

**University of South Dakota School of Law**

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## Justice, Community and Differences: The Challenge from Indian Country

Frank Pommersheim, *University of South Dakota School of Law*



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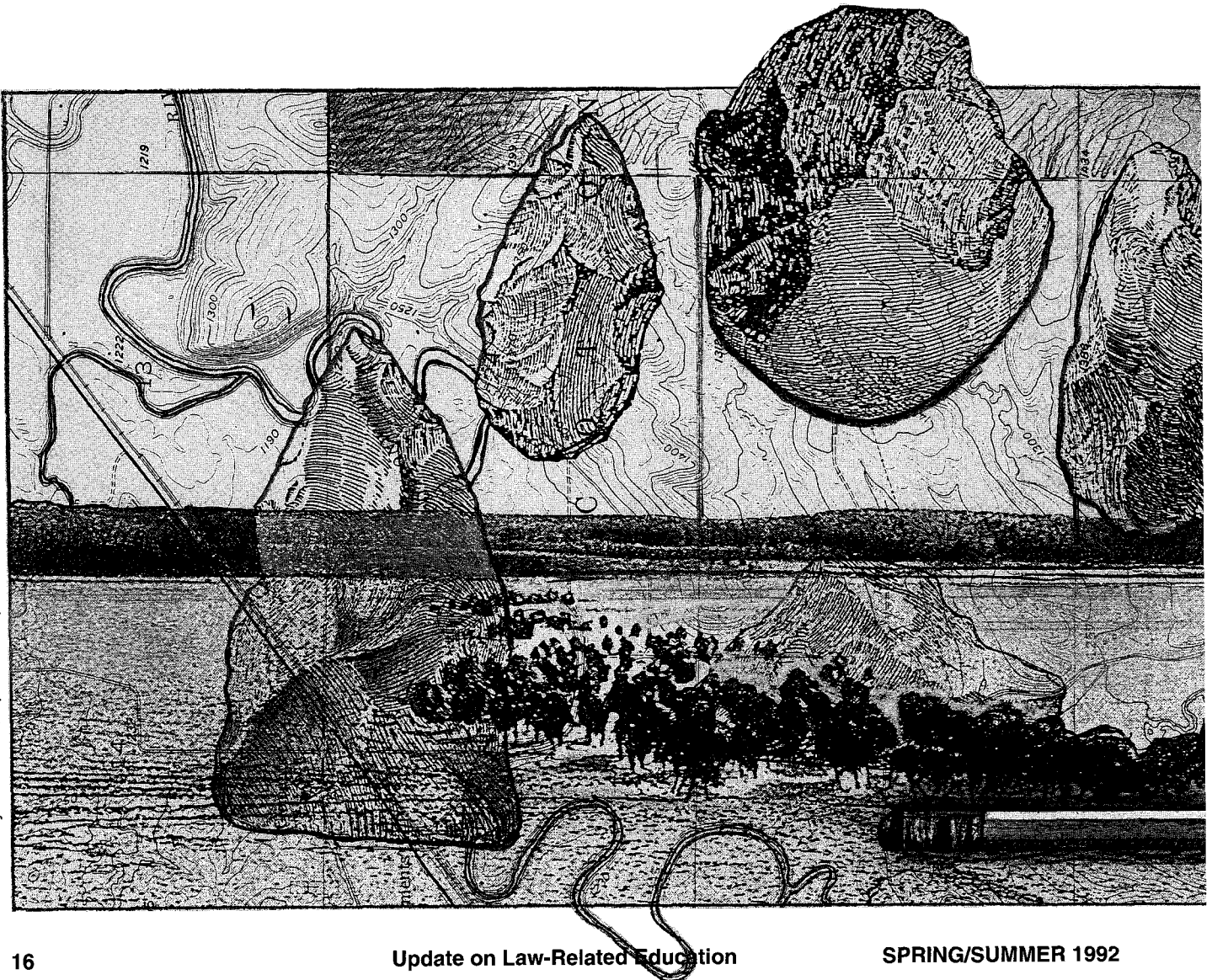
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# Justice, Community and Differences: The Challenge from Indian Country

Seeing differences as worthy of honor and respect requires education and understanding

Illustration by Lester Doré, reprinted with permission from the March-April 1992 edition of *The Heartland Journal*.



With the perspective of one who comes from Indian country, I would like to explore three basic themes that bear on the challenge of diversity. First, the issue of tribal sovereignty; second, developing an understanding of how we think about and approach the notion of difference; and lastly, and I think this is particularly important for people who actually work in states with significant Indian populations, the issue of reconciliation.

If someone were to ask "How many sovereigns exist in this country?" most of us would immediately answer two, the federal government and the states. Period. Case closed. Well, that answer happens to be wrong, because there are basically three sovereigns within our constitutional system. The third sovereign, of course, is the Indian tribes or the Indian nations.

It is important for all of us engaged in the educational enterprise to make sure that this very basic point becomes the cornerstone of any educational programs for Native Americans as well as for non-Native Americans. For many reasons, it is absolutely critical for non-Indian people to learn that tribes have recognized sovereignty.

One of the problems, of course, is that the constitutional dimensions and parameters of tribal sovereignty are not always clear. It is not always possible to define the nature of tribal sovereignty in any particular dispute. What is important is that all the citizens in this country, Indian and non-Indian alike, realize that tribal sovereignty exists, because without this realization all our concerns for Native Americans, for tribes and for Indian nations fall by the wayside. Indian nations and Indian people have to then spend so much of their time struggling to convince people that they really are sovereign before even getting to the issue in dispute. Much energy—and, arguably, needless energy—is expended in convincing people at the local, state and national level that tribes really do have sovereignty. Until that is overcome, it can be very, very difficult for Native Americans and tribes to take their rightful place within our constitutional democracy.

One bonafide question people often ask is "Where does tribal sovereignty come from?" You might read the Constitution and say, "Well, where is it?" Well, as far as I can tell, in at least two places. The first is in Article I, Section 8, referred to as the Indian Commerce Clause, which recognizes that Congress has a right to regulate trade between the states, foreign nations and Indian tribes.

### Tribal Sovereignty Recognized

While not being very definitive, this is recognition—in the Constitution—that Indian tribes are sovereign. The tribes are not quite foreign nations, because the expression "foreign nation" is also used, but they are apparently not states because the term "Indian tribe" is used as well as the word "state". Thus, there is a kind of special sovereign recognition of Indian tribes within the Constitution.

Unfortunately, both Congress and par-

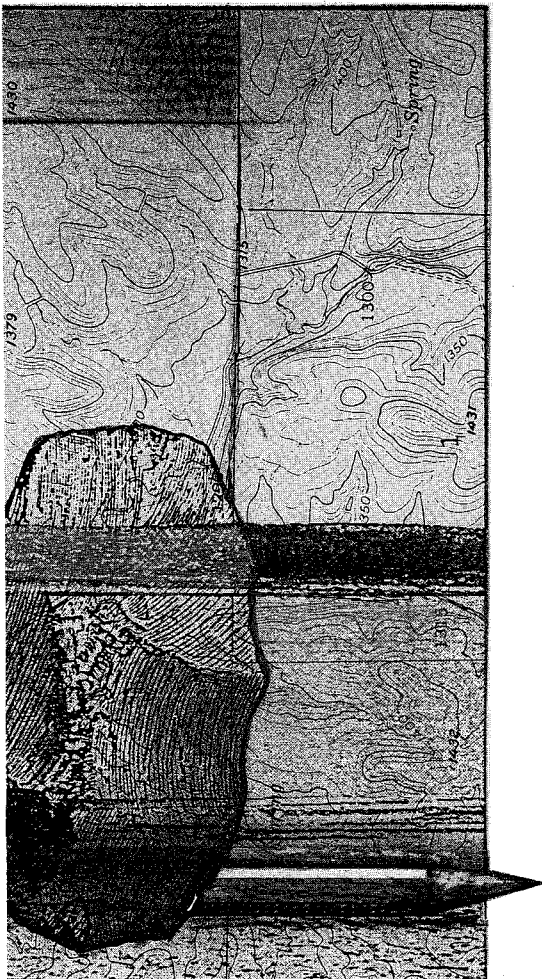
ticularly the Supreme Court have been very unclear over the past 200 years in specifying the nature of tribal sovereignty, yet it is very definitely mentioned in the Constitution.

The second source of tribal sovereignty arises from the concept of treaties. This is particularly important in 1992, the 500th anniversary of the arrival of Columbus in the Americas. Incidentally, I don't quite understand why we celebrate the voyage of someone who was lost and didn't know where he was. The commonly-held perspective on this event is that Columbus is "discovering" something; the view is from his ship. In my opinion, this is the wrong emphasis. What we ought to be concerned with is how the landing looked to the people who were already here. This is not history as it is generally taught, and it's not necessarily pleasant.

What happened when Columbus and his European followers came to this country and found people here? Despite the accounts given in our conventional history books which claim that this was a virgin territory, this was not really the case. Obviously, it is easier to steal something if you say that no one was here. But if you accept that there *were* people here when Columbus arrived, then you must also look at how those people were dealt with. The indigenous people of America were dealt with in different ways. One was simply to kill them and take their land—steal it and expropriate it. I don't mean that as an exaggeration; it is simply a fact.

But it is also true that in the Western legal tradition we profess a commitment to the rule of law, and try, as a general rule, to deal with people in a lawful, legal manner, not simply to steal what belongs to others.

The legal device that was used in dealing with indigenous people, at least in some cases, was the notion of a treaty. This is important because implicit in a treaty is a recognition of sovereignty. That is, you don't make a treaty with a group that is not a nation, a group that lacks nationhood status. Therefore, the principle of sovereignty, besides residing in the Constitution's Indian Commerce Clause, also resides in the practice of





having made over 400 treaties with various Indian groups in this country.

### Supreme Law of the Land?

First and foremost, treaties are premised on an acceptance of the sovereignty of the people you are treating with. Once a treaty is signed, the Supremacy Clause of the Constitution states that treaties are the supreme law of the land. So, with these 400-some treaties, backed up by the Supremacy Clause, one might conclude that the Indian tribes ought to be on solid footing, legally speaking.

However, one of the trends that developed in our legal system over time, particularly with regard to Native Americans and their tribal sovereignty, is a real schizophrenic view of what tribal sovereignty is. On one hand is the sovereignty recognized in treaties, backed up by the Supremacy Clause which recognizes treaties as the supreme law of the land. But, on the other hand, there are decisions by the Supreme Court that recognize—and continue to recognize to this day—the unilateral right of Congress to abrogate treaties. It is very hard to see how these two different approaches can be reconciled, but this is just one of the tensions and ambiguities—a very harmful destabilizing ambiguity—that we are faced with in Indian law.

In thinking about Indian tribes and their rights, sovereignty is an absolute bedrock principle. The greatest number of problems concerning tribal sovereignty today generally involve the extent of authority that Indian tribes have over non-Indian people who live, reside and own property on reservations.

One thing that surprises people (at least it surprised me when I first came to Indian country), is the discovery that reservations are not strictly for Indian people and that non-Indian people live and own property there as well. When disputes arise between Indians and non-Indians, the central issue is frequently the extent of tribal authority over non-Indians and their property. Of course, non-Indians, by definition, aren't Indians. They don't participate directly in the political life of a tribe; they can't run for office and they can't vote. In recent years, at least in the last 30 to 40 years or so, there has been a tremendous resurgence of claims of tribal sovereignty as tribes seek to assert their authority over non-Indians and their property. It is often these claims establish the parameters for the various issues which arise in Indian country.

One might think that the Democratic and Republican parties would concern themselves with these issues. This is not the case, at least not in South Dakota. Indian political issues play no role whatsoever in the formal political life of the state in terms of the major political parties.

If a question arises in South Dakota on an issue that relates to Indians, no one asks "What is the Democratic position?" or "What is the Republican position?" There are no positions. Why? One might argue that there is a history of racism, and that is a small part of the answer. But the larger reason is that most of the people involved in major party politics have little knowledge of these issues and don't want to talk about them. This is one example of why there is a tremendous need for education on these foundational issues. An educated citizenry is essential if these issues are to take their rightful place in the official educational, legal, and political discourse within the state.

### Looking at Difference

My second theme which, I think, is related to the first, centers on the whole notion of "difference." This notion is explored in Martha Minow's stimulating and insightful book *Making All the Difference*, which I highly recommend. When dealing with reservations, tribal sovereignty, and Indian people, just as with other groups in our society, the whole question of "difference" arises. Even today there are people who ask "Why do Indians stay on the reservation?" Many Indians on reservations—at least in South Dakota—are impoverished and face a variety of social problems. Why do they stay? Why don't they join the mainstream where there is more opportunity?

Most Native Americans don't want to leave the reservation. They have pride in their own language, culture and homeland. For them, a "homeland" is not merely a physical place but a spiritual and emotional reality that nourishes them individually and collectively. These are differences that are important for us to understand and respect.

Often in the law, we take the laudable view that differences are stigmatizing and harmful. We see the stigma of difference, and we march forward under the banner of the Equal Protection and Due Process Clauses to eradicate it. This attempt to erase the stigma of difference is a very positive thrust within our legal system. But part of our understanding is missing,

because while there is the stigma of difference, there is also the pride of difference, a distinction that, in my view, is important to learn and know.

The stigma of difference is to be eradicated; that, I think, is something we can all agree on. But I also think that some of us, particularly those of us who are from the majoritarian society—and particularly majoritarian white males—must realize that there is also a pride of difference. We need to understand where that pride of difference comes from and how to recognize it.

### The Pride of Difference

Understanding the distinction between the stigma of difference and the pride of difference is really a critical issue: to try to understand when there is a stigma of difference, when Indian people are being discriminated against and when that stigma ought to be crushed. But we also should be sensitive to recognizing and nourishing that pride of difference and not crushing it, either inadvertently or advertently. Pride of difference, after all, is what a pluralistic society is all about.

It is important to encourage in our programs and in our students, particularly in these times, which economically and otherwise are very constricting, to welcome differences, to celebrate differences, to approach them, because by doing so we can find something to learn and something to celebrate. In these times we seem to be moving in other directions, because, I think, we fear difference and are threatened by it. We feel comfortable only if people are like us. That is dangerous, and simply impossible in a society like our ours, with its tradition of pluralism—we just don't have a uniform society.

We must encourage programs that help our students learn to respect difference and honor difference. If they don't, the future doesn't augur very well. In a global context, people want their differences respected. They say "We are different from you and we want you to respect that. We can get along. We can be friends both individually and as nations—but you must respect us." Respect is just not going to be forthcoming if your goal is to make people over in your own image. A great deal of space is required if people are to take on their individual and social identities. Part of what we think is important in this country is the notion of choice, that people should have the right to choose how they identify themselves and what kind of differences they want to

take on. But in constructing and viewing that society, it is important that we see these differences as worthy of our respect and honor.

My final theme is one that is important in Indian country itself, and that is reconciliation. In South Dakota two years ago, the governor officially proclaimed a year of reconciliation between Indian and non-Indian people. This was seen as a very positive kind of action, that is until one peeled away some of the layers and examined the real meaning. Does reconciliation mean that we should shake hands with Indian people and go to powwows and other such events? Well, that's fine, but if that's as far as it goes, it is too superficial.

### Confronting History

Reconciliation is about confronting history, and in the context of Indian and non-Indian relationships the history is not a very pleasant one. It is not simply a case of looking back through history and saying "Well, that's in the past." One hears that refrain quite often—"Oh, that happened a long time ago." But history is *not* in the past—it's right here, right next to us. It's our shadow and it's always with us. We can't just think about these things in a linear fashion because history isn't linear. Mistakes made in the past, unless we actively try to understand and undo them, will continue to distort the present.

For example, in South Dakota there is a beautiful area in the western part of the state called the Black Hills. The Black Hills, *Paha Sapa* as they are called by the Lakota, are part of the traditional Lakota homeland, recognized and preserved in the Fort Laramie Treaty of 1868. Shortly after the treaty was signed, General George Custer led a scientific expedition in the Hills and discovered gold. Of course, whenever people from Europe discover gold they seem to lose all control of their rational faculties. As a result of Custer's discovery, people poured into the Black Hills to prospect for gold. It wasn't their land but they came just the same.

Given the treaty, the federal government said "Well, we'll negotiate a new treaty and see if the Lakota people will cede the Black Hills to the United States. We'll try to buy it from them. That's fair enough." When the officials arrived from Washington to negotiate, the Lakota people said, "No, we don't want to sell this land. It is a sacred part of our landscape."

A normal reaction would be to reply "Okay, that's the end of it. We can't buy

it because they won't sell it." But that's now how the federal government responded to the Lakota; it just took the land. Congress simply passed a unilateral act in violation of the Fort Laramie Treaty and confiscated 7.7 million acres in the Black Hills—just stole it outright. Now, how can you deal with a situation like that? How can you put things right?

From the very beginning the Lakota people wanted to make things right. Unfortunately, in 1877 Indian tribes didn't have standing to sue the United States government. They had to wait until 1920 for a special jurisdictional act which authorized their lawsuit. This lawsuit languished in the courts for 60 years before it finally reached the Supreme Court in 1980. The Court concluded that the government did take the land, but could have done so anyway because under the power of eminent domain, the government has the authority to take private property for public use. The only problem was that the government forgot to pay for it back in 1877, so the Court ordered the government to pay for the land, more than 100 years later.

### What the Lakota Want

For the Lakota people, however, the important issue is return of the land, not compensation for its confiscation. The federal legal system has never authorized or ordered the return of confiscated land to an Indian tribe. Congress has done so occasionally but the courts never have. The Lakota people refuse to accept the money from the 1980 judgement—it is still sitting in banks back in Washington earning interest. The Lakota say "We do want the money, but we want the money *plus* the land. And until we get the land we're not going to take the money, because we know that once we take the money, we'll never get the land."

Much of the 7.7 million acres is owned by individual non-Indians; some is owned by state, county and local governments. The Lakota don't want that land back; all they want is the land still owned by the federal government, about 1.2 million acres. "Just give us back the land the federal government still owns," the Lakota say, "turn it over to us in a thoughtful way, and non-Indian owned land will not be affected."

One would think that the Lakota offer provides an incredible opportunity to right this historical wrong. Usually when historical wrongs happen there is little chance to correct them. This situation presents a tremendous challenge to our

commitment to justice. In South Dakota, however, there's overwhelming opposition to the Lakota proposal. The governor, both houses of the state legislature, two United States senators and the one congressman all oppose it. Even those who consider themselves sympathetic to Indian issues and concerns are opposed to any Black Hills settlement. For many people, this is an issue that seems very difficult to discuss.

Again, the problem is twofold. One is that some people can't believe this very, very brief synoptic history that I've given. They say "What? I never learned that." One of the aspects of education which again manifests itself very often in the context of education about Indian issues is that not only do we sometimes fail to teach basic facts to create a knowledge base, but we have such an investment in education that education certifies a certain version of history as authentic. If you didn't learn about the Black Hills issue, if you didn't learn about tribal government, not only do you lack that knowledge base, but when it is introduced to you as an adult you see it as inauthentic as well.

### Marginalized in History

As a result, the tribes must struggle against this situation, a situation which marginalizes them in the educational process. It's very difficult to capture authenticity when you've been marginalized. Often, tribes are not even marginalized; they are just out of the picture entirely. Being on the margin indicates that you're actually on some border. In many cases, Native Americans in history have not even been inside the schoolhouse at all.

Even when significant numbers of Indian people are not present in a particular location, these issues are of absolutely critical importance. For better or for worse, many of these issues will be determined at the federal level, and, therefore, citizens around the country need to be informed about issues involving Native Americans. I don't think it's acceptable to say "Well, we don't have any Indian people or tribes in our state so it's not important." It is just as important.

There are three important suggestions relating to reconciliation that I would like to leave with you. One is to listen. This seems to be very difficult for non-Indian people to do. We like to fill space. We like to talk, to have some sort of buzz

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# The Challenge of Diversity

## Tribal Sovereignty Past and Present/Secondary

Gayle Mertz

### Objectives

1. Students will become acquainted with a basic definition of tribal sovereignty.
2. Students will analyze and evaluate the fairness of actions and formal decisions which have contributed to definitions of tribal sovereignty.
3. Students will apply legal and historical concepts of tribal sovereignty to contemporary issues.

### Suggested Grade Level

Ninth through twelfth grades

### Introduction

Tribal sovereignty is an elusive and complex concept. It is also at the core of conflict between Indians and non-Indians. This lesson introduces the concept, and identifies some of the inconsistencies in definitions that have been applied throughout history. The background information provided below compliments the article by Frank Pommersheim which appears elsewhere in this issue. The article and the background information are critical parts of this activity.

### Background Information

The definition of tribal sovereignty depends upon who is defining it, and when and where it is being defined. Webster defines sovereignty as "supreme excellence or an example of it; a supreme power over a body politic; freedom from external control, or an autonomous state." When Indian tribes first encountered Europeans they were sovereign; they conducted their own affairs and depended on no outside power to define or legitimize their governments. Colonial powers, operating with absolute sovereignty, did not challenge the right of Indians to regulate their own internal affairs and entered into government to government treaties with the tribes.

Later, when this nation was being formed, political theorists developed a theoretical foundation for sovereignty in a federalist system where power by definition was shared. Thomas Jefferson stated that sovereignty in an absolute sense was "an idea belonging to the other side of the Atlantic." In this new system, neither the states nor the federal government had absolute power. This change in perspective was applied to Indian tribes as well.

Chief Justice Marshall penned three important Supreme Court decisions which established that (1) Indian tribes were sovereign before European contact and (2) some sovereign powers were restricted after the United States was established.

#### *Johnson v. McIntosh (1823)*

In this decision, the Court ruled that the tribes' "rights to complete sovereignty, as independent nations, were necessarily diminished" and restricted the tribes' rights to transfer land freely. Following this decision, land could only be transferred to European nations, and later to the United States.

#### *Cherokee Nation v. Georgia (1831)*

In a case brought by the Cherokee nation, the Court was asked to restrain the state of Georgia from executing state laws which would "annihilate the Cherokees as a political society, and...seize, for the use of Georgia, the lands of the nation which have been assured to them by the United States in solemn treaties...." In his opinion, Chief Justice Marshall wrote: "Though the Indians are acknowledged to have an unquestionable, and heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated by foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations...."

#### *Worcester v. Georgia (1832)*

In his opinion, Chief Justice Marshall discussed tribal powers both before and after contact with European nations. Before contact, "America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws.... The Indian nations had always been considered as distinct, independent political communities retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power." Ruling for the Cherokee nations, he continued: "...the original rights of the tribes continued, except those abridged by the United States."

These three cases established the foundations of Indian tribal sovereignty, and subsequent decisions have applied them to specific situations. Several notable decisions include (1) a prohibition on tribes exercising criminal jurisdiction over non-Indians; (2) a decision affirming civil jurisdiction over non-Indians; (3) prohibitions on selling alcohol on reservations; and (4) authority to sponsor gaming on reservations.

Some of the fundamental sovereign powers that have been recognized by federal law and retained by Indian tribes include:

- power to establish their own form of government;
- power to define who is eligible for tribal membership;
- power to legislate substantive civil and criminal laws;
- power to regulate land use and levy taxes;
- power to create a tribal police force;
- power to administer justice through tribal courts;
- power to exclude persons from the reservation; and
- power to charter and regulate private corporations.

### Procedure

1. Introduce students to the concept of tribal sovereignty by discussing the article by Frank Pommersheim in this issue and the information above.

# CHART OF CRIMINAL JURISDICTION IN INDIAN COUNTRY BY PARTIES AND CRIMES

Crime by Parties	Statutory Jurisdiction	Authority
a. Crimes by Indians against Indians:		
i. "Major" crimes	Federal or tribal (concurrent)	18 U.S.C.A. §1153
ii. Other crimes	Tribal (exclusive)	
b. Crimes by Indians against non-Indians:		
i. "Major" crimes	Federal or tribal (concurrent)	18 U.S.C.A. §1153
ii. Other crimes	Federal or tribal (concurrent)	18 U.S.C.A. §1152
c. Crimes by Indians without Victims:	Tribal (exclusive)	
d. Crimes by non-Indians against Indians:	Federal (exclusive)	18 U.S.C.A. §1152
e. Crimes by non-Indians against non-Indians:	State (exclusive)	
f. Crimes by non-Indians without Victims:	State (exclusive)	

## Notes:

- This chart does not reflect federal crimes applicable to all persons in all places, such as theft from the mails or treason.
- This chart does not apply to Indian country over which the state has taken jurisdiction pursuant to Public Law 280. 18 U.S.C.A. §1162.

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- Ask students to identify key elements of tribal sovereignty and make a list on the chalkboard, adding new ideas to the list as the class discussion continues.
- Be sure to explain to students that tribal sovereignty is very difficult to define, and that it is even more difficult to predict how the concept will be applied by a judge, a Bureau of Indian Affairs administrator, or the United States Congress. Direct them to the portion of Professor Pommersheim's article which contains the following observation: "...constitutional dimensions and parameters of tribal sovereignty are not always clear. It is not always possible to define the nature of tribal sovereignty in any particular dispute." Explain to students that despite this difficulty, they will attempt to apply tenets of sovereignty to a situation recently argued in the United States Senate.
- Provide students with copies of the following chart that

categorizes criminal jurisdiction in Indian country.

- Read or distribute the student handout.
- Divide the class into groups of three or four students each and have them discuss the situation described in the handout. Then ask them to apply the landmark Supreme Court decisions and the class's list of the elements of sovereignty to the bill introduced in Congress. Ask each group to prepare a statement explaining why this is, or is not a sovereignty issue. Each group should then present their statement to the entire class. This might be followed by further discussion or debate.
- Once the discussion or debate has concluded, tell the students that the bill did not pass in 1989 but was reintroduced as the Violent Crime Control Act of 1991. The new bill included the provision allowing Indian tribes to decide whether the death penalty should apply to them. During debate and political bargaining, the provision was dropped. Once again, Senator Inouye submitted the provision as an amendment to the crime bill, but before the amendment was adopted Senator Thurmond attempted to withhold the option from tribes located in states that have a death penalty. Speaking in opposition to Senator Thurmond's position, Senator Domenici of New Mexico made the following statement: "Either the Indian tribes are sovereign or they are not sovereign. As the Thurmond amendment tries to do, we cannot say they are not sovereign in some states—those that have capital punishment—(and) sovereign in the remainder of states." Senator Thurmond's proposed amendment failed by a vote of 29-69.

## Student Handout

Senator Thurmond of South Carolina introduced the Federal Death Penalty Act of 1989. The bill, if passed, would provide the federal death penalty for a number of crimes: espionage, treason, attempt to assassinate the president, killing a foreign official or bank robbery resulting in death, and first degree murder.

In 1988, there were no federal prosecutions for espionage, treason, attempt to assassinate the president, killing a foreign official, or bank robbery resulting in death. However, an average of some 85 first degree murder cases are heard in federal court each year. In 1988, 62% of these cases involved murders committed on Indian lands, and nearly 78% of those convicted of homicide in federal court in a sixteen-month period were American Indians and Alaska Natives.

Senator Inouye of Hawaii introduced an amendment to Senator Thurmond's bill to protect Indians from the disproportionate impact of a federal death penalty. While recognizing that the federal government has jurisdiction over Indians who commit major crimes on Indian land, Senator Inouye's amendment allowed tribes to decide whether to apply capital punishment as a penalty for first degree murder committed on their reservations. He said that the amendment would protect the sovereign interests of Indian tribes, and allow them to decide, just as the states do, which penalties shall apply to particular crimes.

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# The Challenge of Diversity

## Indian Issues and Party Platforms/Secondary

Gayle Mertz

### Objectives

1. Students will learn about and apply principles and procedures of developing a political party platform.
2. Students will research, assess, and define political issues of particular interest to members of Indian communities living within the United States borders.
3. Students will formulate the above issues into political platform statements.

### Suggested Grade Levels

Ninth through twelfth grades

### Materials

Copies of political platforms and articles about contemporary Indian issues.

### Background

*Indians and the political process.* According to 1990 census figures, 1,959,234 individuals living in the United States identify themselves as American Indians or Alaska Natives. (This figure is considered by many to be considerably lower than the actual number of Indians living in the U.S.) There are currently 510 federally-recognized tribes in the United States. The term "federally-recognized" means a tribe or group that has a special legal relationship to the United States government and its agent, the BIA (Bureau of Indian Affairs). Some Indian tribes and groups do not have federal-recognized status, but are state-recognized.

Indians are United States citizens. In 1924, Congress granted citizenship to all Indians born within the territorial limits of the United States. Prior to that date about two-thirds of the Indian population was granted citizenship through treaty agreements, statutes, naturalization proceedings, and by serving in the armed forces during World War I and receiving an honorable discharge.

Indians have the same right to vote and run for office as any other citizen of the United States. These rights, however, have only been affirmed in the past several decades. In 1948, the Arizona Supreme Court declared unconstitutional disenfranchising interpretations of the state constitution and paved the way for Indians to vote in most states. It wasn't until 1953 that a Utah state law that barred Indians living on reservations from voting was overturned, and, in 1954, Indians in Maine who were not then federally recognized were given the right to vote. Most recently, New Mexico extended the right to vote to Indians in 1962. Indians can vote in federal, state, local, and tribal elections. Each tribe has the right to establish its own determination of who is eligible for tribal membership and voting privileges.

Indians have been elected and appointed to offices at all levels of government. At the federal level, Charles Curtis, a member of the Kaw tribe served as Vice President of the United States under President Herbert Hoover; Ben Reifel, a Sioux from South Dakota, served for five terms in the U.S. House of Representatives; and Ben Nighthorse Campbell, a member of the Northern Cheyenne Tribe of Montana, is cur-

rently serving his third term representing the Third District of Colorado in the U.S. House of Representatives. Numerous Indians have served, and are currently holding elective office in state and local governments across the nation.

*Political platforms.* In preparation for an election, political parties and/or candidates prepare statements which identify key issues that will be debated in the upcoming election, and articulate their policies and positions on these issues. The process of developing a platform for a political party differs from place to place, but usually begins with a small committee creating a draft platform that is then reviewed and revised by party members in their town, city, county, or other jurisdictional area; and then is advanced to a county, district, or state convention for further scrutiny and revision at that level.

Political platforms usually include broad philosophical statements (i.e., "The Democratic Party is committed to providing everyone with an opportunity to achieve economic success. Individuals have the responsibility to take that opportunity and realize their own potential...." (Boulder County, Colorado, Democratic Party platform, 1992) and statements (or planks) addressing very specific local, or national issues (i.e., "...In reaffirming human rights and liberties, we urge repeal of the amendment to the Colorado constitution establishing English as the state's official language...." (Boulder County, Colorado, Democratic Party platform, 1992.) Political platforms are discussed, debated, revised and adopted at party conventions. During this presidential election year, each major party will adopt a platform at its national convention. Prior to the national conventions, local branches of political parties will adopt their own platforms. The platforms form a foundation of principles that will be supported by candidates representing each political party.

Despite the fact that Indians are part of the electorate, and sometimes hold office and represent U.S. citizens, "Indian issues" are rarely if ever included in the platforms of political parties, or of candidates running for office. A brief mention of "Native Americans" was made in the 1988 national Democratic Party platform. "...We...believe that the voting rights of all minorities should be protected, the recent surge in hate violence and negative stereotyping combatted, the discriminatory English-only pressure groups resisted, our treaty commitments with Native Americans enforced by culturally sensitive officials, and the lingering effects of past discrimination eliminated by affirmative action...."

While developing this lesson, I informally asked several Indian friends what Indian issues they would like to see addressed in a political party platform. First and foremost their answers focused on Indian sovereignty, i.e., "Recognize tribal sovereignty and recognize that there are sovereign nations within this country." Other suggestions included: "Develop an educational process to educate people about what tribal sovereignty is"; "Honor all treaties as originally written"; "insure religious freedom, including access to religious sites"; "recognize and address the devastating effects of Indian alcoholism and the prevalence of

Indian fetal alcohol syndrome"; and "recognize Indians as government entities as well as racial groups."

### Procedure

1. Discuss background material and the article by Frank Pommersheim, which is printed elsewhere in this issue, with the class.
2. Brainstorm, and record a class list of local and national Indian issues that students are aware of. If students are not aware of issues a few contemporary issues that can be raised for discussion include:

#### *Hunting and Fishing Rights*

Hunting for subsistence purposes is common among reservation Indians, and the courts have protected their right to hunt and fish on the reservation without state interference. The courts have generally protected the right to hunt and fish at "usual and accustomed grounds" off the reservation as well but the custom of doing so has resulted in conflict with non-Indians who hunt and fish.

#### *Reservation Gaming, or Gambling*

Until recently, reservation gaming was regulated solely by tribes. Federal and state laws were considered unenforceable on reservations. Tribes often voluntarily negotiated the size and scope of their gaming operations with state officials. Several states are now attempting to enforce state law on Indian lands. While court cases appealing state action are pending, tension and conflict is increasing. Some tribes use the income derived from gaming to provide education, health care, and housing for tribal members.

#### *Reservation Mineral Leasing*

Indian reservations contain nearly five percent of the proven reserves of U.S. oil and gas, 30 percent of the strippable low-sulfur coal and 50 to 60 percent of the uranium within U.S. boundaries. This gives a small segment of the population control of a large portion of the nation's energy resources. Courts have ruled that Indians have the right to control and lease minerals on their land and are exempt from paying state mineral taxes. The question of whether Indian nations must comply with federal clean air standards associated with mineral extraction has not been settled.

#### *Return of Human Remains and Sacred Objects*

Many museums and private collectors own and often display Indian skulls, skeletal remains, and sacred artifacts. Indian nations are demanding that all such items be returned to the tribes. Owners of these items often insist that they have paid for the items and that they are theirs to keep and use as they see fit.

3. Ask students to contact the offices of political parties, or candidates and request copies of platforms and campaign literature, or provide these materials for them.
4. Have students to survey friends or family members to determine the extent of their knowledge about Indian issues and what new issues and information about the issues can be added to the class list. Library research may be part of this step if time permits.
5. Lead a class discussion in which students compare the official platforms and the issues they are aware of. Are



Indian issues reflected in the platforms? Are Indian issues different than issues facing the general public or other special interest groups? Why are these issues included or excluded? Would candidates gain or lose support if they paid more attention to Indian issues? Would the public understand—or care about—these issues?

6. Divide the class into small groups and tell them that each group represents a political district. Give each group a copy of an adopted party platform and a selection of articles about Indian issues (both local and national if possible). Ask each group to revise the platform to address "Indian issues" either as separate issues, or to rewrite existing planks to better address the concerns of Indian people.
7. Conduct a mock political convention in which each group presents and defends its new planks, allow groups to negotiate compromise planks, or add and delete planks. Discuss the fairness, appropriateness and viability of the new platform.
8. If possible, invite a candidate, or elected official to appear before the class to discuss, and comment on the class platform.

Gayle Mertz is Director of the Safeguard Law-Related Education Program in Boulder, Colorado.



# The Challenge of Diversity

Working Toward Justice in Diversity/Middle

Constitutional Rights Foundation Chicago

## Background

Many educators are striving to help students to understand, appreciate, and benefit from our increasingly diverse school population. One of their underlying concerns is to avoid the ugly effects of prejudice and resulting discrimination against people of other races, many of whom are recent immigrants to this country. These people are already battling to learn a new language and a new culture; societal discrimination would result in greater alienation, a waste of talent, and increased social conflict.

Many recent immigrants themselves come from countries where populations have been homogenous for generations. Here they, too, are learning to live with people from all parts of the globe in a society whose ideals include tolerance and equality for all.

How to help native-born and immigrant students understand U.S. political life and the rights we all share is taken up in *It's Yours: the Bill of Rights*, a new student text published by the Constitutional Rights Foundation Chicago. The book's lessons are designed to facilitate understanding between students from different ethnic groups. The following lesson, using cooperative learning activities, is adapted from Unit 6, which deals with equality under law. The lesson can be divided to span several class periods and fits well into a unit on the Constitution or in a U.S. history unit on the civil rights movement.

## Objectives

As a result of this lesson, students will:

### Content

1. Identify examples of fair and unfair discrimination and support decisions with reasons;
2. Review civil rights laws; and
3. Identify the civil rights law that applies to a problem situation.

### Language

4. Read for detail and support reasons in writing working in a cooperative group; and
5. Demonstrate understanding by giving an oral explanation of a group decision.

## Part 1: Discrimination

### Procedures

1. Duplicate Student Handout 1 and give to students.
2. Use the opening questions to assess students' opinions on a variety of discrimination issues.
  - a. You can ask what makes a difference in how people are treated? Age? Occupation? Nationality? Income? Sex? Try to get students to give examples from their own experience, as well as that of their families or friends.
  - b. You can put student contributions on the board quickly as they talk. After some discussion, try to pull out the types of discrimination that affect basic civil rights and the right to equality of opportunity in this country.
  - c. If the term "discrimination" doesn't come up, you can

introduce it and have students help you define it.

Bring out the fact that while some kinds of discrimination might be necessary, other kinds are unfair.

- d. Finally, ask what they know about the rules in this country about unfair discrimination. What kind of protection can we get from the laws? This should help you assess their level of knowledge. Tell them this lesson will look at what the laws say about equality today.
  - e. Although this lesson will present gains in equality of rights in the United States, in no way should it suggest that injurious discrimination does not exist today. If your class includes immigrant or minority students, they have often experienced this first-hand; women and girls, gays and lesbians, the disabled continue to agitate for greater rights. Students should feel free to express their ideas. Reading of changes that have come about in the past may give them ideas about how they would like to shape the future.
3. Read the introduction to the discrimination activity with the students. Amplify if they have questions. Government does classify people for legitimate interests of society. For example, children are not allowed to drive motor vehicles.
  4. Have students do the exercise on discrimination in pairs. They should answer the questions and try to come to a shared decision. If members of a pair differ, each should have a reason for his/her decision. Students must determine if the discrimination is reasonable or unreasonable. Is there a logical basis for the action, or does it deny equality of opportunity? If necessary, students can complete this exercise for homework.

## Part 2: Civil Rights Laws

### Procedure

1. Distribute copies of Student Handout 2 to the class. Begin with the "Before You Read" question so students recognize the changes that have taken place since the days of segregation. Have them name as many places as possible where people of all races now mingle.
2. Do the reading with the class to see how greater integration came about. Again, you can augment this section with your experiences, pictures, videos. You can tell students that while *disabled* is now the preferred term for people with disabilities, they will also find the word *handicapped* used.
3. Give students copies of Student Handout 3, "Each One Teach One." Do the activity to teach students the important civil rights laws. You can put each law on a file card and distribute a law to each student. (An alternative would be to have two students work together to learn a law.) Instruct students to learn the laws first. Answer any questions they may have. Then have students move around to teach their laws to other students and learn laws from them. Remind students to question the person they are teaching to be sure he or she understands. Give them a time limit. When the time is up, have students



return to their seats and ask them to tell two of the laws they learned.

### Part 3: Applying Civil Rights Laws

#### Procedure

Review the civil rights laws studied previously. Then divide students into groups, distribute copies of Student Handout 4, "Can They Do This?" and review instructions for the activity. There are five situations. Circulate and give help to groups as needed. Depending on your class, you can ask a student from each group to summarize the problem and give the two-sentence decision, or you can do a "jig-saw." To do this, have students in each group count off from one to the total number of students in the group. Then have all the "ones" form a group, the "twos," etc. Since students in the new groups will have worked on different situations, each can now teach the group about their particular problem situation and explain how a civil rights law does or doesn't apply to the case. When you use the jig-saw, all students hear all situations and the applicable laws, and all have an opportunity to make a short oral presentation.

#### Additional Activities

1. Have some students research local government human rights departments, private rights organizations, and state or city human rights laws. States and cities sometimes go further than the national government in extending such rights.
2. Ask students to think about what they have studied in this lesson. Have them give their own opinions by completing the sentences below. Tell them to give as much information as possible to explain their answers.

*I was surprised to learn that...*

*I think my family and/or friends should know that...*

*A question I would like to ask is...*

#### Answer Key

*For Part 1:* In terms of U.S. law, number 1 reflects the driving experience of this group even though some males under 25 do not have accidents. The law does not forbid this discrimination. Number 2 is not legal under the Civil Rights Law of 1964 which forbids discrimination by national origin. The 1986 Immigration Reform and Control Act also has an anti-discrimination provision that includes employers not already covered by federal laws. Number 3 is obviously reasonable since good vision is necessary to operate an airplane safely and efficiently. Number 4 is legal. An owner can refuse to rent or sell to persons who do not have the income to pay the monthly rent or mortgage payments.

*For Part 3:* (1) 1. "Equal pay for equal work for men and women." Ann and Joe do essentially the same work even though their titles are different. The Equal Pay Act of 1963 requires equal pay when the work is equal even if different job titles are given.

(2) 9. "No discrimination in schools (sports, teachers, college loans, etc.)." This is part of the Civil Rights Act of 1964 (amended in 1972). Since these laws are summarized rather generally for students, choosing item 4, "No discrimination by race, color, religion, sex or national origin by state and local governments and public schools and universities" is also logical. Title IX of the Education Act Amendments of 1972 requires school athletic programs to accommodate

both sexes, although spending equal money on men's and women's sports is not required.

(3) 6. "No discrimination by race, color, religion or national origin in selling or renting most houses and apartments." It is true that landlords and sellers can require that a person have sufficient income to pay and good references. However, under the Fair Housing Act, landlords may not discriminate against people in the categories listed ("protected categories") if a housing unit is over four units. The 1968 Act was amended in 1988 to include families with children as well as the disabled in the protected categories. Restricting housing to a certain group is only allowed for the elderly.

(4) This example does not violate any of the civil rights laws; it is possible to specify an age of maturity, and 21 is an accepted measure.

(5) 4. "No discrimination by race, color, religion, sex or national origin by state and local governments and public schools and universities." This example is modeled on an actual Supreme Court case, *Keyes v. Denver School District # 1*, (1973).

#### Student Handout 1: Working Toward Justice in Diversity

The United States is sometimes called the land of equality—a place where people are treated in the same way, a place where people have an equal chance to succeed. Think about what you have seen in this country. Would you say that all people are treated the same? Always? Sometimes? Is it ever all right to treat people differently?

#### Discrimination: Right or Wrong?

Discrimination means to treat some people differently from others. Sometimes there is a good reason for discrimination. Would you want 10-year-old children to drive cars? Other times discrimination hurts people. Which of the following examples of discrimination do you think are reasonable? Which examples would you want to change? Why?

1. Men under 25 years old have more car accidents than other people. They must pay more for car insurance.
2. Jones Candy Factory will not hire anyone with a foreign accent.
3. Alta Airlines will not hire a pilot who is blind.
4. Lee wants to rent a five-room apartment in Rosedale. The owner will not rent to Lee because Lee has no job and no money.

These examples show that it is not always easy to decide if discrimination is fair or unfair. When discrimination denies people equal opportunity for jobs and schools, it is unfair. History tells us there has been a long struggle for equal rights and fair treatment.

#### Student Handout 2: Civil Rights Laws

##### Before you read:

What are some places in your town where you see people of different races together?

\* \* \*

The Fourteenth Amendment forbids race discrimination by state and local governments. But before the 1960s, privately owned facilities like factories, hotels, and restaurants did not have to serve or hire blacks or other minorities if

they didn't want to. Discrimination was not against the law on "private property."

African-Americans wanted new laws to stop all discrimination. They wanted the right to have jobs that paid well, to live in any community, and to go to any hotel or restaurant. Other Americans agreed and worked with blacks to fight racism. Together they asked people to sign petitions and write letters to Congress. They organized protest marches of thousands of people. Often the marchers were attacked by police or by white people who didn't want blacks to have equal rights.

Sometimes people wouldn't follow segregation rules that they thought were unjust. For example, blacks would sit down in a restaurant for whites only and ask to be served. Often the owner called the police, who took the protesters to jail for civil disobedience.

#### *Many Groups Wanted Equal Rights*

Were African-Americans the only group that protested discrimination? No. Women, disabled people, Latinos, Native Americans, older people, and other minority groups also organized and demanded equal rights.

Because of this pressure for change, Congress began to pass civil rights laws in the 1960s. These laws said facilities that serve people, like restaurants and hotels, must be integrated. Private employers and businesses could not discriminate unfairly against women and minorities.

For example, an employer could not say, "This is my factory. I don't want to hire people of color, so I won't."

#### **Student Handout 3: Each One Teach One**

Your teacher will give one of these civil rights laws to you. You will learn one law and then teach it to other students. Listen to be sure other people learned your law. You will also let other students teach you a law. At the end of this activity, be ready to tell about two laws you learned from someone else.

Here are some of the most important parts of today's federal civil rights laws:

1. Equal pay for equal work for men and women.
2. No discrimination by race, color, religion or national origin in public places (hotels, restaurants, theaters, etc.).
3. Disabled people have the right to jobs, education, and business services.
4. No discrimination by race, color, religion, sex or national origin by state and local governments, public schools, and universities.
5. No discrimination by race, color, sex or national origin in programs that receive money from the federal government.
6. No discrimination by race, color, religion or national origin in selling or renting most houses and apartments.
7. Disabled children have a right to a good education.
8. No discrimination against people over 40 years old by businesses with 20 or more employees.
9. No discrimination by sex in schools (sports, teachers, college loans, etc.).
10. No discrimination by race, color, sex, religion or national origin in employment by businesses with more than 15 employees or by labor unions.

If these laws are not obeyed, people can complain to a government agency or sometimes take a case to court.

#### **Student Handout 4: Can They Do This?**

In small groups, discuss one of the problems given below.

- First, read the problem. Everyone can help with vocabulary words. Be sure everyone understands the problem.
  - Read the civil rights laws listed in Student Handout 3 to see if one of them applies to this problem.
  - As a group, write two sentences telling why you think the school or company is, or is not, violating the law. Each person in the group should copy the sentences.
  - Be ready to explain the problem and read your group's decision to the class.
1. Ann Lewis and Joe Harris work for Mason Bank in the loan office. They have the same education and work experience. They both have good work evaluations. Ann writes reports, gives information on the phone, and organizes files for her supervisor. Her job title is Junior Secretary. She is paid \$19,000 a year. Joe writes reports, gives information on the phone, and organizes the files for his supervisor. His job title is Assistant to the Supervisor. The bank pays Joe \$22,000 a year. Does this violate the law?
  2. Forest High School is a small public school with 200 students. The school does not have much money for their sports program. John Williams, the principal, wants to spend the money on football, basketball and baseball teams for the boys. If he does this, he won't have money for any girls' teams. Mr. Williams says the boys need to have the teams. Colleges will pay tuition for boys who are very good at sports. Colleges don't pay for many girls who are good at sports. Mr. Williams says it's better to use the money for the boys' teams. Does this violate the law?
  3. Luis Garcia and his wife own a building with 10 apartments. One of the apartments is for rent. All the other tenants are Latino, and they feel like a big family. They want Luis to keep the building all Latino. One day, Sam Jung, an immigrant from Korea, comes to see the apartment. He wants the apartment because it is close to his work. Luis doesn't know what to say to him. Then he tells Sam Jung that he rented the apartment to somebody else. "What I told Mr. Jung wasn't true, and I feel bad. But I can't rent to a Korean family," Luis tells his wife that night. "The other families wouldn't like it. Anyway, can't I decide? It's my building." Does this violate the law?
  4. Southeast Electric Company has a fair hiring policy. They hire men and women and members of minority groups. But an employee must be 21 years old to work in the Control Room. Southeast says that the Control Room is dangerous. A person must know a lot about the computer and electrical systems and be very mature and responsible. Peter is 20 years old and has three years of experience working with computer and electrical systems at Southeast. His supervisor says Peter is very good at his work. The supervisor says Peter knows how to do the work in the Control Room. Peter says that Southeast's rule discriminates against him. Is Southeast Electric Company violating the law?

*Adapted with permission from It's Yours: the Bill of Rights, written by Sheila Brady, Carolyn Pereira, and Diana Hess and published by Constitutional Rights Foundation Chicago. Copyright © 1991 Constitutional Rights Foundation Chicago.*

# VOTE

## EDUCATE OUR FUTURE VOTERS



Special Committee  
on Youth Education  
for Citizenship



### TEACHING KITS

**Title:** **Vote about It**  
**Grade Level:** Secondary  
**Contents:** Materials are designed to encourage high school students to register and vote. Included in the package are: a guide for teachers with reproducible work sheets; wall chart showing voting regulations in 50 states; wall map showing 1988 state-by-state voter participation; Vote about It poster and stickers.  
**Cost:** Free  
**Order From:** Vote America Foundation, 1200 19th St., N.W., Suite 606, Washington DC 20036, 202/659-4595

### CURRICULA

**Title:** **First Vote: A Teaching Unit on Registration and Voting**  
**Grade Level:** 12th  
**Contents:** Lessons address the topics: attitudes toward voting, preparing for adulthood, becoming a contributing member of society, more people in America get the right to vote, and what do you care about it? The sixth lesson includes information about registering to vote and actual registration for those eligible.

**Cost:** Free  
**Order From:** People for the American Way, 2000 M Street, N.W., Suite 400, Washington D.C. 20036, 202/467-4999

**Title:** **KIDS VOTING**  
**Grade Level:** K-12  
**Contents:** This licensed program is a 50/50 cooperation between the school system and the community. The KIDS VOTING curriculum is taught at all grade levels and students accompany their parents to polling places to cast special ballots on election day. Licensees receive implementation manuals, curricula for all grades (1,300 pages) and on-site consulting.  
**Cost:** Licensing fee plus about \$1.50 per child, about 35% raised in cash and the remainder in-kind (e.g. printing).  
**Information:** KIDS VOTING, Marilyn Evans, President, 398 S. Mill Avenue, Suite 304, Tempe, AZ 85281, 602/921-3727

**Title:** **Taking Part: An Elementary Curriculum in the Participation Series (Revised Edition)**  
**Grade Level:** K-6  
**Contents:** Activities explore many forms of democratic participation and empowerment, explain simple decision-making models and introduce the electoral process; 43 pages.  
**Cost:** \$15.00 nonmembers, \$13.50 members; volume discounts available; add 10% of total for shipping and handling  
**Order From:** Educators for Social Responsibility, 23 Garden St., Cambridge, MA 02138, 800/370-2515

**Title:** **Making History: A Social Studies Curriculum in the Participation Series**  
**Grade Level:** 7-12  
**Contents:** Activities explore the meaning of empowerment, both in the community and in the nation at large. Students review case studies of community action, learn about various models for decision making and discuss strategies for creating change; 90 pages.  
**Cost:** \$15.00 nonmembers, \$13.50 members; volume discounts available; add 10% of total for shipping and handling  
**Order From:** Educators for Social Responsibility, 23 Garden St., Cambridge, MA 02138, 800/370-2515

**Title:** **Teaching Presidential Elections**  
**Grade Level:** 9-12  
**Contents:** This 10-page booklet teaches about the nominating process, how to distinguish between the popular and the electoral vote and how to evaluate the candidates.  
**Cost:** \$5.95 plus \$1.50 for shipping and handling  
**Order From:** Close Up Publishing, 44 Canal Center Plaza, Alexandria, VA 22314, 800/765-3131

## ACTIVITY BOOKS

**Title:** **The "Elections Books 1992" Series**  
**Grade Level:** K-1, "We Choose Our President," #21569, 16 pages; 2-3, "How We Elect a President," #21669, 24 pages; 4-6, "Electing the President," #21869, 32 pages; 7-9, "Path to the White House," #21969, 32 pages  
**Contents:** History of U.S. political parties and elections; the caucuses and primaries; who can vote; campaign planning; responsibilities of the president; qualifications for office; the electoral college. Activities include: comprehension quizzes; vocabulary quizzes; mock elections; poll-taking; fun facts about U.S. presidents; tracking elections.  
**Cost:** \$2.25 each  
**Order From:** Customer Service, Weekly Reader Skills Books, 4343 Equity Drive, Columbus, OH 43216, 800/446-3355

**Title:** **You've Got the Power**  
**Grade Level:** Secondary  
**Contents:** A 30-page guidebook of activities for schools and classes to teach about the election. "The Birthday Card," a birthday card with a greeting welcoming 18-year-olds to participation in the election process and sized for containing a state election registration form.  
**Cost:** Free; quantities limited.  
**Order From:** California Secretary of State, Elections Division, Attn: John Mott-Smith, 1230 J Street, Rm. 232, Sacramento, CA 95814, 916/945-0820

## PAMPHLETS

**Title:** **How to Judge a Candidate (#818)**  
**Grade Level:** Secondary  
**Contents:** Seven steps on how to evaluate a political candidate. Also included are sections entitled "See through distortion techniques" and "Evaluate candidates' use of television," as well as a "Candidate Report Card" for the student to complete.  
**Cost:** \$.75 each (quantity discounts available) plus \$1 shipping and handling  
**Order From:** League of Women Voters, 1730 M. Street, N.W., Washington DC, 20036, 202/429-1965

**Title:** **How to Watch a Debate (#819)**  
**Grade Level:** Secondary  
**Contents:** Subheadings include "Candidate Debates: A Behind the Scenes Look," "Impact of Debates," and "Rate the Debate." Suggested activities also included.  
**Cost:** \$.75 each (quantity discounts available) plus \$1 shipping and handling  
**Order From:** League of Women Voters, 1730 M. Street, N.W., Washington DC, 20036, 202/429-1965

**Title:** **Getting Out the Vote: A Guide for Running Registration and Voting Drives (#424)**  
**Grade Level:** Voting-age students  
**Contents:** A 16-page booklet explaining how to run a voter registration and "get out the vote" drive.  
**Cost:** \$1.25 each (quantity discounts available) plus \$1 shipping and handling  
**Order From:** League of Women Voters, 1730 M Street, N.W., Washington DC, 20036, 202/429-1965

**Title:** **A Citizen's Gameplan for Watching the 1992 Presidential Debates**  
**Grade Level:** Secondary and adult  
**Contents:** Activities for before, during, and after the presidential debates including a presidential scorecard for rating the debates. Co-sponsored by the League of Women Voters.  
**Cost:** Free  
**Order From:** Debate America, Attention: Eric Rosen, 5310 North Bluemont Drive, Arlington, VA 22203, 703/524-2793

## COMPUTER SOFTWARE

**Title:** **Presidents/The Medalists**  
**Systems:** Apple and MS-DOS, 5 1/4" and 3 1/2"  
**Grade Level:** 6-7  
**Contents:** Facts about U.S. presidents with follow-up drill.  
**Cost:** \$49.95  
**Order From:** Hartley Courseware, 133 Bridge Street, Dimondale, MI 48821, 800/247-1380

**Title:** **The Voting Machine**  
**Systems:** Apple  
**Grade Level:** All grades  
**Contents:** Use an Apple computer as an electronic poll taker; record-keeping features enable analysis of voting results and data  
**Cost:** \$59.95  
**Order From:** Hartley Courseware, 133 Bridge Street, Dimondale, MI 48821, 800/247-1380

## **SIMULATIONS**

**Title:** **Delegate: A Simulation of a National Political Party Convention**  
**Grade Level:** 7-9  
**Contents:** Students are divided into five groups, from radical to reactionary, which work to build the platform and to select the nominee by bargaining and compromising with the various candidates.  
**Cost:** \$20  
**Order From:** Interact, P.O. Box 997, Lakeside, CA 92040, 619/448-1477

**Title:** **Electors: A Simulation of the Electoral College Process**  
**Grade Level:** 7-9  
**Contents:** Students play roles of the two major party candidates and the chairs of each state's electors. Features playing roles of the 1824 election, which resulted in a deadlock resolved in the House of Representatives.  
**Cost:** \$23  
**Order From:** Interact, P.O. Box 997, Lakeside, CA 92040, 619/448-1477

**Title:** **Votes: A Simulation of Organizing and Running a Political Campaign**  
**Grade Level:** 7-9  
**Contents:** Candidates, staff and voters all play a role in this simulation. Committee members determine issue positions, disperse funds and make decisions.  
**Cost:** \$20  
**Order From:** Interact, P.O. Box 997, Lakeside, CA 92040, 619/448-1477

## **VIDEOS**

**Title:** **First Tuesday**  
**Grade Level:** 8th and up  
**Contents:** A futuristic story in which a group of students set out to reinstate voting, which had been eliminated in the U.S. due to apathy.  
**Length:** 20 minutes  
**Cost:** \$20  
**Order From:** San Diego Registrar of Voters, Attention: Vicki Chappell, 5201 Ruffin Rd., Suite I, San Diego, CA 92105, 619/694-3403

**Title:** **First Vote**  
**Grade Level:** 12th  
**Contents:** A collage of on-the-street interviews, teen discussion, and historical sequences addressing the responsibilities of being an adult, the importance of voting, the enfranchisement of minorities and young people, and the impact of young people's participation in changing their communities.  
**Length:** 12 minutes  
**Cost:** Variable  
**Order From:** People for the American Way, Sanford Horwitt, Director of the Citizen Participation Project, 200 M Street, NW, Suite 400, Washington DC 20036, 202/467-4999

**Title:** **Your Vote**  
**Grade Level:** Middle through secondary  
**Contents:** History of the right to vote in America, reviewing the development of universal suffrage, highlighting the people and events that won the vote for African Americans, women, Native Americans, and 18-year-olds.  
**Length:** 27 minutes  
**Cost:** \$30 includes copy of the Teaching Guide and Display Poster; quantity discounts available.  
**Order From:** Taft Institute, 420 Lexington Ave., Suite 2601, New York, NY 10170, 212/682-1530

## **BOOKS**

**Title:** **Choosing the President 1992: A Citizen's Guide to the Electoral Process**  
**Grade Level:** Secondary and adult  
**Contents:** A 160-page book by the League of Women Voters of California Education Fund. It analyzes the workings of political parties; campaign finance systems; convention delegate selection; party conventions; campaign techniques, strategies and costs; voter behavior; and the electoral process.  
**Cost:** \$9.95 paperback; \$15.95 hardcover prepaid (shipping & handling included); quantity discounts available.  
**Order From:** Lyons & Burford, Publishers, 31 W. 21st St., New York, NY 10010, 212/620-9580

**Title:** **Electing a President: The Markle Commission Research on Campaign '88**  
**Grade Level:** Secondary and adult  
**Contents:** This book by Bruce Buchanan reports the findings of the Markle Commission on the Media and the Electorate 1988 study of geographic and demographic factors in citizen participation in the election. (See listing of "The Markle Commission on the Media and the Electorate: Key Findings" and "Recommendations.")  
**Cost:** \$27.95 plus shipping and handling  
**Order From:** University of Texas Press, P.O. Box 7819, Austin, TX 78713-7819, 800/252-3206

**Titles:** **The Markle Commission on the Media and the Electorate: Key Findings; The Markle Commission on the Media and the Electorate: Recommendations**

**Grade Level:** Secondary and adult

**Contents:** These two publications are brief reports of the key findings and recommendations resulting from the 1988 study by the Markle Commission on the Media and the Electorate on the geographic and demographic factors in citizen participation in the election. (See listing of *Electing a President: The Markle Commission Research on Campaign '88*)

**Cost:** Free in limited quantities

**Order From:** The Markle Foundation, 75 Rockefeller Plaza, Suite 1800, New York, NY 10010

**Title:** **Survey of Innovative Voter Registration Programs Across the USA**

**Grade Level:** Secondary and adult

**Contents:** A 30-page manual listing programs in every state and the District of Columbia.

**Cost:** Free

**Order From:** American Bar Association Standing Committee on Election Law, 1800 M Street, NW, Washington, DC 20036, 202/331-2294

## DISCUSSION PROGRAMS

**Titles:** **Election Year Discussion Set**

**Grade Level:** Secondary and adult

**Contents:** The Public Talk Series programs present three or four non-partisan, balanced positions or policy options on each of four election year issues: health care, the economy, welfare and U.S. foreign policy. They are intended to provide a framework for small group discussions. The set includes a participant's booklet (for photocopying and distribution) and a leader's guide which highlights suggestions for involving elected officials and candidates for office in a wrap-up of the discussion.

**Cost:** \$5.00

**Order From:** Study Circles Resource Center, P.O. Box 203, Pomfret, CT 06258, 203/928-2616

## MAGAZINES

**Title:** ***Instructor*** May-June 1992 issue

**Grade Level:** K-8

**Contents:** Article, "Plan-Ahead Guide to Fall '92," is a focus and resource guide for teaching about the '92 election, the Columbus quincentenary, and the International Space Year.

**Cost:** \$3.00 by check paid to *Instructor* magazine.

**Order From:** *Instructor* Magazine, Scholastic Inc., P.O. Box 2700, Monroe, OH 45050-2700

**Title:** ***Update on Law-Related Education*** Fall 1988 issue, "The Living Constitution"

**Grade Level:** K-12

**Contents:** This issue contains teaching strategies about voting and voting rights for middle and secondary level students and an article about why young people do not vote.

**Cost:** \$6.00 for 1 copy, \$4 for 2-9 copies, \$3 each for 10-24 copies, \$2.50 each for 25 or more copies, plus \$3.95 postage and handling.

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**Cost:** To be determined

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**Grade Level:** Secondary

**Contents:** The Classline Today Teaching Plan, a curriculum guide, student supplements, and Path to the Presidency poster accompany subscriptions to *USA Today* newspapers in the USA Today Classline Series. The curriculum guide addresses themes of responsibilities of citizenship, the election process, and election issues. The student supplement guides students through the decision-making process required of responsible voters.

**Cost:** Varies according to length of subscription.

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# The Challenge of Diversity

Developing a Class Proposal on Diversity/Middle-Secondary

Lorenca Rosal

## Background

Although not as boldly proclaimed in the historic American creed as freedom and equality, diversity has marked American society ever since the first arrival of Europeans. At the beginning of colonization a small number of fairly homogeneous groups arrived, each marked by a common language, religion, national origin, and ethnic makeup. But the number of groups soon began to increase and proliferated enormously during the nineteenth and twentieth centuries.

As millions of immigrants poured into the United States in the nineteenth century, the differences between established Americans and the new arrivals tended to arouse suspicion, prejudice, and outright persecution, including violence. Gradually, the positive contributions of diversity and pluralism were recognized, adding to the list of celebrated achievements of American democracy.

How to reap the cultural and intellectual benefits of pluralism while preserving common American political values has been a persistent problem in American society. It requires striking a balance between unity and diversity—between a commitment to the unifying values of political cohesion and the common identity of citizenship and the cultural enrichment that emerges from plural beliefs, ideas, and loyalties.

It is helpful to remember that the conflicts stemming from diversity in American society, serious though they often are, are far less marked than the racial, ethnic and religious animosities in much of the world. The ideals of pluralism and the practices of diverse cultures in the United States are causes for hope that the tensions between political unity and ethnic diversity, between public order and personal freedom, can be sufficiently balanced to maintain the welfare of American constitutional government. The achievement of this balance, however, requires an understanding of the contributions and values of pluralism as well as the problems and burdens.

Effective civic education can foster a consciousness of national identity within the differences that diversity implies. Key elements of this education are knowledge of the democratic values and principles that animate American political institutions and a solid grounding in the nation's history—warts and all. Americans need to know that their past is at once the story of a favored and successful people as well as a history that is troubled and tragic. These institutions and this past are the heritage of Americans of all races and cultural groups. Uninstructed or falsely instructed, they are disinherited. But wisely instructed, they can hardly escape the realization that they share both a common identity and destiny.

## Objectives

At the conclusion of this lesson, students should be able to:

1. Describe issues of diversity which they think are important.
2. Identify fundamental values and important interests to consider when addressing issues of diversity.

3. Develop and express reasoned opinions on issues of diversity in schools.
4. Design a plan or policy to promote a better understanding of and appreciation for diversity and to combat problems arising from diversity

## Preparation

In this lesson, which will take more than one class period, students will read and discuss diversity in general and examine issues of diversity in school settings. Prior to class, make copies of the student handouts for distribution. As a result of discussion and analysis, students will design a plan or proposal to promote a better understanding of and appreciation for diversity and to combat problems arising from diversity in school. Students are encouraged to present their plans or proposals to the rest of the school population and to the community. You may wish to invite community members who deal with issues related to diversity to participate in this process. Guests might include members of your school board or administration, religious leaders, attorneys, youth counsellors, juvenile officers, social workers or judges.

## Procedure

1. *Introduce the Lesson.* Write the word "diversity" on the chalkboard or poster paper. Ask students to offer definitions for and synonyms of the word. Use their suggestions to create a working definition. (*Webster's New Collegiate Dictionary* defines diversity as difference and offers the word "variety" as a synonym.) Then ask students for examples of the types of diversity which exist in our society. Jot down their ideas for reference.
2. *Identify issues of diversity.* Distribute Student Handout 1. Have the class read and discuss the text using the "What do you think?" questions to facilitate discussion. Make a note of the diversity issues your students believe are most immediate and the values and interests they think most important to consider when addressing these issues. You may wish to assign students the task of collecting clippings on these topics to be used as research for other activities, to create bulletin boards, or as the basis for a learning center on diversity in the classroom or school library.
3. *Examine issues of diversity in school settings.* Distribute Student Handout 2 and divide the class into small heterogeneous groups to complete the exercise. Have students read and discuss the text using the "What do you think?" questions as a guide. Each student in the group should take the responsibility to contribute at least one recommendation to the group plan or policy. A recorder and spokesperson should be chosen by the group to take notes on the discussion and present the recommendations to the rest of the class. You may wish to travel between groups to monitor progress. If you choose to simulate a school board meeting as a vehicle for students to share their ideas, select a student from each group to play the roles of school board members. A community guest or

your school principal might be asked to serve as chair. The chair should open the meeting and state the issue to be discussed, i.e., what policies can be instituted to promote a better appreciation of diversity and to minimize and combat problems related to it. Citizens attending the meeting should present their recommendations for discussion. Afterwards, board members might vote on the recommendations or take them under advisement. The meeting should then be adjourned.

4. *Create a class plan to address issues of diversity at school.* Distribute Student Handout 3 and use it to assist students in further evaluating their recommendations. Work with the class to consider each of the points on the checklist and to add other points as necessary. Students should then work to create a class plan based on the recommendations made by each small group. You then may wish to discuss presenting the plan to others as indicated on the handout. Such a presentation is an excellent way to encourage students to share what they have learned with others and to motivate them to take an active role in their community. Additional ideas for reviewing and reinforcing the lesson complete the third handout.

### Student Handout 1: Reading and Discussion

The diversity of the American people is unique among nations. Americans differ from each other in many ways. They live in distinct regions, each of which retains its own speech and intonation, mores and customs, even its own cuisine. Americans differ in age, in education and occupation, in religious belief, in wealth and lifestyle, in skills, capacities, interests, and in other ways too numerous to mention.

These and other sources of American diversity are not the topics of this lesson, however. Instead, you will be taking a look at some of the concerns raised by the ethnic and racial diversity of the American people since that aspect of diversity has become an increasingly common source of public discussion and controversy.

Many of these issues have focussed on education. Should the content of school curriculum be multicultural and, if so, to what degree? Should racial integration in schools be pursued aggressively as a matter of public policy? Should faculty more accurately reflect the multiracial and ethnic makeup of the population at large? How should racial and ethnic incidents in school settings be addressed?

These are just some of the educational issues related to diversity that you will be facing as students and as citizens in the years ahead.

### What Do You Think?

Share and justify your ideas and opinions about the following questions:

1. Which issue of diversity do you think is most critical to address in our country today?
2. What issues of diversity in school settings are foremost in your community?
3. What fundamental values, such as justice, equality and human dignity, might these issues involve?
4. What important interests, such as the common good, efficiency and resources, should be considered when discussing such issues?

### Student Handout 2: Examining an Issue of Diversity

Work in small groups to complete this exercise. Read the following information and then work cooperatively to develop a policy or plan that

- (1) addresses conflicts arising from diversity; and
- (2) promotes a better understanding and appreciation of the benefits of diversity.

Each student in your group should contribute at least one idea. The "What Do You Think?" questions listed below are designed to help stimulate your thinking and group discussion. Have a recorder make a list of your policy recommendations. Then select a group spokesperson to share them with the rest of the class. One way to do this is by simulating a school board meeting in which you discuss and vote on the different policy recommendations.

*What policy would you develop to address the issue of diversity?*

Although a 1992 survey of high school students shows growing appreciation of diversity and a breaking down of social barriers between races and ethnic groups, incidents have occurred in many schools which reflect conflict among students along racial, ethnic and religious lines. For example, swastikas have been drawn on lockers and some students have made disparaging and insulting remarks to those who differ from them.

As a result, administrators and student governments have attempted to promote a better understanding between ethnic and racial groups by various means. They have also tried to develop policies to address problems which have arisen and to prevent incidents of racial and ethnic conflict before they occur.

To promote better understanding, for instance, some schools have held educational forums in which the accomplishments and contributions of various groups in our society are presented. To address problems arising from diversity, some schools have instituted "speech codes." These rules governing expression are designed to prevent statements and comments about race, sex, religion, and ethnic background that might be viewed as offensive by some individuals and groups. The goal is to discourage prejudice and create a more comfortable learning environment for all students.

Unfortunately, some of these rules designed to eliminate conflict have stirred up controversy themselves. For example, some claim that speech codes deny freedom of expression. It is clear that the debate over how to promote a better understanding and appreciation of diversity and how to combat intolerance and bigotry in school settings and in the society at large will continue to be a volatile issue in the years ahead.

### What Do You Think?

1. What can be done in schools to promote a better understanding between different racial, ethnic, religious, and other groups?
2. What can be done in schools to combat and prevent incidents of intolerance and bigotry?
3. What fundamental values and important interests should be considered when designing policies to achieve these goals?

Evaluation Checklist			
Would your plan:	Yes	No	Explain Your Answer
• protect students from incidents of intolerance and bigotry			
• prevent such incidents from occurring			
• lead to discovery of such incidents			
• help educate those involved in order to deter them from further participating in such incidents in the future			
• compensate those who have been wronged or injured in some way			
• safeguard basic constitutional and other legal rights			
• promote a better understanding of problems stemming from diversity			
• lead to a better appreciation of our common history, principles, and values			
• emphasize the benefits which can come from diversity			

### Student Handout 3: Evaluating Your Recommendations

After presenting your recommendations, you may wish to use the following checklist to evaluate them. Feel free to add other considerations to the list. You then may wish to pool your ideas in order to create a final plan for combatting and preventing conflicts which might arise from diversity in your school.

Talk to your teacher about the possibility of presenting your proposal to members of your student government, school administration and community. You might arrange to attend a PTA, school board or community meeting. Following the presentation, a forum might be held to discuss your ideas and how students might work with the community to promote a better understanding of and appreciation for diversity on and off campus.

### Using the Lesson

1. What can young people do to help promote better understanding between different groups in our society? To prevent and combat problems arising from diversity? Write your ideas in a journal entry or a letter to the editor of your school or local newspaper.
2. Work with a group of classmates to select an issue of diversity different from the one discussed in this lesson, for example, preferential treatment programs or immigration policies. Research the issue and then present a debate on it for the rest of your class. Each debate team

should make a five minute formal presentation. Other members of each team should be allowed two minutes to rebut the arguments of their opponents. You may wish to invite community guests who are knowledgeable on the topic you choose to serve as debate judges.

3. Make a video or audio public service announcement to help promote understanding and appreciation of differences and to combat bigotry and intolerance. The PSAs should be 60 or 30 seconds long. Contact your local radio and television stations for information on broadcasting your productions.

*Lorenca Consuelo Rosal is a staff member of the Center for Civic Education in Calabasas, California. This activity has been designed from various curricular materials developed by the Center including With Liberty and Justice for All, a secondary student text on the Constitution and Bill of Rights, and Exercises in Participation, a series of lesson booklets designed to motivate and enable young people to enjoy the rights and accept the responsibilities of living in a free society. The core of the readings on diversity are adapted from CIVITAS, a collaborative project of the Center for Civic Education and the Council for the Advancement of Citizenship. For additional lesson plans and curricula programs, please write the Center for Civic Education, 5146 Douglas Fir Drive, Calabasas, CA 91302.*

# The Challenge of Diversity

## Exploring U.S. v. Hirabayashi/Secondary

Julia Ann Gold

### Objectives

1. Students will place the order of events in the case of *United States v. Hirabayashi* on a time line.
2. Students will identify the arguments put forward by Hirabayashi and the U.S. government at his trial.
3. Students will analyze the actions of the judge and jury, and the outcome of the case.
4. Students will consider current and future implications of the decision.

### Time Needed

Two or three class periods

### Resources

Student Handouts 1 through 4; "A Personal Matter," a 30-minute videotape about Gordon Hirabayashi has been produced by the Constitution Project, P.O. Box 1787, Portland, OR 97207. Call (503) 224-6722 for information on how to order.

### Background for the Teacher

February 19, 1992 marked the 50th anniversary of the signing of Executive Order 9066, which authorized military commanders to exclude persons from vast areas of the western United States during World War II. Gordon Hirabayashi, a college student at the time, was one of a very few Japanese-Americans who challenged the military orders all the way to the U.S. Supreme Court. While the Supreme Court upheld the military orders in 1943, Hirabayashi's conviction was vacated in 1987 by the Ninth Circuit Court of Appeals, under an unusual legal proceeding called *coram nobis*.

After the war, Gordon Hirabayashi went on to complete his education and became a professor of sociology at the University of Alberta, in Edmonton, Canada. He is presently retired, as Professor Emeritus, and spends much of his time speaking and educating others about his experiences. He is a strong believer in the U.S. Constitution, and has stated that "It was not the Constitution that failed me, but those who were supposed to uphold it."

The video "A Personal Matter" is an excellent introduction to this lesson.

(*Editor's note:* Additional background information on the Hirabayashi case and the relocation and internment of Japanese-Americans can be found in the Spring 1990 issue of *Update*. The issue contains a secondary level classroom activity, excerpts from testimony to the Commission on Wartime Relocation and Internment of Civilians and a bibliography.)

### Procedure

1. Pass out Student Handout 1, and ask students to read the background information about the case.
2. Pass out Student Handout 2 (time line) and ask the students to work in pairs to place the events in chronological order on the time line. Review the sequence of events with the entire class.
3. Review the charges against Hirabayashi. He was charged with two counts, or two crimes:  
*Violation of Public Proclamation Number 3:*  
Public Proclamation Number 3 established a curfew period and provided that all persons of Japanese ancestry must remain within their place of residence between the hours of 8:00 p.m. and 6:00 a.m.  
*Violation of Civilian Exclusion Order Number 57:* Civilian Exclusion Order Number 57 required persons of Japanese ancestry in a specific area (including the University District where Hirabayashi lived) to report to a Civil Control Station in Seattle between the hours of 8:00 a.m. and 5:00 p.m. on May 11 or 12, 1942. Remind students that the government had the burden to prove these charges beyond a reasonable doubt.
4. Discuss the arguments that both the government and Hirabayashi made at trial. To win its case for violation of the exclusion order, the government was only required to show that Hirabayashi did not report to the Civilian Control Station on May 11 or May 12, 1942. To win its case for violation of the curfew order, the government was only required to prove that he violated the curfew, by staying out between 8:00 p.m. and 6 a.m. Hirabayashi argued that he was a loyal American citizen, and that his constitutional rights, specifically his Fifth Amendment right to due process, were violated by the issuance of the orders. He stated that the orders discriminated against him because he was of Japanese ancestry.
5. Discuss with students both arguments, and the reasoning for each side's position. Ask students, in small groups, to decide how they would decide this case if they were the jury. Alternatively, you may ask students to make mock arguments to panels of judges or a jury. Tell students that a jury is bound to apply the law as given to them by the judge, but in some cases a jury could choose to "nullify" the law by disregarding the judge's instructions. [This is called "jury nullification," and is not expressly approved by most courts; in this exercise, however, it allows the students more room to argue.]
6. Ask students to read Student Handout 3. Review and discuss the U.S. Supreme Court decisions and the *coram nobis* petitions discussed in the handout.
7. As a final activity, ask students to complete Student Handout 4, an opinion poll, and discuss.

### Student Handout 1: Background Information

Japanese began to immigrate to the U.S. in the late 1800s, to replace Chinese laborers who were excluded after the Chinese Exclusion Act was passed by Congress in 1882. Asian aliens were prohibited from becoming naturalized U.S. citizens, and by 1913, limits had been placed on the ability of Japanese to own land (the Webb Act). Finally, in 1924, the Immigration Exclusion Act was passed by Congress, barring all immigration by Japanese to the U.S.

In early 1942, the United States was at war with Japan, following the surprise attack on Pearl Harbor on December

7, 1941. Almost immediately, the Japanese went on to attack Malaysia, Hong Kong, the Philippines, and Wake and Midway Islands. Many people feared Japanese air raids and invasion of the West Coast by Japanese forces. Attitudes toward Japanese-Americans went from relative tolerance to hostility. For example, Henry McLemore, a syndicated columnist wrote in his January 29, 1942 column in the *San Francisco Examiner*:

I am for the immediate removal of every Japanese on the West Coast to a point deep in the interior.... I don't mean a nice part of the interior either. Herd 'em up, pack 'em off and give 'em the inside room in the badlands.... Personally, I hate the Japanese. And that goes for all of them.

Other newspapers carried reports of subversive activities by Japanese aliens and Japanese American citizens living on the West Coast of the United States. The *Washington Post*, on February 17, 1942, carried a column by Walter Lippmann, the nation's most prestigious political commentator, under the headline:

#### THE FIFTH COLUMN ON THE COAST

It is a fact that communication takes place between the enemy at sea and enemy agents on land....

[The fact that since] the outbreak of the Japanese war there has been no important sabotage on the Pacific Coast...is a sign that the blow is well-organized and that it is held back until it can be struck with maximum effect....

Nobody's constitutional rights include the right to reside and do business on a battlefield.... And nobody ought to be on a battlefield who has no good reason for being there. There is plenty of room elsewhere for him to exercise his rights.

Reacting to public pressure, and relying on the advice of the War Department that military necessity required it, President Franklin D. Roosevelt issued Executive Order 9066 on February 19, 1942.

Roosevelt signed Public Law 503 on March 21, 1942, making it a crime to violate any of the orders that military commanders prescribed. Lt. General John L. DeWitt, appointed Military Commander of the Western Defense Command on February 20, 1942, began immediately to issue orders pursuant to Executive Order 9066.

These orders included Public Proclamation No. 3 issued March 24, 1942, ordering all persons of Japanese ancestry, both aliens and Japanese American citizens, within certain military areas, to remain in their homes between the hours of 8:00 p.m. and 6:00 a.m. This is referred to as the "curfew order."

DeWitt also issued a series of "exclusion orders," ordering all persons of Japanese ancestry to leave their homes and report to assembly centers. They were then transported to internment camps.

Gordon Hirabayashi was a student at the University of Washington in the spring of 1942, when the curfew and exclusion orders were issued. Born in Washington State, Hirabayashi attended public schools, where he was a Boy Scout. Later, at the university, Hirabayashi was active in the YMCA and the Society of Friends, or Quakers. His parents were both born in Japan and came to the U.S. as teenagers.

Hirabayashi decided to defy the orders by remaining in the library to study after 8 p.m., and by refusing to comply with the Exclusion Order requiring him to report on May 11 or 12, 1942 because:

It was my feeling at that time, that having been born here and educated and having the culture of an American citizen, that I should be given

the privileges of a citizen—that a citizen should not be denied such privileges because of his descent. I expressed my thoughts that I had a right to stay.

Hirabayashi turned himself in to the FBI on May 16, 1942. The FBI charged him with a violation of the Exclusion Order, and placed him in jail, where he remained until his trial. Hirabayashi admitted to defying the curfew order as well, and was charged with a second count.

The case was tried on October 20, 1942, before a jury and Judge Lloyd L. Black, in Seattle, Washington. The judge instructed the jury that both orders were valid and enforceable, and that they were to find as matters of fact that Hirabayashi was of Japanese ancestry and therefore subject to the orders, that he had violated the curfew, and that he failed to report for evacuation. Based on these findings, the judge instructed the jury to find Hirabayashi guilty. The jury returned in 10 minutes with a finding of guilty on both counts.

At sentencing the next day, the judge took the five months that Hirabayashi had already spent in the King County Jail into account, and sentenced him to 30 days on each count, to be served consecutively. Hirabayashi then asked if he could serve a longer sentence—90 days—because he had found that if his sentence were at least 90 days, he would be allowed to serve the sentence outside a prison, in a roadcamp. The judge agreed, and changed the sentence to 90 days for each count, to be served concurrently (at the same time). Hirabayashi and his lawyers agreed, not realizing that the U.S. Supreme Court would use the concurrent sentences to avoid ruling on the constitutionality of the exclusion order, and rule only on the curfew order, considered to be less obtrusive, and therefore more "justifiable."

Hirabayashi's was the first case the Supreme Court heard regarding the constitutionality of the military orders issued pursuant to Executive Order 9066. Hirabayashi's lawyers argued that Congress unconstitutionally delegated its legislative power to the military by authorizing DeWitt to issue the orders, and that the due process clause of the Fifth Amendment prohibited the discrimination against citizens of Japanese descent. Since Hirabayashi was a loyal citizen, he should be treated as an individual. He was being deprived of his life, liberty and property without due process of law.

The government argued that the military commander, DeWitt, had authority from Congress and the President, and that there was no time, due to the imminent danger of air raids and invasion by Japanese forces, to determine the loyalty of individual Japanese citizens.

The Supreme Court issued a unanimous ruling, affirming Hirabayashi's conviction, and upholding the government's action. The Court chose to address only the curfew order, because the trial judge had made the sentences on the two convictions concurrent. The Court found that under the war powers given to the President and Congress in Articles I and II of the Constitution, the President and Congress have wide discretion to determine the nature and extent of the danger during war, and how to resist it. The Court concluded that there was a "substantial basis" for the action taken, citing information about how Japanese had not assimilated into the white population, how Japanese children attended Japanese language schools believed to be sources of Japanese nationalistic propaganda, and how many Japanese American citi-

zens were actually citizens of Japan as well, since Japan allowed dual citizenship.

The Court then turned to the discrimination argument, and began by pointing out that the Fifth Amendment does not contain an equal protection clause, such as found in the Fourteenth Amendment. (The Equal Protection Clause of the Fourteenth Amendment is the amendment cited today in discrimination cases (along with many specific laws that prohibit discrimination). However, the Fourteenth Amendment, as written, only applied to actions by the states. At the time of Hirabayashi's trial, the Fourteenth Amendment's "equal protection" clause had not been formally "incorporated" into the Fifth Amendment, and therefore was not applicable to the federal government.)

After stating that distinctions between citizens solely because of their race are "odious to a free people whose institutions are founded upon the doctrine of equality," and that discrimination based on race alone would be insupportable, "were it not for the fact that the danger of espionage and sabotage, in time of war and of threatened invasion, calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas," the Court concluded that:

The adoption by Government, in the crisis of war and of threatened invasion, of measures for the public safety, based upon the recognition of facts and circumstances which indicate that a group of one national extraction may menace that safety more than others, is not wholly beyond the limits of the Constitution and is not to be condemned merely because in other and in most circumstances racial distinctions are irrelevant.

Three other Japanese-Americans challenged Executive Order 9066 all the way to the Supreme Court. Those cases can be classified into three categories, based on the Court's treatment of the issues in its decisions:

#### *Challenge of the Curfew Orders*

*Hirabayashi v. U.S.*, 320 U.S. 81 (decided June 21, 1943), and *Yasui v. U.S.*, 320 U.S. 115 (decided June 21, 1943) were both unanimous decisions, in which the Court upheld the constitutionality of the curfew order, as applied to Gordon Hirabayashi and Minoru Yasui.

#### *Challenge of the Exclusion Orders*

In *Korematsu v. U.S.*, 323 U.S. 214 (decided Dec. 18, 1944), the Court, in a 6-3 decision, relied on the *Hirabayashi* case, and affirmed the conviction of Korematsu, upholding the constitutionality of the exclusion orders, as applied to Korematsu. Doing another sidestep, the Court also avoided ruling on the issue whether it would be constitutional to *detain* Korematsu, concededly a loyal citizen, in

one of the camps, since there was no evidence that he would have been sent to a camp, had he reported to an assembly center. Justice Roberts, one of the dissenters, along with Justices Murphy and Jackson, characterized the exclusion orders as "imprisonment in a concentration camp, based on ancestry."

#### *Challenge of the Detention*

*Ex Parte Endo*, 323 U.S. 283 (decided Dec. 18, 1944), was a habeas corpus challenge by Mitsuye Endo in which the Court, in a unanimous decision, found that Endo, as a loyal citizen, could not be legally detained in a camp. The day before the *Endo* case was decided, the government announced that the camps would close.

### Student Handout 2

#### Time Line

Place the letter of each item where the event would appear on the time line below.

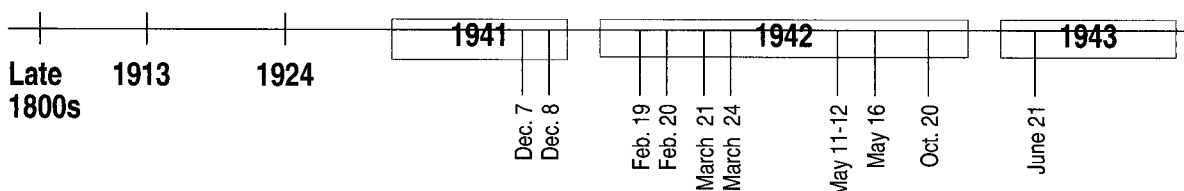
- A. The United States declares war on Japan.
- B. Gordon Hirabayashi fails to report to the U.S. Civil Control Station.
- C. Japanese are encouraged to immigrate to the western United States.
- D. President Franklin Roosevelt signs Executive Order 9066.
- E. U.S. Supreme Court upholds Gordon Hirabayashi's conviction.
- F. Judge Lloyd Black presides at the jury trial of Gordon Hirabayashi.
- G. The Webb Act passed, denying Japanese born in Japan the right to own land in the U.S.
- H. Japanese planes bomb Pearl Harbor.
- I. Gordon Hirabayashi reports to the FBI and is charged with violating the law.
- J. Lt. General DeWitt is appointed Military Commander to carry out evacuations in the Western Defense Command.
- K. The U.S. enacts the Immigration Exclusion Act, which closes all immigration to the U.S. from Japan.
- L. Lt. General DeWitt declares a curfew for all persons of Japanese ancestry.
- M. President Franklin Roosevelt signs Public Law 503, which makes a knowing violation of the DeWitt's orders a crime.

### Student Handout 3:

#### The Aftermath

Since the Supreme Court decisions, the United States has reexamined its treatment of Japanese-Americans during World War II. In 1976, President Ford rescinded Executive

#### Time Line





Order 9066; four years later, Congress repealed Public Law 503 and created the Commission on Wartime Relocation and Internment of Civilians.

From July to December 1981, the Commission conducted hearings on the internment and, in December 1982, issued its report, *Personal Justice Denied*, which concluded that "a grave injustice" had been committed against Japanese-Americans.

In 1985, Gordon Hirabayashi sought to overturn his convictions, using an unusual legal proceeding called *coram nobis*. The evidence at his second trial consisted of documents found at the National Archives, and others obtained under a Freedom of Information Act request that showed that during the appeal to the Supreme Court in 1943, government lawyers had intentionally withheld from the courts important intelligence reports and other evidence that showed that the "military necessity" for the internment was less dire than the government claimed.

For example, the government lawyers had claimed that there was no time to determine the loyalty of individual Japanese-Americans. The evidence uncovered, however, revealed that the military commanders had decided that it would be impossible to determine loyalty of the Japanese, regardless of the time factor.

The judge at Hirabayashi's second trial set aside the conviction on Count I, the exclusion order, but not Count II, the curfew order. Both sides appealed, and the Ninth Circuit Court of Appeals set aside both convictions. Finally, in 1987, Gordon Hirabayashi's struggle to clear his name was over.

In August 1988, Congress passed a statute that provides compensation, up to a maximum of \$20,000 per individual, for Japanese-Americans and resident aliens who were living as of August 10, 1988 and who were confined, held in custody, relocated or otherwise deprived of property or liberty as a result of Executive Order 9066.

#### Student Handout 4: An Opinion Poll—How Far Can the Government Go?

*Directions:* Read the following statements and place the letter that most closely corresponds with your opinion in the lefthand blank. SA (strongly agree), A (agree), U (undecided), D (disagree), SD (strongly disagree).

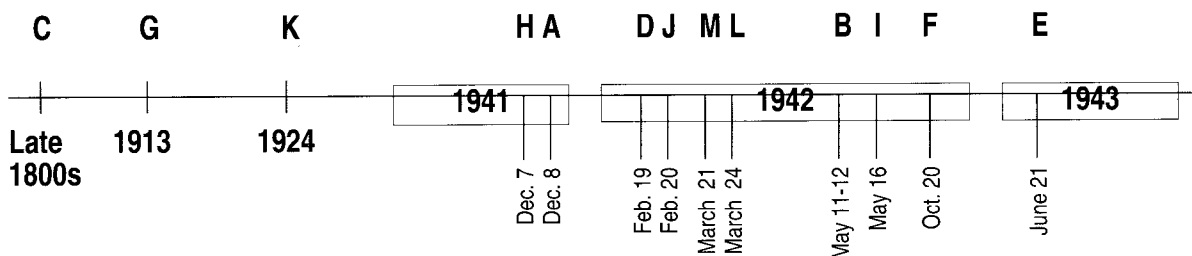
- \_\_\_\_ 1. The U.S. is at war with Norway. There have been threats of terrorism against Americans, and reports

that Norwegians in the U.S. are planning terrorist attacks in major American cities. The U.S. government should be able to require all Norwegian aliens in the United States to report to the government for questioning.

- \_\_\_\_ 2. The U.S. is at war with Paraguay. There have been terrorist attacks on American citizens living in Los Angeles, allegedly led by Paraguayans. The government should be able to require all American citizens of Paraguayan descent living in the Los Angeles area to report to the FBI for questioning.
- \_\_\_\_ 3. The U.S. is at war with Pakistan. An American passenger plane was destroyed by a terrorist bomb, killing 250 people. Airline officials in the U.S. should have the right to stop and question anyone boarding an airplane who looks like a Pakistani.
- \_\_\_\_ 4. Both homosexual men and drug addicts with AIDS should be forcibly quarantined (kept in isolation from all other people) until the AIDS epidemic is controlled. This would be for their own protection, as well as the safety of the public.
- \_\_\_\_ 5. It is the year 1997. The drug problem in the U.S. has reached epidemic proportions. Crack dealers are on every street corner, and crack houses have taken over large areas in many American cities. The President has issued an Executive Order, declaring the situation a national emergency and authorizing the National Guard to round up dealers and users within areas to be determined by commanders of the National Guard and put them in prison. This should be allowed.
- \_\_\_\_ 6. Crime involving teenagers in the early morning hours has been on the rise in a large urban area. In order to protect teens from being victims of crime, and to control roving gangs of teens, a curfew should be enacted by the County Council. The curfew would require that everyone 16 years old and under be off the streets between the hours of 11:00 p.m. and 6:00 a.m.

*Julia Ann Gold is an attorney and Deputy Director of the Institute for Citizen Education in the Law at the University of Puget Sound School of Law, Tacoma, WA. The concept for the time line activity was contributed by Tarry Lindquist. Funding for the development of this activity was provided by the Commission on the Bicentennial of the U.S. Constitution.*

#### Time Line Answer Key





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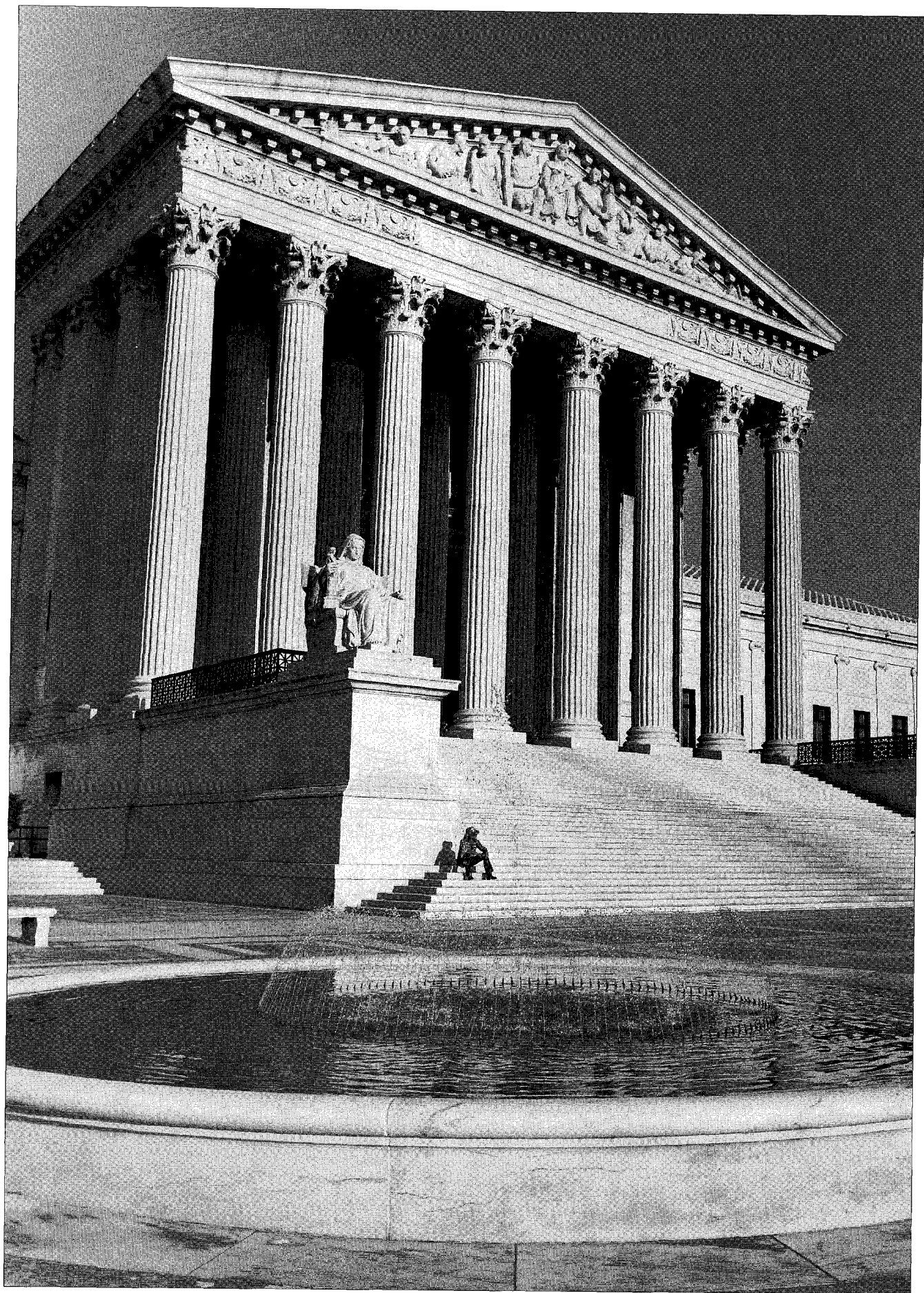
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*Thank you!*





and scope of the *Jacobson* decision in future cases in which entrapment is raised as a defense. Because the Supreme Court never spoke of due process or any other constitutional provision, it may well be that the *Jacobson* decision will only affect federal courts.

Nothing in the *Jacobson* decision will affect the ability of government agents to engage in undercover operations, although it is possible that some of those operations may not lead to criminal convictions. In the overwhelming bulk of cases, a defendant who willingly violates the law after the government provides an opportunity to do so will be found to be predisposed to break the law despite the absence of any proof that the defendant ever previously violated that law or expressed a willingness to do so. It appears that Justice O'Connor, in her dissent, has engaged in a common practice of dissenters of exaggerating the effect of a decision with which she did not agree. It is of course possible that her dissent is correct in viewing *Jacobson* as having modified prior law regarding entrapment. If that is true, entrapment will nevertheless remain a difficult defense to prove although its scope may have been slightly broadened by the court's decision. □

*Alan Raphael is an Associate Professor of Law at Loyola University Chicago School of Law. He specializes in teaching in the areas of criminal law and procedure.*

## Challenge

(continued from page 3)

the development of positive self-esteem in African American students. She cites the objectives of the Indianapolis Public Schools' multicultural education program as an example of approaches that respond to a need and should be replicated elsewhere.

What is the "American Experience?" Daniel Ramirez's colorful description of the diverse, expanding Hispanic community in the United States (focusing on the Chicano) is interspersed among his analysis of the intersection between American law, with its roots in Anglo-Saxon tradition, and Chicano culture and history. This blending of people and history offers a striking commentary on the constant conflict between Hispanic and non-Hispanic cultures and the failure of laws and political and educational policies to

mitigate these conflicts.

The strained relationship between the Native American people and non-Native Americans offers an illustration of the failure of law to protect the rights of groups from the interests of the majority. Frank Pommersheim explores of the legal origins of tribal sovereignty within the United States Constitution and the complex issues of rights in direct conflict. He examines difference, urging the eradication of the stigma of difference and the nourishing of the pride of difference. Professor Pommersheim calls for an increased understanding of the history of Native Americans within the elementary and secondary school curriculum. In addition, he asks for individual action to support the resolution of long-standing legal conflicts.

I am grateful to these authors for their presentations at the seminar as well as their efforts in preparing these articles. These articles question foundational thinking and challenge us to contribute in the redesigning of our national identity.

I also wish to express my thanks to those educators who contributed the classroom activities contained in this issue. Their efforts illustrate how law-related education can illuminate some of the hidden and shadowy areas of our nation's past while helping students address diversity in a thoughtful and insightful manner.

We hope that this issue of *Update* helps to inform discussions about multicultural issues in schools and the ways that law-related education offers a framework for further examination of the critical questions of where we have been, where we are and where we are going. □

*George S. Perry, Jr. is Guest Editor of this issue and is Assistant Staff Director, ABA Special Committee on Youth Education for Citizenship.*

## Indian Country

(continued from page 19)

going on. But we don't particularly want to listen. Just consider your own everyday conversations and you'll understand what I mean. When we say "I understand what you're saying" or "Sure, I know where you're coming from" we are actually communicating the exact opposite because we're not bothering to listen to that person.

## Listening—and Understanding

For Indians, being listened to and really being understood are extremely important. We have to keep in mind that they are often coming from a very different place than the place that we're in. It is essential to know where they're coming from historically, culturally and socially.

What do they have to bring to this process? For example, Native Americans have a very different view of history, a very different view of the meaning of the land. The land is not just something to be exploited for profit. Many Indian people regard the land as sacred. Listening is important, as is its corollary, to learn. Non-Indians, and non-Indian educators in particular, must be committed to learning. Sometimes as adults, as busy people, it's hard to commit ourselves to learning this. But, on another level, it's not understandable or acceptable because people—if they really are serious—must commit themselves.

My last suggestion is to act. It is not enough simply to gain knowledge; you have to be willing to act on it as well, whether in your family, your community, your church, or your workplace. You must be willing to talk about these issues. Because there is a certain amount of risk in talking about issues that are unpleasant or unpopular, many times we just let it go by. For Indian people and for their future—for the future of all of us, really—we can't let it go by.

From discussions with my friends in Indian country, I sense that that's what they want—they want to *see*. Why? It is because Indian people are very good at watching. They have heard much over the years, many words spoken both privately and publicly by those who profess to be committed to their issues. For Indian people, actions are much more important than words, and they watch very carefully what people are actually doing.

It is incumbent upon us, if we are committed to justice and to righting the wrongs of history, to act. Not to act recklessly or heedlessly, but to act in concert with Indian people in a relationship that acknowledges differences and views them as worthy of honor and respect. □

*Frank R. Pommersheim is Professor of Law at the University of South Dakota School of Law. He also serves as Chief Justice of the Cheyenne River Sioux Tribal Court of Appeals and is Associate Justice of the Rosebud Sioux Tribal Court of Appeals.*