sometimes referred to as the "adversative, or doubting, model of education." No one contends that this method is appropriate for all individuals; education is not a "one size fits all" business. If Virginia were to include women in VMI, the school "would eventually find it necessary to drop the adversative system altogether." Thus, Virginia's options were an adversative method that excludes women or no adversative method at all.

In the course of this dissent, I have referred approvingly to the opinion of my former colleague, Justice Powell, in *Mississippi Univ. for Women v. Hogan,* **458 U.S. 718 (1982)**. Many of the points made in his dissent apply with equal force here. But there is one statement with which I cannot agree. Justice Powell observed that the Court's decision in *Hogan,* which struck down a single sex program offered by the Mississippi University for Women, had thereby "left without honor ... an element of diversity that has characterized much of American education and enriched much of American life." Today's decision does not leave VMI without honor; no court opinion can do that.

In an odd sort of way, it is precisely VMI's attachment to such old-fashioned concepts as manly "honor" that has made it, and the system it represents, the target of those who today succeed in abolishing public single-sex education. The record contains a booklet that all first-year VMI students (the so-called "rats") were required to keep in their possession at all times. Near the end there appears the following period piece, entitled,

#### The Code of a Gentleman

Without a strict observance of the fundamental Code of Honor, no man, no matter how 'polished,' can be considered a gentleman. The honor of a gentleman demands the inviolability of his word, and the incorruptibility of his principles. He is the descendant of the knight, the crusader; he is the defender of the defenseless and the champion of justice ... or he is not a Gentleman. A Gentleman ... Does not discuss his family affairs in public or with acquaintances. Does not speak more than casually about his girl friend. Does not go to a lady's house if he is affected by alcohol. He is temperate in the use of alcohol. Does not lose his temper; nor exhibit anger, fear, hate, embarrassment, ardor or hilarity in public. Does not hail a lady from a club window. A gentleman never discusses the merits or demerits of a lady. Does not mention names exactly as he avoids the mention of what things cost. Does not borrow money from a friend, except in dire need. Money borrowed is a debt of honor, and must be repaid as promptly as possible. Debts incurred by a deceased parent, brother, sister or grown child are assumed by honorable men as a debt of honor. Does not display his wealth, money or possessions. Does not put his manners on and off, whether in the club or in a ballroom. He treats people with courtesy, no matter what their social position may be.

Does not slap strangers on the back nor so much as lay a finger on a lady. Does not 'lick the boots of those above' nor 'kick the face of those below him on the social ladder.' Does not take advantage of another's helplessness or ignorance and assumes that no gentleman will take advantage of him. A Gentleman respects the reserves of others, but demands that others respect those which are his. A Gentleman can become what he wills to be...

I do not know whether the men of VMI lived by this code; perhaps not. But it is powerfully impressive that a public institution of higher education still in existence sought to have them do so. I do not think any of us, women included, will be better off for its destruction. The Goldberg Case

## SHORT SUMMARY OF THE GOLDBERG CASE

#### **CASE HISTORY**

After the end of the Vietnam War, registration for the military draft was discontinued in 1975. In 1980, because of the Soviet Union's military action in Afghanistan, President Carter decided that it was necessary to reactivate the registration process, and asked Congress to allocate funds for that purpose. He also recommended that Congress permit the registration and conscription (draft) of women as well as men. However, Congress allocated only those funds necessary to register males and declined to amend the Military Selective Service Act to permit the registration of women. Several men, including Robert Goldberg, brought a lawsuit challenging the Act's constitutionality. A three-judge District Court ruled that the Act's gender-based discrimination violated the Due Process Clause of the 5th Amendment and prevented registration under the Act.

The case was appealed to the U.S. Supreme Court, which in 1981 overturned the lower court and ruled that the Military Selective Service Act did not violate the 5th Amendment.

### **MAJORITY OPINION OF THE SUPREME COURT**

The Supreme Court based its decision on the following reasoning:

- 1. The courts have traditionally deferred to Congress and the President regarding decisions about national defense and the military. The Supreme Court said, "Congress acted well within its constitutional authority to raise and regulate armies and navies when it authorized the registration of men and not women. While Congress is not free to disregard the Constitution when it acts in the area of military affairs, this Court must be particularly careful not to substitute its judgment of what is desirable for that of Congress, or its own evaluation of evidence for a reasonable evaluation by the Legislative Branch.
- 2. The Court also said, "The question of registering women was extensively considered by Congress in hearings held in response to the President's request for authorization to register women, and its decision to exempt women was not the accidental byproduct of a traditional way of thinking about women. And since women are excluded from combat service by ... military policy, men and women are simply not similarly situated for purposes of a draft or registration for a draft, and Congress' decision to authorize the registration of only men, therefore, does not violate the Due Process Clause. The testimony of executive and military officials before Congress showed that the argument for registering women was based on considerations of equity, but Congress was entitled, in the exercise of its constitutional

The Goldberg Case

powers, to focus on the question of military need rather than "equity." The District Court, undertaking an independent evaluation of the evidence, exceeded its authority in ignoring Congress' conclusions that whatever the need for women for noncombat roles during mobilization, it could be met by volunteers, and that staffing noncombat positions with women during a mobilization would be positively detrimental to the important goal of military flexibility."

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, POWELL, and STEVENS, JJ., joined. WHITE, J., and MARSHALL, J., filed dissenting opinions, in which BRENNAN, J., joined.

#### **DISSENTING OPINIONS**

- 1. Justice White's dissent was based on his opinion that it would be difficult during wartime to fill all of the noncombat jobs in the military without drafting some women, since not enough volunteers might be available.
- 2. In Justice Marshall's dissent, he stated that the right to equal protection was being violated by Congress, which based its policy on "ancient canards (false stories) about the proper role of women." He went on to say that even though Congress should have primary authority over military affairs, the courts do have the right to decide questions of constitutionality. "As the Court has pointed out: 'The phrase *war power* cannot be invoked ... to support any exercise of congressional power ... Even the war power does not remove constitutional limitations safeguarding essential liberties,' *United States* v. *Robel*, (1967). One such 'safeguard of essential liberties' is the Fifth Amendment's guarantee of equal protection of the laws. In my judgment, there simply is no basis for concluding ... that excluding women from registration is substantially related to the achievement of an ... important governmental interest in maintaining an effective defense." Justice Marshall agreed with Justice White that women might need to be drafted in order to fill noncombat positions in the military. He quoted a Defense Department representative who said:

"It is in the interest of national security that, in an emergency requiring the conscription for military service of the Nation's youth, the best qualified people for a wide variety of tasks in our Armed Forces be available. The performance of women in our Armed Forces today strongly supports the conclusion that many of the best qualified people for some military jobs in the 18–26 age category will be women."

Master

No. 80-251

# SUPREME COURT OF THE UNITED STATES

### ROSTKER v. GOLDBERG, 453 U.S. 57 (1981)

ROSTKER, director of selective service

## GOLDBERG et al.

Appeal from the United States District Court for the Eastern District of Pennsylvania.

ARGUED MARCH 24, 1981 Decided JUNE 25, 1981

The Military Selective Service Act (Act) authorizes the President to require the registration for possible military service of males but not females, the purpose of registration being to facilitate any eventual conscription under the Act. Registration for the draft was discontinued by Presidential Proclamation in 1975 (the Act was amended in 1973 to preclude conscription), but as the result of a crisis in Southwestern Asia, President Carter decided in 1980 that it was necessary to reactivate the registration process, and sought Congress' allocation of funds for that purpose. He also recommended that Congress amend the Act to permit the registration and conscription of women as well as men. Although agreeing that it was necessary to reactivate the registration process, Congress allocated only those funds necessary to register males and declined to amend the Act to permit the registration of specified groups of young men. In a lawsuit brought by several men (*including Robert Goldberg*) challenging the Act's constitutionality, a three-judge District Court ultimately held that the Act's gender-based discrimination violated the Due Process Clause of the Fifth Amendment and enjoined registration under the Act.

v.

The Act's registration provisions do not violate the Fifth Amendment. Congress acted well within its constitutional authority to raise and regulate armies and navies when it authorized the registration of men and not women.

- a. The customary deference accorded Congress' judgments is particularly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality, and perhaps in no area has the Court accorded Congress greater deference than in the area of national defense and military affairs. While Congress is not free to disregard the Constitution when it acts in the area of military affairs, this Court must be particularly careful not to substitute its judgment of what is desirable for that of Congress, or its own evaluation of evidence for a reasonable evaluation by the Legislative Branch. Congress carefully considered whether to register only males for potential conscription or whether to register both sexes, and its broad constitutional authority cannot be ignored in considering the constitutionality of its studied choice of one alternative in preference to the other.
- b. The question of registering women was extensively considered by Congress in hearings held in response to the President's request for authorization to register women, and its decision to exempt women was not the accidental byproduct of a traditional way of thinking about women. Since Congress thoroughly reconsidered the question of exempting women from the Act in 1980, the Act's constitutionality need not be considered solely on the basis of the views expressed by Congress in 1948, when the Act was first enacted in its modern form. Congress' determination that any future draft would be characterized by a need for combat troops was sufficiently supported by testimony adduced at the hearings so that the courts are not free to make their own judgment on the question. And since women are excluded from combat service by statute or military policy, men and women are simply not similarly situated for purposes of a draft or registration for a draft, and Congress' decision to authorize the registration of only men, therefore, does not violate the Due Process Clause. The testimony of executive and military officials before Congress showed that the argument for registering women was based on considerations of equity, but Congress was entitled, in the exercise of its constitutional powers, to focus on the question of military need rather than "equity." The District Court, undertaking an independent evaluation of the evidence, exceeded its authority in ignoring Congress' conclusions that whatever the need for women for noncombat roles during mobilization, it could be met by volunteers, and that staffing noncombat positions with women during a mobilization would be positively detrimental to the important goal of military flexibility.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C.J., and STEWART, BLACKMUN, POWELL, and STEVENS, J.J., joined. WHITE, J., and MARSHALL, J., filed dissenting opinions, in which BRENNAN, J., joined.

# EXCERPTS FROM JUSTICE WHITE'S DISSENTING OPINION:

I assume what has not been challenged in this case—that excluding women from combat positions does not offend the Constitution. Granting that, it is self-evident that if during mobilization for war, all noncombat military positions must be filled by combat-qualified personnel available to be moved into combat positions, there would be no occasion whatsoever to have any women in the Army, whether as volunteers or inductees. The Court appears to say ... that Congress concluded as much and that we should accept that judgment even though the serious view of the Executive Branch, including the responsible military services, is to the contrary.

I would also have little difficulty agreeing to a reversal if all the women who could serve in wartime without adversely affecting combat readiness could predictably be obtained through volunteers. In that event, the equal protection component of the Fifth Amendment would not require the United States to go through, and a large segment of the population to be burdened with, the expensive and essentially useless procedure of registering women. But again I cannot agree with the Court ... that Congress concluded or that the legislative record indicates that each of the services could rely on women volunteers to fill all the positions for which they might be eligible in the event of mobilization.

As I understand the record, then, in order to secure the personnel it needs during mobilization, the Government cannot rely on volunteers and must register and draft not only to fill combat positions ... but also to secure the personnel needed for jobs that can be performed by persons ineligible for combat without diminishing military effectiveness. The claim is that in providing for the latter category of positions, Congress is free to register and draft only men. I discern no adequate justification for this kind of discrimination between men and women. Accordingly, with all due respect, I dissent.

# EXCERPTS FROM JUSTICE MARSHALL'S DISSENTING OPINION:

The Court today (gives its support to) ... one of the most potent remaining public expressions of "ancient canards about the proper role of women." It upholds a statute that requires males but not females to register for the draft, and which thereby categorically excludes women from a fundamental civic obligation. Because I believe the Court's decision is inconsistent with the Constitution's guarantee of equal protection of the laws, I dissent.

By now it should be clear that statutes like the MSSA *(Military Selective Service Act)*, which discriminate on the basis of gender, must be examined under the "heightened" scrutiny mandated by *Craig* v. *Boren* (1976). Under this test, a gender-based classification cannot withstand constitutional challenge unless the classification is substantially related to the achievement of an important governmental objective. I agree with the majority ...

that "no one could deny that ... the Government's interest in raising and supporting armies is an 'important governmental interest." The majority also notes that "the Court accords 'great weight to the decisions of Congress," and that the Court has accorded particular deference to decisions arising in the context of Congress' authority over military affairs. I have no particular quarrel with these sentiments in the majority opinion. I simply add that even in the area of military affairs, deference to congressional judgments cannot be allowed to shade into an abdication of this Court's ultimate responsibility to decide constitutional questions. As the Court has pointed out: "The phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. 'Even the war power does not remove constitutional limitations safeguarding essential liberties." *United States* v. *Robel*, (1967).

One such "safeguard of essential liberties" is the Fifth Amendment's guarantee of equal protection of the laws. When, as here, a federal law that classifies on the basis of gender is challenged as violating this constitutional guarantee, it is ultimately for this Court, not Congress, to decide whether there exists the constitutionally required "close and substantial relationship" between the discriminatory means employed and the asserted governmental objective. In my judgment, there simply is no basis for concluding in this case that excluding women from registration is substantially related to the achievement of a concededly important governmental interest in maintaining an effective defense.

The Government does not defend the exclusion of women from registration on the ground that preventing women from serving in the military is substantially related to the effectiveness of the Armed Forces. Moreover, since the combat restrictions on women have already been accomplished through statutes and policies that remain in force whether or not women are required to register or to be drafted, including women in registration and draft plans will not result in their being assigned to combat roles. Thus, even assuming that precluding the use of women in combat is an important governmental interest in its own right, there can be no suggestion that the exclusion of women from registration and a draft is substantially related to the achievement of this goal.

In this case, the Government makes no claim that preparing for a draft of combat troops cannot be accomplished just as effectively by registering both men and women but drafting only men if only men turn out to be needed. Nor can the Government argue that this alternative entails the additional cost and administrative inconvenience of registering women. This Court has repeatedly stated that the administrative convenience of employing a gender classification is not an adequate constitutional justification under the *Craig* v. *Boren* test.

The Court's reasoning ... is flawed because the entire argument rests on a premise that is demonstrably false. As noted, the majority simply assumes that registration prepares for a draft in which every draftee must be available for assignment to combat. But the majority's draft scenario finds no support in either the testimony before Congress, or more importantly, in the findings of the Senate Report. Indeed, the scenario appears to exist only in the Court's imagination, for even the Government represents only that "in the event of mobilization, approximately two-thirds of the demand on the induction system would be for combat skills." The Department (of Defense) indicated that conscripts would also be needed to staff a variety of support positions having no prerequisite of combat eligibility, and which therefore could be filled by women. In testifying about the Defense Department's reasons for concluding that women should be included in registration plans, Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) Pirie stated:

It is in the interest of national security that, in an emergency requiring the conscription for military service of the Nation's youth, the best qualified people for a wide variety of tasks in our Armed Forces be available. The performance of women in our Armed Forces today strongly supports the conclusion that many of the best qualified people for some military jobs in the 18–26 age category will be women.

All four Service Chiefs agreed that there are no military reasons for refusing to register women, and uniformly advocated requiring registration of women. The military's position on the issue was summarized by then Army Chief of Staff General Rogers: "Women should be required to register ... in order for us to have an inventory of what the available strength is within the military qualified pool in this country."

The Court substitutes hollow shibboleths about "deference to legislative decisions" for constitutional analysis. It is as if the majority has lost sight of the fact that "it is the responsibility of this Court to act as the ultimate interpreter of the Constitution." Congressional enactments in the area of military affairs must, like all other laws, be judged by the standards of the Constitution. For the Constitution is the supreme law of the land, and all legislation must conform to the principles it lays down.

I would affirm the judgment of the District Court.

## **Fourth Memo**

## Ebbets Chavez & Kofax

ATTORNEYS AT LAW, LLF

To: First-Year Associates From: Brandi Bickering, Senior Partner Re: Presentation Requirements

We have just learned that the Supreme Court has granted a *writ of certiorari* for the *Connolly* case. Since this makes your recommendation even more important, I have generated a list of topics that the senior partners want you to address in your presentation. Your five-minute group presentation should state your recommendation as to whether the firm should accept or reject the case and explain your reasoning. Begin your presentation with a brief review of how this case reached the Supreme Court, and why you think the Court granted a *writ of cert*.

Please be aware that your prepared speech may be interrupted by me or another partner, as often happens during oral arguments in front of the Supreme Court. Each of you should be prepared to answer any of the questions asked. After your presentation, the senior partners may ask questions for a few more minutes. One thing you must keep in mind is that even though we are being recruited by Lt. Connolly, the political views of the senior partners (like Supreme Court justices) vary considerably. You will be addressing political conservatives as well as liberals, and military veterans as well as former women's rights attorneys. In other words, because it is impossible to appease everyone's political and emotional ties, make sure your arguments rest on logic, reason, and sound legal thinking. The questions from the senior partners may include:

- 1. Role of the 5th and 14th Amendments
  - a. Does Lt. Connolly have a legitimate claim?
  - b. Does the 5th Amendment apply? Why or why not?
  - c. Does the 14th Amendment apply? Why or why not?
- 2. Balance between women's rights and state interests
  - a. Are there comparable alternatives to the Special Forces for women? Explain.
  - b. What are the military's interests in barring women from the Special Forces?
  - c. What hardships for women might occur if they are excluded from Special Forces?

- d. What hardships for the U.S. military might occur if women are excluded from Special Forces?
- e. Is there a potential negative impact on the morale of the units if women are admitted? If yes, should this be a consideration in the Court's decision?
- 3. Risks associated with women in the Special Forces
  - a. Are there unique risks faced by female members of the Special Forces?
  - b. If yes, and if a woman knowingly accepts these unique risks, should she be allowed to subject herself to these risks? Explain.
  - c. Is it the government's role to protect its citizens from unreasonable harm? Are laws requiring seatbelts in automobiles, motorcycle helmets, and child safety car seats comparable to laws barring women from joining the Special Forces?
- 4. Discussion of precedent
  - a. How does the *VMI* case relate to the present case? Why does *VMI* apply or not apply, depending on your position?
  - b. Is it important that *VMI* concerns education and not the Special Forces? Why or why not?
  - c. Is it important that the Supreme Court in the *VMI* decision found there was no equal program for women, despite the creation of the VWIL? Why or why not?
  - d. What did the Supreme Court say about archaic notions of women and their role in current policies? Does this apply here? Why or why not?
  - e. How does the *Goldberg* case relate to the present case? Why does *Goldberg* apply or not apply, depending on your position?
  - f. What does the Court suggest will happen to the male-only draft if women are allowed to serve in combat? Should this be a concern in deciding the *Connolly* case?

## **Final Memo**

## EBBETS CHAVEZ & KOFAX

ATTORNEYS AT LAW, LLF

To: First-Year Associates FROM: Brandi Bickering, Senior Partner RE: New Developments in the Connolly Case

Just this morning we received the following letter from one of our important clients, the American Association of Women. I urge you to weigh their concerns when making your recommendation to the partners, who will add the following to their list of questions: Will other women's rights be threatened if Lt. Connolly wins her case? Specifically:

- Hiring preferences where women have been traditionally underrepresented
- The right to maternity leave in the workplace
- Affirmative action programs
- Title IX protections for equal educational opportunity
- Why or why not?

Please refer to the following cases as reference:

- *Reed* v. *Reed* 404 U.S. 71 (1971) Case evolved the Equal Protection clause of the 14th Amendment to protect women from discrimination on the basis of sex. http://www.oyez.org/cases/1970-1979/1971/1971\_70\_4
- Johnson v. Transportation Agency 480 U.S. 616 (1987) The case involved whether a state agency could take into account a person's gender in making a promotion decision. http://www.oyez.org/cases/1980-1989/1986/1986\_85\_1129
- *Geduldig* v. *Aiello* 417 U.S. 484 (1974) Case involved whether California's denial of insurance benefits for disabilities resulting from a pregnancy violated the Equal Protection Clause of the 14 Amendment. http://www.oyez.org/cases/1970-1979/1973/1973 73 640
- *Pederson* v. *Louisiana State University U.S. Court of Appeals, 5th Circuit* (2000) The case involved female students at LSU suing the school for refusing to offer them athletic participation opportunities equal to those it offers its male students. http://www.titleix.info/Resources/Legal-Cases/ Pederson-v-Louisiana-State-University.aspx

#### Final Memo 2



To: Senior Partners of Ebbets, Chavez, and Kofax From: Teresa Duran, Director Re: United States Army v. Connolly et al.

Our organization recently learned of your potential involvement in the *Connolly* case. As your loyal client, we respect your need to pursue financial gain, and the lure of an important Supreme Court case. However, there is much more to this case than you may realize. Although the American Association of Women is dedicated to expanding opportunities for women, we take a more balanced view on some issues, as compared to more radical organizations such as Today's Hope for an Equal Nation.

We fear that women across the nation may suffer if Lt. Connolly prevails in her claim against the United States Army. If the United States Supreme Court rules that the military's distinctions between men and women are unconstitutional under the 5th and 14th Amendments, the application of this ruling may be limitless. If the law cannot recognize fundamental differences between men and women, some hard-fought achievements won by our organization and your firm may be in jeopardy, such as the legitimacy of hiring preferences in areas where women have traditionally been underrepresented. Other special protections that women need, such as maternity leave and Title IX, may be eliminated. In light of these possibilities, it is our position that there must be room for the law to recognize differences between men and women and to act upon such differences. In other words, we should look very critically at the desirability and potential effect of declaring total equality between men and women.

The American Association of Women has been very happy with your representation of our interests in the past, and we hope to continue our patronage. While we recognize it is your prerogative to choose clients and cases, we hope you will be persuaded by our concerns so as not to damage our long-term relationship.

Name:

Master

Date:

# **Test for** *Fighting Chance*

#### Please circle the letter of your answer.

- 1. Which of the following is the *best* definition of the 5th Amendment's due process clause?
  - A Fair procedures and fair laws
  - B Constitutional guarantee to legal counsel
  - C All persons are entitled to being treated equally
  - D Everyone has the right to a fair trial
- 2. The 14th Amendment was written primarily to
  - A provide more authority to the Supreme Court.
  - B prevent state governments from denying basic rights to newly freed slaves.
  - C reinforce the equal protection clause of the 5th Amendment.
  - D prevent the federal government from denying anyone of due process.
- 3. The 14th Amendment was passed during what period of American history?
  - A The Constitution Convention
  - B The Civil War
  - C The Revolutionary War
  - D The Reconstruction period
- 4. What is the purpose of the 5th Amendment's due process clause?
  - A Prevents the states from reinstituting slavery
  - B Provides the definition of a U.S. citizen
  - C Prohibits the federal government from unreasonable discrimination
  - D Protects citizens from unreasonable search and seizure
- 5. Article III of the U.S. Constitution gives Congress the power to
  - A create inferior courts.
  - B make all laws necessary and proper to carrying out the duties of government.
  - C establish the Supreme Court.
  - D overrule Supreme Court decisions.
- 6. Why is the power of judicial review so important to the checks and balance system?
  - A It allows Congress to evaluate the performance of judges.
  - B It allows the courts to rule acts of Congress unconstitutional.
  - C It allows the Supreme Court to overrule its earlier decisions.
  - D It allows Congress to select federal judges.

- 7. In which of the following cases did the Supreme Court break precedent and overrule a previous decision?
  - A Marbury v. Madison
  - B Plessy v. Ferguson
  - C United States v. Virginia
  - D Brown v. Board of Education
- 8. Which of the following are examples of reasonable discrimination?
  - A Denying a driver's license to people less than 5 feet tall.
  - B Rejecting a terrorist organization's request for a parade permit.
  - C Setting a minimum age for marriage.
  - D Excluding foreigners from coming into the country.
- 9. Which of the following cases would the Supreme Court most likely *not* grant a *writ of certiorari*?
  - A Two lower courts decided the case differently.
  - B The issue involved determining innocence or guilt.
  - C The issue involves new development in technology or culture.
  - D The issue reflects a change in society's values.
- 10. Judicial restraint and judicial activism are hotly contested positions on how courts should use the power of judicial review. By definition, which of the following might be considered an act of judicial restraint?
  - A Declaring a municipal ban on handguns unconstitutional.
  - B Protecting a woman's right to abortion under the "right to privacy."
  - C Forcing busing to achieve integration.
  - D Prohibiting school-sponsored religious activities.
- 11. Which of the following is a definition of judicial activism?
  - A The courts should only interpret the laws, not make new laws.
  - B The courts should base their rulings on the original intent of the Constitution's framers.
  - C The courts have a role in solving social, economic, and political problems.
  - D The courts should strike down any laws that try to reform society.
- 12. What was Lt. Amy Connelly's main argument against the Army's policy of excluding women from Special Forces?
  - A The Army didn't grant her special consideration because she is a woman.
  - B The policy violated her right to due process and equal protection under the law.
  - C The policy considered her too young to join Special Forces.
  - D The Army had honored the prejudices of its male members against women.

- 13. What was the basis for the Army's denial of Lt. Connelly's entry into Special Forces?
  - A The male members of Special Forces would object to her admission.
  - B She did not meet the physical performance requirements.
  - C Women face unique risks in combat that are different from men.
  - D Women are excluded from direct combat roles.
- 14. In the 1996 case of *United States* v. *Virginia, w*hat did the Supreme Court say about the Virginia Women's Institute for Leadership as a viable alternative to Virginia Military Institute?
  - A The Women's Institute did not provide equally rigorous military training for women.
  - B Obtaining a degree from Women's Institute was comparable to a degree from the Virginia Military Institute.
  - C The Women's Institute lacked the historical benefit and prestige of the Virginia Military Institute.
  - D Women were equally qualified to attend either college.
- 15. The major difference between the United States v. Virginia (VMI) and U.S. Army v. Connelly was
  - A The *Connelly* case requested special facilities to be provided to protect women's privacy. None were requested in the *VMI* case.
  - B Lt. Connelly was drafted into the Army but the female cadets in the VMI case had volunteered.
  - C The *VMI* case involved education and the *Connelly* case involved combat.
  - D The state of Virginia proved that the discrimination at VMI served important governmental objectives. The Connelly case was not based on discrimination.
- 16. What was the Supreme Court's ruling in Rostker v. Goldberg?
  - A Because the Vietnam War was over and the military draft was discontinued, the plaintiff had no case for gender-based discrimination.
  - B Because women were excluded from combat, it was not a violation of due process to exclude them from the draft.
  - C Congress should permit men as well as women to register for the draft.
  - D Only Congress, and not the president, has the power to raise and regulate armies.
- 17. According to the United States Army, how did the Supreme Court's ruling in the *Goldberg* case justify excluding Lt. Connelly from Special Forces?
  - A Congress' decision to exclude women from the draft violated the due process of men.
  - B Excluding women from the draft had nothing to do with whether they served in combat, as other non-combat roles could be given to them.
  - C Military policy could supersede an act of Congress.
  - D Excluding women from combat barred them from the draft and it should also bar them from being in Special Forces.

- 18. What was the central argument from the Veterans Association in their *amicus curie* brief to the Supreme Court?
  - A Women face the same risks as male soldiers if captured.
  - B The due process clause of the 5th and 14th Amendments doesn't extend into the military.
  - C Allowing women into Special Forces would compromise the effectiveness of the unit.
  - D Women have other avenues for advancement in the military and don't need to be in combat.
- 19. The central argument of Today's Hope for an Equal Nation (THEN) contended that Lt. Connelly's 5th and 14th Amendment rights were violated. According to THEN, what hardships do women face if they are excluded from Special Forces?
  - A It limits their ability to advance through the military ranks.
  - B They could be interrogated more harshly if captured.
  - C It would limit their ability to serve in other roles in the military.
  - D They have been accepted by their male colleagues in all other areas of the military.
- 20. What was the central concern of the American Association of Women in their memo to Lt. Connelly's law firm?
  - A Ebbets, Chavez and Kofax were only considering the case for the financial gain.
  - B Women would lose many hard fought rights if women were allowed to serve in combat.
  - C The court would rule the due process clause of the 5th and 14th Amendment did not apply to the military.
  - D Fundamental differences between men and women could be negated by a Supreme Court ruling.

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