

Vietnam Draft and Civil Liberties

Ron Miller – Jewett Academy

Lesson Plan Summary:

This unit examines the issues of civil liberties and protests of the Vietnam War. Is the draft a violation of civil liberties? Does the draft deny equal protection of the laws to some segments of society? Are draft protesters protected by the First Amendment, symbolic speech when they burn their draft cards?

Objectives: Students will analyze information to determine if the actions of draft protesters during the Vietnam War were protected by the First Amendment.

U.S. History Era:

The Vietnam War Era

Grade Level

High School

Materials:

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| Handout # 1 | Vietnam Draft and Civil Liberties |
| Handout # 2 | The Draft and the Constitution |
| Handout # 3 | Vietnam Era Draft Classifications |
| Handout # 4 | Draft Card Burning |
| Handout # 5 | Is Burning a Draft Card Protected by the First Amendment? |
| Handout # 6 | Reaction to the O'Brien Decision |
| Handout # 7 | <i>Life</i> Editorial March 8, 1968 |
| Handout # 8 | The Catonsville Nine |

Lesson Time: Each of these lessons can be used independently. Each lesson is between forty-five and ninety minutes.

Lesson Procedures:

First Day:

Time: one class period, 45 minutes

Topic: Introduction to issue

Objective: Students will identify define terms related to the issue of draft card burning.

Activities: Take the class to the computer lab.
Open Fixing to Die Rag after the first verse, start the slide show of men burning their draft cards. <http://www.countryjoe.com/rag.htm>
Pass out list of vocabulary terms. Working in pairs, students will utilize web tools; on-line dictionaries, search engines, and web pages to define terms.
They should write the definitions of the terms in the spaces on the work sheets.
(see Handout # 1)

Assessment: Go over worksheet and have students add any additional information they may need.

Second Day

Time: one class period, 45 minutes

Topic: The Draft and the Constitution

Objective: Students will analyze the Constitution and the Amendments to examine the justification for the draft.

Activities: Students search the Constitution and the Amendments for sections that support the authority of the government to draft individuals and for sections that reject the power of the government to draft.
Use Handout #2 to guide the groups work.

Assessment: Whole group discussion of the result of the group work.

Third Day

Time: two class periods, 90 minutes

Topic: The Draft and Draft Classifications

Objectives: Students will understand the Vietnam draft era process and the reasons for the complaints against the draft that it was unfair.

Activities: Take the class to the computer lab.
Divide the class into small groups of three to four students. Each group must select one student as their computer researcher.
Open: Vietnam Era Draft Classifications: www.landscaper.net/draft.htm
Answer the questions on Handout #3

Assessment: Score handout

Fourth Day

Time: two class periods, 90 minutes (continue from previous day)

Topic: The Draft and Draft Classifications (continue from previous day)

Objectives: Students will understand the Vietnam draft era process and the reasons for the complaints against the draft that it was unfair.

Activities: Take the class to the computer lab.
Divide the class into small groups of three to four students. Each group must select one student as their computer researcher.
Open: Vietnam Era Draft Classifications: www.landscaper.net/draft.htm
Answer the questions on Handout #3

Assessment: Score handout

Fifth Day

Time: one class period, 45 minutes

Topic: Criminalizing Burning of Draft Cards and the Case of David Miller

Objectives: Students will analyze the case of David Miller and the reaction to the case.
Students will recognize point of view and determine biases.

Activities: Start class with a discussion of draft card burning. Tell the students they will be reading a primary source editorial, *Time* magazine from 1967. Discuss the term editorial. Pass out Handout #4. Students will work individually, read the editorial and answer the questions.

Assessment: Score the students' answers to the questions.

Sixth Day

Time: one class period, 45 minutes

Topic: Draft Card Burning as Symbolic Speech
O'Brien v United States

Objectives: Students will examine the Supreme Court Case of O'Brien v. United States. Students will analyze the majority opinion to see how the court rules on the contention that draft card burning is protected by the First Amendment as symbolic speech.

Activities: Start the class with a review of the concept of symbolic speech. Break the class into predetermined groups of four students. Put at least one of the stronger readers in each group. Pass out Handout #5. Have the students work together to answer the questions about the O'Brien case

Assessment: In a large group, go over the questions on Handout #5

Seventh Day

Time: one class period, 45 minutes

Topic: Reaction to the O'Brien Decision

Objectives: Students will read two primary source articles and determine the reaction to the O'Brien decision. Students will compare and contrast the article from the New York Times and the Washington Post.

Activities: Students will work with partners. Students will read the articles that were printed just after the O'Brien decision. Pass out Handout #6. While reading the articles, students will look for the similarities and the differences between the two.

Assessments: Score the answers to the questions.

Eighth Day

Time: one class period, 45 minutes

Topic: Was the Draft inherently unfair?

Objectives: Students will evaluate the editorial in *Life* magazine to determine if the draft of 1968 was unfair. Students will predict the changes that would be made to the draft.

Activities: Introduce the lesson by explaining that many people in 1968 thought the draft was inherently unfair to the poor and undereducated. Remind the students of the draft classification system. Pass out Handout #7. The students will then read the editorial in *Life* magazine and answer the questions.

Assessment: Discuss the answers to the questions on Handout #7

Ninth Day

Time: Two class periods, 90 minutes

Topic: The Catonsville Nine

Objectives: Students will evaluate the actions of the Catonsville Nine.
Was their destruction of Selective Service records an act of symbolic speech?
Was their protest of the war a constitutional protected act?

Activities: Class will go to the computer lab. Students will work in pairs.
Open Fire and Faith: the Catonsville Nine
<http://c9.mdch.org/index.cfm>
Students will work together to answer the questions on Handout #8.

Assessment: Whole class discussion. Students will use questions as starting place to evaluate the actions of the Catonsville Nine.

Tenth Day

Time: Two class periods, 90 minutes

Topic: The Catonsville Nine (continued)

Objectives: Students will evaluate the actions of the Catonsville Nine.
Was their destruction of Selective Service records an act of symbolic speech?
Was their protest of the war a constitutional protected act?

Activities: Class will go to the computer lab. Students will work in pairs.
Open Fire and Faith: the Catonsville Nine
<http://c9.mdch.org/index.cfm>
Students will work together to answer the questions on Handout #8.

Assessment: Whole class discussion. Students will use questions as starting place to evaluate the actions of the Catonsville Nine.

Activities: Activities vary with each lesson and are included in the daily procedures

Vietnam Draft and Civil Liberties

Handout 1

This unit examines the issues of civil liberties and protest during the Vietnam War. Is the draft a violation of civil liberties? Does the draft deny equal protection of the laws to some segments of society? Do draft age men have the constitutional right to protest the Vietnam War by burning their draft cards?

As the music played at the start of the slide show indicated, there were many Americans who questioned, "what are we fighting for?" and protested against the war. Some of the young men opposed to the war burned their draft cards in protest of the war.

With your partner, use internet tools, such as on-line dictionaries, search engines, and web pages to define the following terms.

Draft

Draft Lottery

Symbolic Speech

Selective Service

Civil Liberties

Bill of Rights

The Draft and the Constitution

Handout 2

Group Members _____

The power of the national government to draft individuals into the military has been controversial. The Civil War draft in the North led to draft riots in New York City. Anti-draft pamphlets were published during World War I. Charles T. Schenck, in his World War I anti-draft pamphlet claimed that a draftee was “little better than a convict.” Protesters held marches, demonstrations, and burned their draft cards during the War in Vietnam.

In this lesson, we will examine the constitution to look at both sides of the draft controversy.

The constitution does not specifically state the government has the power to draft individuals into the military. Supporters of the draft point to Article One, Section Eight for the constitutional authority to draft. Search the section and decide which phrase gives the government the power to draft.

Congress shall have the power to _____

Supporters of the draft also point to a presidential responsibility to utilize a draft. Locate a presidential power in Article Two Section Two that would give the president the authority to utilize the draft.

Opponents of the draft believe that the draft violates an individual’s civil liberties. They believe the Fifth Amendment, the Thirteenth Amendment and the Fourteenth Amendment protects people from the draft.

Opponents contend that the draft violates the Fifth Amendment by

Thirteenth Amendment, according to draft opponents, prohibits a draft because it forbids

Other draft opponents argue Fourteenth Amendment rejects the draft because

After looking at the various interpretations of the constitution, discuss within your group, is the draft constitutional? On the back of this worksheet, indicate your group's decision and the reasons for that decision.

Vietnam Era Draft Classifications Handout 3

Name _____

One of the many criticisms of the draft system was the selective service classification system. Approximately 1,857,300 young men were drafted in the Vietnam era.¹ Prior to 1969, critics often charges that the rich and well connected were able to get draft deferments unavailable to the poor and middle class.

Go to <http://members.aol.com/warlibrary/draft.htm> to access the Vietnam era draft classifications. Study the classifications for information that will help answer the questions. You will also need to search the web for answers to some of the questions.

Which classification category do you think would have the most men?

Use a web dictionary to define deferment.

On Nov. 17, 1964, Ex-President Bill Clinton received a draft deferment. What type of deferment did he get? (use a web search engine for this question)

Both former Vice President Dan Quayle and President George W. Bush were in the National Guard during the Vietnam era. What type of draft classification would people in the National Guard, military reserves, and ROTC receive?

Vice President Dick Cheney had a student deferment until 1966 when he was reclassified III-A. What is a class III-A deferment?

Which draft deferment do you think would be most commonly available to upper class young men after they graduated from high school?

One of the major complaints about the draft was the draft was unfair to the poor and middle class. Since most poor and middle class young men would not be able to afford college, what draft classification would they receive after they graduated from high school?

Do you think the Vietnam era draft system, (prior to 1969) violated the equal protection of the laws clause of the Fourteenth Amendment?

How do you think the draft system could have been revised to eliminate the advantage of the rich?

¹ Selective Service System, www.sss.gov/induct.htm, accessed 4/17/2006

Daft Card Burning

Handout 4

Name _____

As protests against the War in Vietnam grew, draft card burning as a form of protest against the war became more common. Congress reacted by adding an amendment to the Universal Military Training and Service Act. This amendment, passed in only nine days, made it a crime to “knowingly destroy” or “knowingly mutilate” a draft card. President Johnson signed the bill on August 31, 1965. Punishment for violation of this statute was a fine up to one thousand dollars and or imprisonment for up to five years. David J. Miller was the first person arrested under this new statute. Read the primary source editorial and answer the questions.

The Supreme Court

Time

February 24, 1967

Burning Words, Yes; Burning Cards, No

After publicly burning his draft card as a “symbolic protest” in Manhattan in 1965, Roman Catholic Pacifist David J. Miller, 24, became the first person to be convicted under a new law that makes draft card burning punishable by a \$10,000 fine or five years’ imprisonment, or both. When Miller appealed his suspended three-year sentence, he argued that Congress had enacted the law deliberately to suppress dissent. Indeed, the bill’s proponents made no secret of the fact that it was aimed at “beatniks” – meaning critics of the U.S. war effort in Viet Nam.

Last fall Miller lost his case in U.S. Appellate court. Last week the Supreme Court refused to review it. Whether the Justices think the law constitutional or whether they did not want to tackle the issue now may never be known. By their refusal to act, however, they left standing a new rule that the First Amendment right to utter burning words does not protect the act of burning draft cards.

Unbalancing Holmes. In rejecting Miller’s argument last fall, the Appellate court pointed out that Congress is fully empowered to regulate the draft; the card-burning law, which amends the Selective Service Act, simply strengthened “an already existing regulatory scheme.” In a law is thus constitutional on its face, said the court, judges are not ordinarily supposed to probe its sponsors “real” motives.

Miller’s lawyers tried to dig deeper: they argued that the First Amendment protects card burning as “symbolic speech,” and Justice Holmes’s famous dictum that mere words cannot be punished unless they create “a clear and present danger that will bring about the substantive evils that Congress has a right to prevent.” Miller & Co. insisted that burning the draft card endangers no one except the burner. The information on the card is already on file; moreover, another law makes it a crime to be in “willful nonpossession” of a draft card. In short, they argued, the antiburning law deliberately punishes what is in effect nondangerous “speech.”

Balancing Dissent. The Appellate Court flatly refused to raise a protective umbrella over all “symbolic conduct”—nothing that such a broad interpretation might include anything from a “thumbs-down gesture to political assassination. Most important, it rejected the Holmes test. Instead it followed the Supreme Court’s recent tendency to “balance” in interest served by the statute v. free speech. Draft cards are vital to running the draft, said the Appellate Court. They backstop lost records and help control evaders. The need to retain them takes precedence over any alleged right to burn them. Holmesians might be troubled, but the decision hardly suppressed the right to dissent. David Miller and “those who agree with him,” said the court, “remain free, as indeed they should be, to criticize national policy as they desire by the written or spoken word: they are simply not free to destroy Selective Service certificates.”

Answer the following questions about the editorial.

What crime did David Miller commit?

What was the punishment for that crime?

What is "symbolic speech"?

What was David Miller's defense?

What were the Appellate Court's reasons for rejecting Miller's arguments?

Why was the Supreme Court's decision not to hear Miller's appeal important?

Who do you think was right, David Miller or the Appellate Court? Explain your reasons.

Is this issue important for America today? Explain your opinion.

Is Burning a Draft Card Protected by the First Amendment? Handout 5

The contention that the burning of a draft card was symbolic speech and therefore, protected by the First Amendment was brought before the Supreme Court in 1968. On March 31, 1966, David Paul O'Brien and three other men burned their draft cards outside the south Boston Courthouse. There were some FBI agents in the crowd and O'Brien was arrested and charged with violation of the 1965 amendment to the Universal Military Training and Service Act which made destruction of a draft card a crime.

The case reached the U.S. Supreme Court in 1968. Read the following excerpts from *United States v O'Brien* 391 U.S. 367 (1968) to determine if burning of a draft card is protected as symbolic speech.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court. (7-to-1)

On the morning of March 31, 1966, David Paul O'Brien and three companions burned their Selective Service registration certificates on the steps of the South Boston Courthouse. ...

For this act, O'Brien was indicted, tried, convicted, and sentenced ... he burned the certificate publicly to influence others to adopt his antiwar beliefs, as he put it, "so that other people would reevaluate their positions with Selective Service, with the armed forces, and reevaluate their place in the culture of today, to hopefully consider my position."

In the District Court, O'Brien argued that the 1965 Amendment prohibiting the knowing destruction or mutilation of certificates was unconstitutional because it was enacted to abridge free speech, and because it served no legitimate legislative purpose...

By the 1965 Amendment, Congress added to 12 (b) (3) of the 1948 Act the provision here at issue, subjecting to criminal liability not only one who "forges, alters, or in any manner changes" but also one who "knowingly destroys, [or] knowingly mutilates" a certificate. ... It prohibits the knowing destruction of certificates issued by the Selective Service System, and there is nothing necessarily expressive about such conduct. The Amendment does not distinguish between public and private destruction, and it does not punish only destruction engaged in for the purpose of expressing views.

O'Brien first argues that the 1965 Amendment is unconstitutional as applied to him because his act of burning his registration certificate was protected "symbolic speech" within the First Amendment. His argument is that the freedom of expression which the First Amendment guarantees includes all modes of "communication of ideas by conduct," and that his conduct is within this definition because he did it in "demonstration against the war and against the draft."

We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea. ...

This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. ... we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. We find that the 1965 Amendment to 12 (b) (3) of the Universal Military Training and Service Act meets all of these requirements, and consequently that O'Brien can be constitutionally convicted for violating it.

The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping. ... The power of Congress to classify and conscript manpower for military service is "beyond question." ... Congress may establish a system of registration for individuals liable for training and service, and may require such individuals within reason to cooperate in the registration system. The issuance of certificates indicating the registration and eligibility classification of individuals is a legitimate and substantial administrative aid in the functioning of this system. And legislation to insure the continuing availability of issued certificates serves a legitimate and substantial purpose in the system's administration.

The many functions performed by Selective Service certificates establish beyond doubt that Congress has a legitimate and substantial interest in preventing their wanton and unrestrained destruction and assuring their continuing availability by punishing people who knowingly and wilfully destroy or mutilate them.

We think it apparent that the continuing availability to each registrant of his Selective Service certificates substantially furthers the smooth and proper functioning of the system that Congress has established to raise armies. We think it also apparent that the Nation has a vital interest in having a system for raising armies that functions with maximum efficiency and is capable of easily and quickly responding to

continually changing circumstances. For these reasons, the Government has a substantial interest in assuring the continuing availability of issued Selective Service certificates.

It is equally clear that the 1965 Amendment specifically protects this substantial governmental interest. ... The 1965 Amendment prohibits such conduct and does nothing more. In other words, both the governmental interest and the operation of the 1965 Amendment are limited to the noncommunicative [391 U.S. 367, 382] aspect of O'Brien's conduct. The governmental interest and the scope of the 1965 Amendment are limited to preventing harm to the smooth and efficient functioning of the Selective Service System. When O'Brien deliberately rendered unavailable his registration certificate, he wilfully frustrated this governmental interest. For this noncommunicative impact of his conduct, and for nothing else, he was convicted.

In conclusion, we find that because of the Government's substantial interest in assuring the continuing availability of issued Selective Service certificates, because amended 462 (b) is an appropriately narrow means of protecting this interest and condemns only the independent noncommunicative impact of conduct within its reach, and because the noncommunicative impact of O'Brien's act of burning his registration certificate frustrated the Government's interest, a sufficient governmental interest has been shown to justify O'Brien's conviction.

O'Brien finally argues that the 1965 Amendment is unconstitutional as enacted because what he calls the "purpose" of Congress was "to suppress freedom of speech." We reject this argument because under settled principles the purpose of Congress, as O'Brien uses that term, is not a basis for declaring this legislation unconstitutional. ...

Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in [391 U.S. 367, 384] this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a "wiser" speech about it.

MR. JUSTICE HARLAN, concurring.

The crux of the Court's opinion, which I join, is of course its general statement, ante, at 377, that: "a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

I wish to make explicit my understanding that this passage does not foreclose consideration of First Amendment claims in those rare instances when an "incidental" restriction upon expression, imposed by a regulation which furthers an "important or substantial" governmental interest and satisfies the Court's other criteria, in practice has the effect of entirely preventing a "speaker" [391 U.S. 367, 389] from reaching a significant audience with whom he could not otherwise lawfully communicate. This is not such a case, since O'Brien manifestly could have conveyed his message in many ways other than by burning his draft card.

MR. JUSTICE DOUGLAS, dissenting.

The Court states that the constitutional power of Congress to raise and support armies is "broad and sweeping" and that Congress' power "to classify and conscript manpower for military service is `beyond question.'" This is undoubtedly true in times when, by declaration of Congress, the Nation is in a state of war. The underlying and basic problem in this case, however, is whether conscription is permissible in the absence of a declaration of war.

Is Burning a Draft Card Protected by the First Amendment?

Burning Draft Cards and Symbolic Speech: United States v. O'Brien

Group Members _____

Work together to answer the following questions about the O'Brien case.

David O'Brien readily admitted that he burned his draft card. What did he hope to achieve by burning his draft card?

O'Brien claimed the 1965 law prohibiting the burning of draft cards was unconstitutional. List his reasons.

What was the outcome of the court case?

The Chief Justice writes, "This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms..." Essentially, the government can limit symbolic speech if under four conditions. What are the four conditions?

Why did Justice Harlan agree with the majority decision?

Why did Justice Douglas dissent?

What did the Chief Justice mean when he wrote, "We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea"?

"The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping..." Explain how this statement justifies the government's power to draft young men into the military.

"O'Brien's act of burning his registration certificate frustrated the Government's interest, a sufficient governmental interest has been shown to justify O'Brien's conviction." How does this statement justify O'Brien's conviction?

Justice Douglas thinks that the court is arguing the wrong question. What question does he think the court should be deciding?

The Court determined that burning a draft card is not protected by the First Amendment as a expression of symbolic speech. Do you think the court made the correct decision? Explain the reasons for your opinion.

Reaction to the O'Brien Decision

Handout 6

Read the following primary source articles to gauge to reaction to the Supreme Court's decision in United States v. O'Brien.

Article 1: **Law Against Burning Draft Cards Upheld** **Washington Post, May 28, 1968**
By John P. Mackenzie

The Supreme Court yesterday upheld the power of the congress to punish draft card burners and scolded young men who consider their draft cards as "so many pieces of paper."

Draft cards served a valid national purpose and are not "to be retained or tossed in the wastebasket according to the convenience or taste of the registrant." Chief Justice Earl Warren declared for the 7-to-1 majority.

In equally scolding tones Warren rejected the claim of the American Civil Liberties Union that public burning of draft papers was a form of "symbolic speech" protected by the First Amendment. "We cannot accept the view," said Warren, "that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."

The Court reversed the First Circuit Court of Appeals in Boston, which had been the only Federal appellate court to rule that the 1965 card-burning law was invalid because Congress betrayed a motive to punish dissent.

The lower court had affirmed the conviction of David P. O'Brien, 22, but only on the theory that he broke the law by failing to carry his draft papers after he burned them on the steps of the South Boston Courthouse two years ago.

Justice William O. Douglas dissented in today's ruling in the O'Brien case and a series of dissents in related cases, he argued for a thorough reexamination of the legality of the Vietnam war, which he said was the underlying issue. Justice Marshall did not participate.

Besides upholding the six year Youth Correction Act sentence of O'Brien, a philosophy student at Boston University, the initial impact of the decision was expected to be on the trial in Boston of Dr.

Benjamin Spock and four other protesters against the Vietnam war. They are accused of conspiring to obstruct the draft.

Brief is Rejected

Lawyers for the five defendants have asked the Court in a special friend of the Court brief to avoid sweeping rulings on the issues of their case. The Court formally rejected the brief yesterday. It had been lodged too late for filing under Court rules.

Potentially most damaging to the Spock defense was the Court's pronouncement that the issuance of draft certificates "is a legitimate and substantial administrative aid in the functioning of this system" of raising armies. The Government's evidence at the Spock trial has included filmed scenes of card burnings and the abandonment of hundreds of cards at the Justice Department last October.

Defense counsel in the Spock, O'Brien, and other draft resister prosecutions have argued that the draft card system served only a minor purpose compared with the infringement of free expression that accompanied enforcement of rules requiring constant possession of the cards.

Warren said it was "unrealistic" to minimize the importance of draft certificates within the "broad and sweeping" power of the Government to raise armies.

Many Functions Cited

"The many functions performed by Selective Service certificates establish beyond a doubt that Congress has a legitimate and substantial interest in preventing their wanton and unrestrained destruction," the chief Justice said.

As for the congressional motive, Warren said probing for motive was "a hazardous matter" that the Court attempted only in trying to define a law's meaning. He found that the law was "penal" but not "punitive" in the sense of seeking out individuals to punish.

Justice John M. Harlan filed a short concurring statement emphasizing his view that O'Brien was not being denied all rights of expression since he "manifestly could have conveyed his message in many ways other than by burning his draft card."

Douglas argued that the need to raise armies must be based on the existence of a legal war. He said the issue of conscription "in the absence of a legally declared war" had never been decided by the Court. He dissented also in the denial of review in four other draft cases, arguing that the war issues should be set down for argument in the fall.

Article 2: **Draft Card Burning** **Washington Post, May 28, 1968**

There is a wealth of common sense in Chief Justice Warren's opinion for the Supreme Court upholding the constitutionality of the 1965 law prohibiting the destruction or mutilation of a draft card. In open defiance of the law, a young man, David Paul O'Brien, burned his draft card in 1966 on the steps of South Boston Courthouse, justifying his act as a symbolic form of protest or expression protected by the First Amendment. The Chief Justice disposed of this contention by ruling that "a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial government interest, if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest."

No doubt young Mr. O'Brien's intent, as he claimed, was to express dramatically his opposition to the war in Vietnam and to conscription. A similar intent might be claimed, we supposed, by someone who set fire to a building or public records; but undoubtedly Congress could make such conduct punishable for the sake of protecting the public interest unrelated to the suppression of speech. The operation of the Selective Service System is obviously facilitated by a requirement that draft cards be kept in good condition and carried by everyone subject to the draft.

There is rather more merit, we surmise, to Mr. O'Brien's contention that Congress passed the 1965 law for the purpose of preventing just the kind of protest in which he engaged. But the Court was thoroughly justified in following the settled rule that it avoid the imputation of illegitimate legislative motives in construing an otherwise constitutional statute.

The 1965 law may have been meant to limit protest. But it clearly did not foreclose all means of expressing opposition to the Selective Service System. As Mr. Justice Harlan pointed out in a concurring opinion, "O'Brien manifestly could have conveyed his message in many other ways other than burning his draft card." Free Speech in the United States suffers no impairment from this ruling.

Reaction to the O'Brien Decision

Name _____

One of the nation's major newspapers, the *Washington Post*, published stories on May 28, 1968 about the Supreme Court's decision in *United States v. O'Brien*. Read the two articles to gauge the reaction to the case. Look for similarities and differences in the two articles.

One of the articles was an editorial. Which one was the editorial? Explain how you could tell.

According to article one, Chief Justice Warren used "scolding tones." What is the author trying to convey by using the phrase, "scolding tones"?

Do any of the articles indicate that O'Brien's freedom of speech was violated?

Why are, in the opinion of the court, draft cards necessary?

Both articles indicate that the court ruled burning of draft cards was not protected by the First Amendment. Yet, each article listed different reasons. Why did the court rule against O'Brien? How can you account for the reasons given in the articles?

Both articles indicate Justice Harlan rejected O'Brien's claim of symbolic speech. Why did Justice Harlan feel O'Brien was not denied his right to express opposition to the war?

Which article included Justice Douglas's dissent? Why did Justice Douglas disagree with the majority of the Supreme Court?

O'Brien was arrested under a 1965 law that prohibited the destruction of a draft card. One of the articles indicates that the "law may have been meant to limit protest." Why did the author think the law was still constitutional?

Editorial

Handout 7

One article indicated this ruling would have an influence on an upcoming trial. What was the trial and how did the author expect the O'Brien ruling to impact the other trial?

By 1968, many people complained that the draft violated the Fourteenth Amendment because it did not grant equal protection of the laws. The case was made that certain segments of society were less likely to be drafted, and therefore, sent to Vietnam than other segments of society. Read the following editorial and determine if the author thought the draft was unfairly applied and if so, which segment was treated unfairly. If the draft was unfair, what should be done?

The Draft Must Be Made Fairer

As a moment when the war in Vietnam is in so discouraging a state, and many more troops are being talked of, it is tragic for the nation to be saddled with an unfair draft law. Yet, every time somebody sets out to improve the draft ends up worse than it started.

In the past the inevitable inequities, though cruel to individuals, were such that we could live with them as a nation. But in this agonizing moment, grossly unfair draft rules add a tragic dimension to our problems. Snared in a war whose purpose many question, and that is something short of national survival, we must ask the draft that it treat with complete impartiality the men whose lives it may take. With such stakes there is no room for politicking or for satisfying grudges against more privileged young men. But these had been a part of the latest rewriting and interpretation of the Selective Service Act.

The old regulations badly needed rewriting. Their provisions allowed men with above-average cash or intelligence to parlay a college education into prolonged graduate studies and virtual exemption from the draft. These new rules, which will take effect in June, will not simply plug the loophole. They will completely reverse the inequity. From a situation in which few graduate students ever saw service, next year will see the draft calls primarily filled by graduate students while nonstudent youths are spared.

When the President last spring suggested a revision of the system, one of his key proposals would have reversed the order of call-up – by inducting 19-year-olds first, then working up to older men if necessary. Since we would seldom need all eligible 19-year-olds, the president also suggested a form of random choosing, or lottery, as the only fair way to decide who would serve.

Under such a plan there would be no need to continue deferments for graduate students since by the time they reached that point in their education, youths would have already served – or be assured that they would not be called except for a major emergency.

The Congress bought only a small part of the President's proposal. It agreed to the abolition of graduate deferments for all but medical trainees (who are liable after graduation in their own "doctors" draft). But the congressmen specifically ordered the President not to institute any form of lottery, and thus set the stage for more trouble.

The new rules allow continued deferment for only men in their second year of graduate school or beyond. Those who will finish their first year this spring, and seniors graduating this year who had planned to go on to graduate school, are now draftable. And since President Johnson has unaccountably decided not to institute his own plan to call 19-year-olds first, the two-year group of graduate students will supply most of the manpower for the nation's draft boards.

Of the approximately 300,000 male students in the two classes, it is estimated that the draft will take about 60%. And others will likely enlist to exercise a choice of service. The graduate schools will be left, in the words of Harvard President Nathan Pusey, with "the lame, the halt, the blind, and the female."

Dragooning most of the men from two full years of the education cycle in America is a matter of importance to more than just those graduate students who lose deferments. Graduate assistants do much of the classroom teaching at universities – and some of those schools will lose half of these instructors. Under the new rules, no graduating college senior will know exactly when he will be called – and whether he should chance starting a year of graduate study. The same uncertainties are playing havoc with the universities which are already committed of overhead expense for next year with no idea of the size of their student bodies.

As long as the draft needs fewer than half the men who become available each year, then the country needs a selective service law that will take them with some even-handedness from among the wealthy and the poor, the intelligent and the average. The President should revive his own plan to draft the 19-year-olds first. That age falls early enough to prevent much disruption of career or school plans. And we still think some form of random lottery is the fairest way to choose the 19-year-olds who will serve.

Name _____

Read the following editorial from *Life* magazine, March 8, 1968 and answer the questions about the editorial.

What is the author's position on the draft?

According to the author, why do the draft laws need rewriting?

What usually happens when changes are made in the draft laws?

What problems are created by the new rules scheduled to go into effect in June?

What has Congress specifically forbidden the President to do?

List President Johnson's proposals to revise the draft.

How would the drafting of large numbers of graduate assistants affect the nation's universities?

Approximately how many individuals did the author expect to be drafted in a year?

According to the author, what should Americans ask of the draft system?

At what age does the author believe the draft would be the least disruptive?

What does the author think is the fairest way to draft young men?

How do you think the author feels about the war in Vietnam?

The Fourteenth Amendment guarantees equal protection of the laws. Do you think that the draft law of this time provided equal protection to all young men? Explain your answer.

After reading the article, write a short paragraph explaining what you think would be the most equitable draft system.

The Catonsville Nine

Handout 8

Open <http://c9.mdch.org/index.cfm> Fire and Faith: The Catonsville Nine

Read the home page and answer the questions below.

What did the Catonsville Nine do?

Their action was described as civil disobedience. What is civil disobedience?

What did the Catonsville Nine use to burn the draft records?

Open the action folder and watch the video.

Describe the burning of the draft records.

What did the Catonsville Nine do while the draft records were burning?

How did the reporters manage to get to the draft board office quick enough to take pictures of the burning records?

Open the resistance section of the action folder.

What was the first act of resistance that members of this group did?

How was this different than the action they took at Catonsville?

Open the blood to fire window.

Why did the Nine decide to burn the draft records at Catonsville?

What did they use to make the napalm?

How did they know how to make napalm?

Open the consequences window.

List three consequences of the Catonsville draft card burning.

Three of the nine were Roman Catholic priests. How did their participation influence the way the public saw the incident?

Open the Trial file.

Describe the trial of the Catonsville Nine.

The defendants admitted that they burned the files but did not consider themselves guilty of a crime. Why did they believe they were innocent of criminal actions?

What was the verdict in the trial?

What were the punishments for the Catonsville Nine?

Open the profiles window.

Look at the pictures of the Catonsville Nine.

Why do these people appear unlikely draft protesters?

As a group, how would you describe the appearance of the Catonsville Nine?

Conclusion

Why do you think the Catonsville Nine decided to burn the draft records?

This was an act of civil disobedience. Obviously, the Catonsville Nine destroyed government property and knowingly destroyed draft records. Do you think this was an action of criminal behavior or social conscience? Explain your answer.

Do you think the Catonsville Nine were heroes or villains? Explain your answer.

Assessment: Assessment varies for each lesson and lesson assessments are included in the daily procedures.

Unit Assessment:

Students will write an FCAT style essay.

Did the Vietnam era draft deny draftees their civil liberties?

Were Vietnam era draft protesters denied their civil liberties?

Resources:

Vietnam Era Draft Classifications: <http://members.aol.com/warlibrary/draft.htm>

Time February 24, 1967 Burning Words, Yes; Burning Cards, No

United States v O'Brien 391 U.S. 367 (1968)

Mackenzie, John P. "Law Against Burning Draft Cards Upheld" Washington Post, May 28, 1968

Editorial, "Draft Card Burning" Washington Post, May 28, 1968

Editorial, "The Draft Must Be Made Fairer" *Life*, March 8, 1968

Fire and Faith: the Catonsville Nine <http://c9.mdch.org/index.cfm>

MacDonald, Joe *Fixin to Die Rag* <http://www.countryjoe.com/rag.htm>