

Cases, costumes, and civic concepts: Teaching U.S. Supreme Court decisions using the “Equal Justice Under Law” video series*

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To facilitate the civic educational dissemination of the constitutional principles expressed by Chief Justice John Marshall in *Marbury v. Madison*, *United States v. Burr*, *Gibbons v. Ogden*, and *McCulloch v. Maryland*, and then later to mark the Constitution’s 1987 bicentenary, a series of videos was commissioned by the Judicial Conference of the United States. The period-costume dramatizations of the politics and legalities of the cases reached out to students in a way that neither the judicial opinions nor academic commentary were able to. In this paper, I conclude that thirty years after their initial release, these videos continue to serve as important teaching tools.

Usually the first Court decisions to which undergraduates are exposed in American constitutional law courses, these cases are neither easy to teach nor conceptually accessible for most students who are just beginning to understand legal reasoning. However, they contain important discussions of fundamental principles, a firm grasp of which is essential for appreciating the legal role of the Court and its contribution to shaping and maintaining civic discourse. The “Equal Justice Under Law” video series recognized this.

By combining the teaching notes written by Justice Harry Blackmun for his lectures on the videos, classroom experience using the material, and analysis of the civic educational role of the Supreme Court and its decisions, I show that the films continue to bring to life events portrayed in legal decisions that students might otherwise dismiss as nothing more than “required reading.”

* I would like to thank the students in my Fall 2006 classes for participating in the research for this paper. I am also grateful to Justin Warkentin for his research assistance.

Perhaps most important, the viewers are quickly engaged in the issues being discussed and do not feel they are watching a group of clown actors in wigs, as is so often the case in historical dramas. That in itself is no mean accomplishment.¹

(Richard E. Ellis)

Thirty years ago, U.S. Supreme Court Justice Harry Blackmun traveled to Austria to give a series of lectures on “American Law and Legal Institutions” at the Salzburg Seminar in American Studies. He incorporated into his talks a set of films that are period dramatizations of famous cases decided by the Court under the leadership of Chief Justice John Marshall. The use of the films to educate the seminar participants came two months before the series received its television premier on PBS. “Equal Justice Under Law” (EJUL) was so new, that with few exceptions, it had only been viewed by those involved in its production. Following the 1977 broadcast of the series, and the 1987 reissue as part of the celebration of the bicentennial of the Constitution, copies of the films were distributed to libraries, schools, and colleges. Like Justice Blackmun, numerous educators have used the films to teach groups of Americans about fundamental principles of constitutional law and politics.

John Marshall’s opinions defined the nature and degree of many of these principles, shaping the new country in the process. The cases featured in EJUL – *Marbury v. Madison* (1803), *United States v. Aaron Burr* (1807), *McCulloch v. Maryland* (1819), and *Gibbons v. Ogden* (1824) – produced four of the most important of these opinions. They are, to this day, cited and quoted from repeatedly by courts, scholars, and teachers. When the series was created, it was felt that the dramatizations would aid in the educational dissemination of the country’s

¹ Richard E. Ellis, "Review: *Equal Justice under Law: The Marshall Years* by Mat Von Brauchitsch," *The Journal of American History* 75, no. 3 (1988): 1042-3.

founding constitutional principles. When they were produced, the need for this civic education was considered pressing. Today, the situation seems no different.

In order to set the scene for an evaluation of the ability of EJUL to accomplish this goal thirty years on, Part I of this paper will take a broad look at the civic educational role (both normative and empirical) of the Supreme Court. Over the course of that institution's history, many of its members have sought to use the Court's opinions, particularly those that they write, to teach Americans about their country's founding principles. Part II analyzes the efforts of Justice Blackmun and Chief Justice Warren Burger within the context of the decision to commission the series of films. Part III then proceeds to evaluate the series by drawing on questionnaires completed by current college students.

Part I: The Supreme Court as a Civic Educator

Questions of law rarely assume a cast, which introduces them to extensive, public notice; and those, which require the highest faculties of mind to master and expound them, are commonly so intricate, and remote from the ordinary pursuits of life, that the generality of readers do not bring to the examination of them the knowledge, necessary to comprehend them, or the curiosity, which imparts a relish and flavor to them.²

(Justice Joseph Story)

Seeking “to inspire immigrants to learn about the civic values of this nation” in a manner that goes beyond rote memorization of answers, in November 2006 the U.S. Citizenship and Immigration Services unveiled a significantly revised naturalization test. The new test has been

² Quoted in George Lee Haskins and Herbert A. Johnson, *History of the Supreme Court of the United States Volume I: Foundations of Power: John Marshall, 1801-1815* (New York: Macmillan, 1981), 83.

designed to encourage more detailed thinking about the “fundamental concepts of American democracy and the rights and responsibilities of citizenship.”³ The bank of 144 pilot questions drew the following reaction from one columnist. “The idea,” wrote Clyde Haberman, “is to see whether budding Americans understand underlying principles of our democracy. In other words, we expect them to be better than the rest of us.”⁴ This response incorporated recent polling data that suggested that perhaps the state of the nation’s civic education was not terribly healthy, with public interest in, and knowledge about the judiciary lagging quite a long way behind the other two coequal branches. For example, seventy-four percent of respondents could name the Three Stooges, but only forty-two percent could identify the three branches of government; and while only twenty-four percent could provide the names of two members of the Supreme Court, seventy-seven percent of those questioned could provide the names of two of the seven dwarfs.⁵ Snow White obviously is not turning in her grave, but it seems that James Madison might be, particularly given the views that he held, and which have been shared by many of the justices, about the Supreme Court’s role in civic education.

This role is defined by the fact that within the sphere of American law and politics civic education is a decidedly joint venture. It is not the sole province or responsibility of judges nor professors, because “all those who engage in constitutional and legal commentary thereby help to articulate competing visions of lawmaking that are essential to building a vibrantly free political community.”⁶ The most famous formulation of the idea that the Supreme Court, through its

³ “Press Release: USCIS Issues Questions and Answers for New Pilot Naturalization Exam,” November 30, 2006; “Fact Sheet, USCIS Naturalization Test Redesign,” November 30, 2006. Both available at: [<http://www.uscis.gov>], last accessed December 13, 2006. Whether the new questions actually achieve this goal – I doubt that they do – is a question for a different paper.

⁴ Clyde Haberman, “Good Thing We Citizens Aren’t Tested,” *New York Times*, December 5 2006.

⁵ Data from a 2006 Zogby poll, quoted in *Ibid.*

⁶ Ira L. Strauber, *Neglected Policies: Constitutional Law and Legal Commentary as Civic Education* (Durham, NC.: Duke University Press, 2002), 17.

opinions, can play an educational role in American society remains that expressed by Eugene V. Rostow in 1952. The Court, wrote Professor Rostow, is “an educational body, and the Justices are inevitably teachers in a vital national seminar.”⁷ Christopher Eisgruber accurately captured academia’s reaction to Rostow’s description when he wrote that “an astonishing range of thinkers has endorsed some version of this idea.”⁸ Even though they have disagreed about its specific normative and empirical details, law professors and political scientists alike have provided this endorsement as part of a larger debate over the proper relationship between the people and the Supreme Court – the role of the Court in a constitutional democracy.⁹

There is considerable evidence that the idea of the Court acting as a civic educator is consistent with the vision of the Constitution and the Court held by James Madison. Although Madison famously acknowledged the shortcomings of “parchment barriers” (and the need for additional checks against tyrannical government), he was also very aware that these barriers – such as the Constitution and the Bill of Rights – could play an important educational role because they encouraged public interest in civic life and the workings of the people’s government.¹⁰ As he observed later in his life, in an oft-quoted letter to William T. Barry:

⁷ Eugene V. Rostow, "The Democratic Character of Judicial Review," *Harvard Law Review* 66 (1952): 208.

⁸ Christopher L. Eisgruber, "Is the Supreme Court an Educative Institution?," *New York University Law Review* 67 (1992): 962.

⁹ For a more detailed discussion of these scholarly reactions, see Helen J. Knowles, "The Supreme Court as Civic Educator" (paper presented at the Southern Political Science Association Annual Conference, New Orleans, LA, 2007).

¹⁰ Federalist 48, in Benjamin F. Wright, ed., *The Federalist by Alexander Hamilton, James Madison, and John Jay* (New York: Metro, 2002), 343-47, James Madison, "Speech Introducing Proposed Constitutional Amendments, June 8, 1789," in *The American Republic: Primary Sources*, ed. Bruce Frohnen (Indianapolis, IN: Liberty Fund, 2002), 340.

A popular government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will for forever govern ignorance. And, a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.¹¹

Of course, it is a separate question whether the American public actually finds it necessary to engage in civic education in order, for example, to maintain the country's commitment to democratic self-government. And, regardless of the answer to this question, one has to ask whether the Court actually plays any role in the distribution of this knowledge (as a civic educator). As Professor Eisgruber asked, "[d]oes the Court...have an educative responsibility, or does it instead merely have an occasional educative effect as a by-product of interpretive accidents?"¹²

Putting aside a search for *the* empirical answer to Eisgruber's question, what we do know is that over the years many of the justices who have remained largely unknown to a majority of the American public have lamented the extent to which We, The People, the Court's constant constituency, do *not* know about the interpreter of the country's supreme law.¹³ And many have sought to remedy this situation by using their judicial *opinions* to express the fundamental legal and constitutional principles at the heart of civic education.¹⁴ This approach is consistent with the primary direction that law-related education (LRE) – "legal education for non-law students"

¹¹ Letter from James Madison to William T. Barry, August 4, 1822, in *James Madison: Writings 1772-1836*, (New York: Library of America, 1999), 790. For analysis of the letter as a Madisonian expression of the importance of education, see Michael Doyle, "Misquoting Madison," *Legal Affairs*, July/August 2002.

¹² Eisgruber specifically stated that he was not addressing the empirical question whether or not the Court's educative opinions actually do educate. Eisgruber, "Is the Supreme Court an Educative Institution?," 963-64, 1014 (quotation).

¹³ See, for example, comments of Justices O'Connor, Scalia, and Breyer, "Constitutional Conversation," (C-SPAN, 2005), Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (New York: Alfred A. Knopf, 2005), 133-34.

¹⁴ As I have recently argued elsewhere, a prominent current example of a member of the Court writing his opinions to contribute to a clearly identifiable civic educational project is Justice Kennedy. Helen J. Knowles, "A Dialogue on Liberty: The Classical Liberal Origins of Justice Kennedy's Vision of Judicial Power" (Ph.D. Dissertation, Boston University, 2006).

– has taken (or its advocates has sought to direct it towards) since the 1950s. The emphasis is on the teaching of facts *and* the evaluation of principles. This was in reaction to the identified shortcomings in the previously dominant approach that focused on teaching facts alone.¹⁵ The majority of information that people gain about the Court, and the extent to which the work of the Court contributes to the civic education of Americans, comes not from the justices’ work product but rather is determined by the media’s coverage of that institution.¹⁶ Interestingly, however, while justices can agree that one “miss[es] the principal point” when one concentrates on votes and decisions instead of opinions and reasoning,¹⁷ whether the media is guilty of interpreting the Court’s work in this way or whether it can and does help the Court “to instruct and inspire” is hotly contested.¹⁸

Of course, unless college students – the Court’s constituency with which this paper is most interested – take courses in which they directly encounter education about the Supreme Court (and its decisions), it is an indisputable fact that the primary source of their knowledge about the judicial branch of the government will continue to be the media. However, with specific regard to EJUL it is important to remember that students were the target audience for the series. Therefore, before proceeding to a discussion of the films and an analysis of their

¹⁵ Mark C. Alexander, "Law-Related Education: Hope for Today's Students," *Ohio Northern University Law Review* 20 (1993).

¹⁶ Elliott E. Slotnick and Jennifer A. Segal, *Television News and the Supreme Court: All the News That's Fit to Air* (Cambridge: Cambridge University Press, 1998), chapter one, Richard L. Pacelle, Jr., *The Role of the Supreme Court in American Politics: The Least Dangerous Branch?* (Boulder, CO: Westview, 2002), chapter seven.

¹⁷ Justice Antonin Scalia, quoted in Elliott E. Slotnick, "Media Coverage of Supreme Court Decision Making: Problems and Prospects," *Judicature* 75, no. 3 (1991): 130. And, in so doing, challenge one of the underlying assumptions of the attitudinal model of judicial decision-making – that for political scientists judges’ votes are more valuable data than opinions because of the likelihood that explanations differ from actions. Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge: Cambridge University Press, 2002).

¹⁸ Justice William Brennan, quoted in Slotnick, "Media Coverage," 130.

longevity (in Parts II and III of this paper), it is necessary briefly to consider the in-classroom sources of law-oriented civic education that the dramatizations were intended to supplement.

At the beginning of every semester, during the first class of my constitutional law and civil liberties courses, I used to show the opening clip from *The Paper Chase*. This has since been replaced by showing the equivalent, but far more modern scenes from *Legally Blonde*.¹⁹ The point I make, which the students quickly realize is a very serious one, is that the Socratic method of instruction that I employ – which both films illustrate very well – is an efficient (even if for them initially quite painful) way of appreciating some of the finer points and complexities of legal reasoning.²⁰ This is important because, to return to a point made above, understanding and/or teaching the principles explained in a judicial opinion is far more challenging and poses greater learning and pedagogical difficulties than expounding the facts of a case.

Perhaps best articulated by the esteemed judicial politics scholar C. Herman Pritchett, when he admonished members of his profession to remember that “political scientists who have done so much to put the “political” in “political jurisprudence” need to emphasize that it is still “jurisprudence,””²¹ the degree to which the American judicial system, and the opinions that its members author are politicized must not be exaggerated.²² However, Pritchett’s warning similarly informs us that teachers of American constitutional law should not ignore the political environment out of which cases are born, and within which the justices work. As Christopher E. Smith has written, educating people – whether they be the general public or students in law and

¹⁹ James Bridges, "The Paper Chase," (Twentieth Century-Fox, 1973), Robert Luketic, "Legally Blonde," (MGM, 2001).

²⁰ It is this that *Legally Blonde* achieved explicitly, in a manner unmatched by the adaptation of John Jay Osborn, Jr.'s novel. I am referring to the scene involving the quotation from Aristotle: “The law is reason free from passion.”

²¹ C. Herman Pritchett, "The Development of Judicial Research," in *Frontiers of Judicial Research*, ed. Joel B. Grossman and Joseph Tanenhaus (New York: Wiley, 1969), 42.

²² A tendency that was evident in, for example, Segal and Spaeth, *Attitudinal Model Revisited*, Terri Jennings Peretti, *In Defense of a Political Court* (Princeton, NJ: Princeton University Press, 1999).

politics classes – about “laws” rather than the “complex human elements that affect the judicial process” probably presents fewer instructional and pedagogical challenges.²³ However, if civic educational principles are to mean anything, they cannot be successfully passed to future generations in an apolitical vacuum-packaged lecture entitled “law.”

In the classroom, many different materials and methods are employed to help students – be they in high school, college undergraduate or graduate students, or at law school – confront legal reasoning and acquire the skills necessary to decipher justices’ opinions, and understand the political context of cases. One of the most important contributions that supplementary and complementary resources make is to open students’ eyes to the nature of this relationship between the legal facts detailed and the legal arguments made in judicial opinions, and the socio-political factors that shape the actions of all the parties involved – litigants, advocates, and decision-makers alike. For example, books that ‘tell the stories’ of the players in a case can help to form a greater degree of attachment between the student and a case than might otherwise be achieved from simply reading an opinion.²⁴

In 1978, *The Constitution and Chief Justice Marshall* was published. Authored by Professor William F. Swindler (one of the principal academic advisers for EJUL, and the chairman of the Supreme Court Historical Society’s publications committee), it was officially undertaken independently but was intended to serve as a supplementary and complementary scholarly work for EJUL.²⁵ Essays about the four cases featured in EJUL, and Marshall’s

²³ Christopher E. Smith, "Review Essay: Educating the Public About Courts and Law," *Judicature* 75 (1991): 111-12.

²⁴ For example, see Peter Irons, *The Courage of Their Convictions: Sixteen Americans Who Fought Their Way to the Supreme Court* (New York: Penguin, 1990), Michael C. Dorf, *Constitutional Law Stories* (New York: Foundation, 2004). Also fulfilling this role is the Landmark Law Cases and American Society series, the first volume of which was published by University Press of Kansas in 1997.

²⁵ William F. Swindler, *The Constitution and Chief Justice Marshall* (New York: Dodd, Mead, 1978), "Equal Justice under Law: Documentary Films on the Supreme Court," *Supreme Court Historical Society Yearbook* 1978 (1978).

opinion in *Dartmouth College v. Woodward* (1819),²⁶ were accompanied by relevant primary documents. For example, in addition to the Court’s opinions in the cases, the reader of this volume had access to the relevant federal legislation (such as the Judiciary Act of 1789), executive branch materials (Jefferson’s statements relating to *Burr*), and state documents (the Charter of Dartmouth College, Maryland’s taxation law, and the New York licensing statute questioned in *Dartmouth College*, *McCulloch* and *Gibbons* respectively). The volume was rounded out by an appendix containing the Bentham Club Lecture, on *Marbury*, that Chief Justice Burger gave at the University of London in 1972. The educational value of bringing all these documents together in one place was immense, but Swindler and the creators of EJUL recognized the shortcomings of teaching with dry documents written in legalese. Therefore, in “round[ing] out the story of Marshall’s Supreme Court in the American constitutional process” the book was the intended *supplement*, the videos remained the primary teaching tool.²⁷

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Of course, teaching aids need not be confined to standard academic literature. *May It Please the Court*, the set of edited oral argument transcripts and recordings for twenty-three landmark cases, compiled by Peter Irons, remains an important educational tool fourteen years

²⁶ 17 U.S. 518 (1819) (holding that the Contract Clause applies to a corporate charter – thereby giving the Court an important tool with which to revise substantial amounts of state legislation). It has been suggested that instead of *Burr* the producers of EJUL could have dramatized three other Marshall Court decisions involving ‘more significant issues’ – *Dartmouth College*, *Martin v. Hunter’s Lessee*, 14 U.S. 304 (1816) (the Supreme Court has the power to review the constitutionality of state supreme court decisions), and *Cohens v. Virginia* 19 U.S. 264 (1821) (the Supreme Court has jurisdiction to review state criminal proceedings). Ellis, “Review,” 1042. It is true that the numbers of subsequent Supreme Court opinions citing these cases certainly exceed the citations of *Burr*. As of December 2006, a Shepard search shows that *Burr* has been cited in approximately 90 Supreme Court opinions, *Dartmouth College* in 109, *Hunter’s Lessee* in 128, and *Cohens* in 180. A stronger argument can be made in defense of inclusion of *Hunter’s Lessee* and *Cohens* than *Dartmouth College* because of their greater ties to the overall EJUL themes of national unity and separation of powers.

²⁷ Warren E. Burger, “Introduction,” in Swindler, *Chief Justice Marshall*, xiii.

after its publication in 1993.²⁸ And now students have numerous reputable Internet sites from which to retrieve information about the law and politics of the Supreme Court's work.²⁹ In the pages that follow, I consider whether EJUL, as a predecessor to all these different technological teaching aids, made a valuable contribution to the ability of educators to convey to their students the importance of the civic educational principles embodied in the chosen quartet of John Marshall's judicial opinions. I also ask whether the series represents a teaching tool that can help to convey the civic educational principles embodied in the Marshall Court opinions in a manner that is more student-friendly than both the opinions and traditional academic commentary.

Part II: Making "Equal Justice Under Law"

Today too few Americans think of the Constitution
as being a vital part of our everyday lives.³⁰

(Chief Justice Warren Burger)

Although it was not until 1986 that Warren Burger resigned the Chief Justiceship in order to devote his energies to chairing the Commission on the Bicentennial of the United States Constitution, a position for which he was "drafted" by President Reagan a year earlier, Burger

²⁸ Peter Irons and Stephanie Guitton, eds., *May It Please the Court: 23 Live Recordings of Landmark Cases as Argued before the Supreme Court, Including the Actual Voices of the Attorneys and Justices in Oral Argument and Questioning* (New York: New Press, 1993). This has since been joined by three more book and cassette sets: *Arguments on Abortion* (1995); *The First Amendment* (1998); and *Courts, Kids, and the Constitution* (2000).

²⁹ One of the more valuable sites is <http://www.oyez.org>.

³⁰ Remarks by Chief Justice Warren Burger during the introductory commentary for the 1987 version of *McCulloch v. Maryland*, EJUL.

had long maintained an interest in civic education.³¹ As one historian has written, the Chief Justice “believed civic education was an obligation just as honorable as presiding over the Supreme Court.”³² The federal judiciary’s involvement in the country’s 1976 bicentennial celebrations was limited because the nation’s courts were not due to celebrate *their* bicentennial until 1987. However, the preparations for commemorating American independence did generate an awareness, by the third branch of government, that We The People should be better educated about our courts. Chief Justice Burger played a major role in the subsequent efforts to make the Supreme Court building more welcoming to visitors, and in the creation of the Supreme Court Historical Society in 1974 (over a decade after the establishment of the United States Capitol Historical Society and the White House Historical Association). As Burger observed in the introduction to the society’s first yearbook, published in 1976, changes were necessary because:

Most people know, or think they know, what the President and Congress are expected to do under our Constitution. Relatively few have any definite idea of what goes on in the courts generally, and in the Supreme Court of the United States in particular. Even though hundreds of thousands of visitors a year have gone through parts of the building, and perhaps observed oral arguments briefly, for most of them it has remained a remote, austere “marble temple” housing some seldom-seen jurists who periodically issue pronouncements on the law of the land.³³

Burger’s description was accurate, for only one year earlier, as the country prepared to celebrate its bicentennial, the *New York Times Magazine* described the Supreme Court as “probably the

³¹ Letter of Resignation, from Chief Justice Burger to President Reagan, June 17, 1986. Available at: [<http://www.reagan.utexas.edu/archives/1986/61786d.htm>], last accessed December 26, 2006.

³² A.E. Dick Howard, "Chief Enigma," *American Bar Association Journal* (1995): 69.

³³ Warren E. Burger, "Introduction," *Supreme Court Historical Society Yearbook 1976* (1976). He also made an effort to provide more information about the work of the federal judiciary. Doris A. Graber, *Mass Media & American Politics*, 6th ed. (Washington, D.C.: CQ Press, 2002), 311-12.

most ‘secret society in America.’”³⁴ As part of the judiciary’s efforts to reach out to the public, the Judicial Conference (the administrative body of the federal courts) commissioned EJUL, “[b]elieving that a dignified presentation of the judicial story ought to be made available to the general public.”³⁵ The series was, in Burger’s opinion, the main judicial contribution to the 1976 celebrations, and it always had an educational objective. The films were designed to reach out to far more people than those who would visit the Court or benefit in other ways from the work of the Supreme Court Historical Society. The “documentary films” were “designed to better acquaint the American public with the role of the judiciary in our constitutional system,” and were “primarily for use by the public television network, schools and colleges, [and] bar associations and civic groups.”³⁶

Although initially an anniversary celebration, the “concept” of the series quickly expanded as the Society sought “to achieve a more lasting public interest.”³⁷ Produced under the watchful eye of Supreme Court Justice Byron R. White, and a committee of federal judges from across the nation; funded by Congress; and drawing on academic contributions from prominent historical and legal scholars, the series was:

...intended to inform the general public, as well as educational and professional audiences, on the American constitutional heritage as exemplified in the major decisions of the Supreme Court under Chief Justice John Marshall.³⁸

³⁴ Quoted in Lewis F. Powell, Jr., “What Really Goes on at the Supreme Court,” in *Judges on Judging: Views from the Bench*, ed. David M. O’Brien (Washington, D.C.: CQ Press, 2004), 88.

³⁵ William F. Swindler, “Equal Justice under Law,” *American Bar Association Journal* 63 (1977): 1101.

³⁶ Burger, “Introduction,” xi.

³⁷ “Documentary Films.”

³⁸ Responsibility was placed in the hands of a film subcommittee of the Judicial Conference Committee on the Bicentennial of Independence and the Constitution. Swindler, “Equal Justice under Law,” 1099-101. “Documentary Films.”

The four cases were chosen because they illustrate “five of the fundamental constitutional principles that evolved during the first fifty years under the Constitution – major principles in the American credo of constitutional freedom.”³⁹ We look to *Marbury* to explain the concept of judicial review, and to expound on the authority of the judicial branch to undertake final interpretation of the nation’s supreme law. *Burr* describes the individual right to a jury trial, and the institutional importance of the separation of powers and checks on executive authority. And *McCulloch* and *Gibbons* put in place formative understandings of two of the concepts that were central to the unity and growth of the United States, namely federalism and implied constitutional powers. Marshall’s “words gave life to [these] great concepts...and underscored the need to guard closely the basic freedoms for which the Revolution had been fought.”⁴⁰ Whether the EJUL dramatizations of the four cases can continue to educate generations of Americans about the enduring importance of the concepts is considered below.

EJUL premiered on PBS in September 1977, coinciding with what was then called Citizenship Day (September 17).⁴¹ Every film took the same format. The thirty-minute presentation opened with classical music as the camera panned across the façade of the U.S. Supreme Court building that bears the inscription “Equal Justice Under Law.” Introductory and closing remarks, as well as narration at points during the film, were provided by E.G. Marshall. Articles discussing the series in 1977 focused on Marshall’s 1960s acting work, especially in the popular television series *The Defenders*, for which Marshall won two Emmys for his portrayal of

³⁹ Burger, “Introduction,” xi.

⁴⁰ Ibid.

⁴¹ In 1940, Congress created “I am an American Day,” which was celebrated in May until 1952 when it was replaced with “Citizenship Day” and moved to September 17 to coincide with the anniversary of the signing of the Constitution. Its name was change to “Constitution Day” in 2004. Barry J. Lipson, “Federally Speaking: Whiskey Rebellion Follows Sacco, Vanzetti Trial,” *The Lawyers Journal* 4 (2002), Nelson Lund, “Is Constitution Day Constitutional?,” *Green Bag* 9 (2006).

defense attorney Lawrence Preston.⁴² He was also known for playing Juror 4, the bespectacled stockbroker, in *12 Angry Men*.⁴³ Marshall's opening narrative provided an overview of the principal legal and political issues of the case, and was followed by dramatization of the key events out of which the litigation evolved. The films covered the oral arguments, deliberations amongst the justices, and the announcement of and reaction to the Court's decision. In 1987, as part of the celebrations of the bicentennial of the Constitution, EJUL was reissued. With snazzier packaging; an opening that featured audio-visual sound bites showcasing the most dramatic moments of the particular film, new music and up-to-date images of the front of the Supreme Court building; and opening titles that appended "The Marshall Years" to "Equal Justice Under Law," the series was updated for a new generation. Additionally, for each film E.G. Marshall's narrative was preceded by a short commentary on the case by Chief Justice Burger, who was filmed on location at John Marshall House in Richmond, Virginia.

One of the originally intended audiences was high school students; and the films were aired on weekday mornings at times convenient for integration into classes. Subsequent weekend evening presentations exposed a larger number of viewers to the cases, but there is no doubt that students were the primary targets.⁴⁴ Reviewing the 1987 re-issue of EJUL, historian Richard E. Ellis concluded that although the dramatizations might be useful as supplementary material in introductory history courses, it was important to note that "they tend to oversimplify and confuse the historical record." Ellis reasoned that this was because the films were

⁴² "Documentary Films," 1099, Swindler, "Equal Justice under Law."

⁴³ Interestingly, Marshall's identity was never revealed in EJUL. Indeed, the closing credits failed to mention any of the actors.

⁴⁴ Swindler, "Equal Justice under Law." A detailed teaching guide was produced to accompany the series, and was distributed to educators along with the films. I obtained a copy of this guide too late to incorporate comments about it, and its material into this paper.

“constructed from a lawyer’s point of view.”⁴⁵ This was not simply the result of a production team guided by the lawyer-dominated Supreme Court Historical Society and the Bicentennial Commission. Rather, the films were created specifically to educate about *constitutional and legal* principles. In so doing, they reflected a belief, expressed in much of the literature, that civic education is best when it is taught in government and politics classes, rather than as a ‘topic’ touched upon in numerous scholarly settings – such as economics, sociology, and *history*.⁴⁶ It is with this in mind that we turn our attention to the following question: To what extent can American law and politics students benefit from EJUL today, thirty years after the production of the series?

Part III: Evaluating a Series, Thirty Years On

It not infrequently happens that, transported by the indignation arising from an attempt to destroy a free government, its friends, by the measures they take to defend and support it, sap those principles on which it is founded.⁴⁷

(Congressman James Hughes (R-KY) (1807))

At the end of his book about the political and judicial battles between Marshall and Jefferson, James Simon refers to four court cases when summarizing the Chief Justice’s judicial legacy.⁴⁸ *Marbury v. Madison*, *United States v. Aaron Burr*, *McCulloch v. Maryland*, and *Gibbons v. Ogden* also constitute the quartet of Marshall decisions chosen for depiction in

⁴⁵ Ellis, "Review," 1042.

⁴⁶ For example, see Charles N. Quigley, "Civic Education: Recent History, Current Status, and the Future," *Albany Law Review* 62 (1999): 1425.

⁴⁷ Quoted in James F. Simon, *What Kind of Nation: Thomas Jefferson, John Marshall, and the Epic Struggle to Create a United States* (New York: Simon & Schuster, 2002), 228.

⁴⁸ *Ibid.*, 300-01.

EJUL.⁴⁹ The following description of the legal and political legacies of the four cases tells us much about why, when it embarked upon EJUL, the Judicial Conference made the right choice of cases for period dramatization:

Each decision turned on judicial discretion and strengthened judicial authority, yet perpetuated the myth of judicial modesty. None precluded flexibility of interpretation by future Courts. At the same time, the whole production bristled with Augustan rhetoric and moral imperatives: the nationalist doctrines which the Chief Justice liked were “part of our history,” “self-evident” and “universally understood,” doctrines which “the good sense of the public has pronounced,” “the people have declared,” and “America has chosen.”⁵⁰

In addition to answering questions about the general teaching value of the videos, my students were asked to provide information that enabled me to determine whether they took away from their viewing experiences greater knowledge of the “universally understood” legal and political doctrines that Marshall expounded upon in his opinions.

Data collection

After integrating the EJUL series into judicial politics and constitutional law courses at both Boston University and the State University of New York at Oswego, in the Fall of 2006 I decided to elicit my Oswego students’ responses to the films in a systematic manner. It was already clear that numerous students had benefited immensely from the use of the dramatizations of *Marbury* and *Gibbons* to supplement lectures about these complex cases, but the data I had only consisted of short, anecdotal reactions to these two videos. The opportunity to watch, and

⁴⁹ 5 U.S. (1 Cranch) 137 (1803); 25 F. Cas. 55 (1807); 17 U.S. (4 Wheat.) 316 (1819); 22 U.S. (9 Wheat.) 1 (1824).

⁵⁰ R. Kent Newmyer, *The Supreme Court under Marshall and Taney* (Arlington Heights, Ill.: Harlan Davidson, 1968).

complete questionnaires – consisting mainly of open-ended questions allowing for maximum flexibility of response⁵¹ – about their viewing experiences for all four films was offered, as an extra-credit assignment, to the students in my three courses – Critical Thinking in Politics (introductory level political science), The Supreme Court, and American Constitutional Law (both upper division classes). The films were shown once a week over a four-week period. Sixty-four percent of my students (45 out of 70) completed the entire assignment.⁵² All the questionnaires were completed anonymously, but in order to compare responses over the course of the films each student was randomly assigned a number that they kept for the duration of the series and wrote on each questionnaire. Primarily for logistical reasons, the students watched EJUL in the following order: *Marbury*, *Burr*, *Gibbons*, and *McCulloch*. In advance of showing this final film, the only one of the four that was a 1987 version, I informed half of the students that they would be seeing the updated edition and that I sought their reactions to the changes the producers had made. These questionnaires were kept separate.

Before taking my courses, no student had watched any of the EJUL series; this meant that it was the first viewing experience of *Burr* and *McCulloch* for all respondents; approximately one third of the students had seen *Marbury* and/or *Gibbons* in one of my classes. No freshmen were in the audience, and every student had declared his/her major, making it possible to analyze the questionnaires taking into account the students' academic background. As the data in Table 1 indicate, only five of the students were not majors in a subject that is part of the College of Arts and Sciences, and almost forty percent were political science majors.⁵³ Given that the films were shown towards the end of the semester, and that the data in Table 2 show that sixty-four

⁵¹ For the questions, see Appendix 1.

⁵² Fifty-six students (eighty percent) actually participated, but only forty-five attended all four films.

⁵³ This is unsurprising for two reasons: (1) this college is responsible for the most number of majors at SUNY Oswego (for the list, see Appendix 2); (2) all the students were in at least one of my political science courses.

percent of the students were taking at least one of my upper division classes, it is reasonable to assume that at the time they watched the films most of the students had a fairly good understanding of American politics and some of the most important principles of judicial politics and/or public law.

Major	Sophomore	Junior	Senior
Political Science	28.6% (2)	39.1% (9)	40% (6)
Other Arts and Sciences Majors	42.8% (3)	47.9% (11)	60% (9)
School of Business Major	0	4.3% (1)	0
School of Education Major	28.6% (2)	8.7% (2)	0
All students	15.6% (7)	51.1% (23)	33.3% (15)

Table 1: Years of study, and declared majors for students completing the EJUL questionnaires

Major	Critical Thinking in Politics	Supreme Court	Constitutional Law	More than one class
Political Science	12.5% (2)	46.2% (6)	50% (5)	66.6% (4)
Other Arts and Sciences Majors	62.5% (10)	46.2% (6)	50% (5)	33.3% (2)
School of Business Major	6.2% (1)	0	0	0
School of Education Major	18.8% (3)	7.6% (1)	0	0
All students	35.6% (16)	28.9% (13)	22.2% (10)	13.3% (6)

Table 2: Percentages of participating students, divided by school of major, taking certain political science courses in Fall 2006

Marbury: “an essay on American government”⁵⁴

One of the most prominent themes of both *Marbury* and *Burr* is the complex nature of the relationship that existed between first cousins Chief Justice John Marshall and President Thomas Jefferson. Although the EJUL producers can be criticized for their excessively sympathetic treatment of Marshall’s views (at the expense of the political positions taken by Jefferson), which I discuss below, there is no doubt that the differences of opinion between these two men, and the implications of these differences for the shape of the nascent United States, were necessarily major features of the two films. *Marbury* was the direct result of the actions of several men during and after the presidential election of 1800 that began the Jeffersonian reign of power in both the executive and legislative branches of the government. As two of the Court’s historians have observed, this election and the passage of the 1801 Judiciary Act by the Federalist Congress just before Jefferson took office “brought the Court into the vortex of politics.”⁵⁵ *Marbury* was the inescapably political result of these two events.

In 1801, in an attempt to pack the federal judiciary with favorable judges in order to prevent Jefferson from controlling the courts, outgoing Federalist President Adams commissioned (amongst many others) William Marbury to serve as a justice of the peace for the District of Columbia (the 1801 Judiciary Act created these appointment opportunities). Marbury’s commission went undelivered, and when Jefferson assumed the presidency he directed his Secretary of State, James Madison, not to deliver it. The resulting litigation brought by Marbury sought a writ of mandamus directing Madison to deliver the commission. Marbury

⁵⁴ Haskins and Johnson, *Foundations of Power*, 203.

⁵⁵ *Ibid.*, 141.

argued that Section 13 of the Judiciary Act of 1789 empowered the Supreme Court to issue such writs.

While in his opinion for the Court Marshall agreed that Marbury had a legal right to his commission, and that the withholding of the commission was a rights violation remediable by law, the ultimate victory in the case went to Madison (and Jefferson) because of the holding that Section 13 was unconstitutional, therefore denying the Court the power to issue this particular legal remedy. The decision turned on the fact that the case *originated* in the Supreme Court; it did not come to the justices on appeal and as such was brought to them under the Court's original jurisdiction. Marshall argued that the language of Section 13 conflicted with Article III, Section 2 of the Constitution, which confines original jurisdiction to cases "affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party." Upon ratification of a constitutional amendment, this language could be changed; but ordinary legislation could not add to this jurisdiction, as Section 13 did.

McCulloch: "The "Supreme Law of the Land" Defines "Necessary and Proper""⁵⁶

Although the Court could have dismissed *Marbury* on jurisdictional grounds, because Marshall took the initiative to establish the power of the Court to declare a law unconstitutional – because the Constitution is the supreme law of the land and it is the duty of the Court "to say what the law is," *Marbury* is usually the case with which professors begin courses on American constitutional law. In 1975, with the publication of the first edition of *Processes of Constitutional Decisionmaking: Cases and Materials*, Paul Brest sought to bring about a change

⁵⁶ "Documentary Films."

in this traditional approach to teaching the decisions of the Court. The book represented a dramatic departure from the standard constitutional law casebook.⁵⁷ As its title suggested, Brest did not take as a given that constitutional law was only about the writings of the Supreme Court. He wanted to emphasize that constitutional law was about so much more than just the Constitution, which is in their judicial opinions “what the judges say it is.”⁵⁸ The first case that it featured was not *Marbury*. After all, the Court’s first exercise of the power of judicial review was only the logical beginning for a constitutional law course that placed the primary emphasis on learning the content of the *Court’s* work product. Brest chose instead to begin with *McCulloch v. Maryland*. Two years later, in Austria, when Justice Blackmun incorporated the EJUL films into his lectures on American law he too began with *McCulloch*.⁵⁹

Often regarded as the most controversial opinion that Marshall wrote, by far the most cited of the quartet discussed here, and home to some of the most famous lines in Supreme Court history, *McCulloch* tells the story of the Second Bank of the United States.⁶⁰ In 1818, two years after Congress chartered the national Bank, Maryland passed a law imposing a tax on the Maryland branch. Legal proceedings began after James McCulloch, the cashier for this branch, refused to pay the tax. When the case reached the Supreme Court, the justices were asked to consider two main questions. First, does Congress have the power to incorporate a bank? Article I of the Constitution explicitly assigns to the legislative branch of the federal government

⁵⁷ Paul Brest, *Processes of Constitutional Decisionmaking: Cases and Materials* (Boston, MA: Little, Brown, 1975).

⁵⁸ Charles Evans Hughes, quoted in Fred R. Shapiro, *The Oxford Dictionary of American Legal Quotations* (New York: Oxford University Press, 1993), 216.

⁵⁹ His notes indicate that he originally intended to show *Gibbons* first, but changed his mind. *Gibbons* notes and *McCulloch* notes, Salzburg Seminar Notes, Box 1536 [hereinafter SSN], Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C. [hereinafter HAB-LOC].

⁶⁰ On the controversial nature of the opinion, see G. Edward White, *The American Judicial Tradition: Profiles of Leading American Judges* (Oxford: Oxford University Press, 1976), 30. As of December 2006, a Shepard search shows that *Marbury* has been cited in 225 Supreme Court opinions, *Gibbons* in 275, and *McCulloch* in 361.

the power to do many things, but one of these enumerated powers is not the authority ‘to incorporate a national bank.’ Second, the Court considered whether or not Maryland was empowered to tax the state branch of the federal bank. The Court answered ‘yes’ and ‘no’ to these two questions respectively, holding that Congress could incorporate a national bank, and that that institution could not constitutionally be taxed by a state.

Writing for the Court, Chief Justice Marshall declared that although the powers of the federal government are expressly limited, that government remains “supreme within its sphere of action.” And while there is no explicit power of the federal government to charter a Bank, a constitution, by its very nature, only states “great outlines,” from the “nature” and “language” of which voids are filled through interpretation. As Marshall stated in one of the most famous sentences ever penned by a Supreme Court justice, this is the only way the public could understand it. “We must never forget,” he wrote, “that it is a constitution we are expounding.”⁶¹ The *implicit* power to create the national bank is found, Marshall explained, in Article I, §8, cl. 18, of the Constitution – the Necessary and Proper Clause that gives Congress the power

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.⁶²

In its expansive⁶³ interpretation of this clause, the Court rejects the argument that something is “necessary” only if its existence is depended upon by something else. Wrote Marshall: “Let the

⁶¹ 17 U.S. at 405, 407 (1819).

⁶² The importance, to *McCulloch*, of the language of this clause is recognized in Justice Blackmun’s teaching notes. In the margin he made a note to himself to remember to read the clause to his audience. *McCulloch* notes, SSN, HAB-LOC.

⁶³ Although, as Randy Barnett has shown, it is difficult to say with certainty whether reading the clause expansively is inconsistent with the original meaning of the Constitution, it is clear that the interpretation that Marshall wrote into *McCulloch* is expansive. Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton, NJ.: Princeton University Press, 2004), chapter seven.

end be legitimate, let it be within the scope of the constitution, and all means which are appropriate...”⁶⁴

Answering the second question – concerning Maryland’s power to tax the national bank – Marshall concluded that from the Constitution’s status as the “supreme law of the land”⁶⁵ can be deduced the following corollaries: a power to create implies a power to preserve; any power to destroy, when in the hands of another, is hostile to the creation and preservation powers; if there is this hostility, the supreme authority is controlling. *The power to tax is the power to destroy*; the Constitution is supreme; therefore, a state cannot tax the national bank.⁶⁶ In making this argument, Marshall introduced a “representation-reinforcement” argument that makes a fundamental and enduring observation about federalism.⁶⁷ “In imposing a tax,” he explained, “the legislature acts upon its constituents.”⁶⁸ It was a law passed by the Maryland legislature, however, that authorized the tax that was being imposed upon the national bank. And the Maryland legislature represented only the citizens of that state. Therefore, Maryland could not tax the constituents of the federal government –the peoples of *every* state.

⁶⁴ 17 U.S. at 421.

⁶⁵ “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.” Article VI, U.S. Constitution.

⁶⁶ 17 U.S. at 428-432.

⁶⁷ John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA.: Harvard University Press, 1980), 85-86.

⁶⁸ 17 U.S. at 428.

Students' reactions to Marbury and McCulloch

Historians have praised Marshall for writing 'clear and eloquent' opinions in both *Marbury* and *McCulloch*.⁶⁹ Indeed, while both are challenging cases for most students because they are usually taught in the first few weeks of a course, when legal analysis and appreciation of reasoning is not yet an acquired skill, the opinions are nevertheless written in a way that makes them conducive to a step-by-step approach to proceeding through them in the classroom. From the students' comments regarding *Marbury*, it is clear that the EJUL producers were able to capture this characteristic of the case in their dramatization, because of all the films this was easily the one that left the students with the best understanding of the decision's legal principles. Indeed, most of the questionnaires contained comments discussing the ease with which the respondents were able to understand just what the case decided.

That said, the presentation of *Marbury* was not received without criticism. When one student, a junior majoring in history, responded quite seriously to question fifteen ('Who do you think was the originally intended audience for this series, and why?') by writing "Maybe the Federalists...", he or she spoke for a surprisingly large number of his/her classmates. The student was responding to the criticism of many, that the film depicted the actions of John Marshall through a rather rose-tinted lens. As Professor Ellis wrote in his review of EJUL, the strongest portrayal of 'Marshall the savior' actually came in *Burr*, where "Jefferson is portrayed as petty, vindictive, and demagogic, while Marshall comes off as a disinterested discoverer of the eternal truths embedded in the Constitution. No mention is made of the fact that the chief justice had his own political ax to grind against Jefferson or that he socialized with Burr after he

⁶⁹ Newmyer, *Marshall and Taney*, 45.

released him on bail.”⁷⁰ Although my students did not make this critical observation for the dramatization of *Burr* (probably because, as I discuss below, there were more prominent objections to the film), it is significant that they picked up on this emphasis during their very first exposure to the series.

With the exception of those completed by students who had studied *McCulloch* in my constitutional law course, almost every other questionnaire responding to this dramatization made the same point – the case was not presented in sufficient detail. Many students made mention of the fact that the film was approximately five minutes shorter than the others. While five minutes might seem like an insignificant amount of time, a majority of the students was of the opinion that what the producers had sacrificed was an adequate explanation of the crucial legal principles that the series was created to convey. Perhaps this observation justifies the aforementioned decision by Justice Blackmun to show *McCulloch* first. While this would not fit *chronologically*, civic educational logic warrants introducing students to EJUL with a video whose abbreviated coverage of issues provides the teacher with a perfect opportunity with which to stimulate discussion about the case.

As noted above, *McCulloch* was the only film that was shown from the 1987 reissue, and approximately half of the students were informed of this fact in advance. I had expected to read on the questionnaires comments about the new opening and closing scenes featuring the commentary of Chief Justice Burger. Instead, only two students made any reference to these changes, and both were in the group that had been forewarned. The graphic design major, a junior taking critical thinking in politics, expressed an intense dislike of the changes; the student who liked the new opening sequence, which he/she considered an excellent explanation of the

⁷⁰ Ellis, "Review," 1042. Also see Simon, *What Kind of Nation*, (chapter ten, acknowledging some of the justifications for Jefferson's actions).

significance of *McCulloch* for the concept of implied powers, was a senior taking constitutional law and majoring in political science. These responses tell us two interesting things. First, although data from two respondents cannot be considered conclusive, it is reasonable to assume that an introduction from a former Chief Justice was likely to give the series more appeal to those students who already had an interest in the subject. Second, and more importantly, the *McCulloch* questionnaires suggest that *if* featuring Chief Justice Burger in the 1987 reissue had civic educational value at the time, this value has since disappeared. It is clear that my students would have been quite content had the producers not changed the format of E.G. Marshall providing the narrative from, in the words of one member of my constitutional law course, a junior majoring in history, his “Masterpiece Theater-esque chair.”

*Gibbons: “the emancipation proclamation of American commerce”*⁷¹

Gibbons v. Ogden featured classic questions of federalism and national unity, and has aptly been described as Marshall’s “opportunity to lay the last great foundation block of national power.”⁷² After the New York state legislature passed a law granting them exclusive rights to operate steamboats in New York waters, Robert Fulton and Robert Livingston licensed Aaron Ogden to run a ferry between New York City and Elizabethtown Point, New Jersey. The dispute that was settled by the Supreme Court arose when Thomas Gibbons began to run competing ferries that were licensed as “vessels [in] the coasting trade” by a 1793 *federal* statute. When faced with two competing laws, one federal and one state, which is supreme? In order to answer this question, the Court also considered whether the activity in question – transportation – was

⁷¹ Charles Warren, *A History of the American Bar* (Boston, MA: Little, Brown, 1911), 396.

⁷² Newmyer, *Marshall and Taney*, 49.

part of “commerce” as that term is defined in the Constitution. Finding that it was – interpreting constitutionally protected commerce “among the several states” broadly (an interpretation determined from (a) the general understanding that commerce includes navigation, and (b) the definition of “among” as meaning “intermingled with”) – Marshall concluded that the New York law had to fall because it conflicted with an activity that was the province of the federal government.

Students’ reactions to Gibbons

When I first began to decide whether to incorporate EJUL into my courses, I was struck by one phrase that was uttered by E.G. Marshall in both the opening and closing scenes of narration for *Gibbons v. Ogden*. The case was described as the “emancipation proclamation of American commerce.” First used by Charles Warren in *A History of the American Bar* published in 1911, this phrase has since been invoked on numerous occasions.⁷³ And Justice Blackmun integrated it into his Salzburg notes.⁷⁴ In this respect, its inclusion in EJUL is not out of place. Perhaps influenced by the rulings of the Rehnquist Court that offered a less expansive interpretation of the commerce clause,⁷⁵ it seemed to me, however, that describing *Gibbons* in

⁷³ Warren, *A History of the American Bar*, 396, George L. Haskins, “John Marshall and the Commerce Clause of the Constitution,” *University of Pennsylvania Law Review* 104 (1955): 28 (citing Warren), George Dangerfield, “The Steamboat Case,” in *Quarrels That Have Shaped the Constitution*, ed. John A. Garraty (New York: Perennial, 1962), 68 (citing Warren), Deborah A. Ballam, “The Evolution of the Government-Business Relationship in the United States: Colonial Times to Present,” *American Business Law Journal* 31 (1994): 592 (citing Dangerfield), Jean Edward Smith, *John Marshall: Definer of a Nation* (New York: Henry Holt, 1996), 473 (citing Warren), Robert Wernick, “Chief Justice Marshall Takes the Law in Hand,” *Smithsonian*, November 1998, Steven K. Balman, “Constitutional Irony: Gonzales V. Raich, Federalism and Congressional Regulation of Intrastate Activities under the Commerce Clause,” *Tulsa Law Review* 41 (2005): 138 n31 (citing Warren and Smith).

⁷⁴ *Gibbons* notes, SSN, HAB-LOC.

⁷⁵ *United States v. Lopez*, 514 U.S. 549 (1995), *United States v. Morrison*, 529 U.S. 598 (2000).

this manner was unnecessary, and that it would not appeal to those students who had also read the recent cases.

Of the four cases featured in EJUL, the dramatization of *Gibbons v. Ogden* did elicit the least favorable response from the students, but not because of the “emancipation proclamation” reference. It is true that questionnaire responses were equally divided between ‘the worst film so far’ and ‘the best one we’ve seen’ (*Gibbons* was shown third). However, the far more significant observation comes from the fact that this was the only dramatization that provoked the students to respond in this fashion. Only *Gibbons* drew from them comments that compared it to *Marbury*, *Burr*, and *McCulloch*; and over fifty percent of the questionnaires contained such responses. There was something about *Gibbons* that compelled so many people to express ‘viewing experience’ comparisons. For example, judging from their viewing reactions, it is possible that this was the result of the black eye patch-wearing individual with whom the film opened. One would be forgiven for thinking that this actor was better suited for a pirate movie than a serious film about legal issues. To be sure, one person liked the “cool guy with eyepatch,” but, in addition to those who laughed at the beginning of the film, one did note the pirate comparison on his/her questionnaire.

These students’ reactions might lead one to conclude that both the teaching and civic educational value of this particular dramatization is questionable. However, the film plays an important role which, although not redeeming it in terms of civic education does make a significant contribution to facilitating an understanding of the case that cannot be gained from studying the opinions alone. As the EJUL dramatization explains, *Gibbons* took place against the volatile political backdrop of slavery. It was clear to all involved that a ruling that expansively read the coverage of the commerce clause would inflame the passions of the

slaveholding states because from it one could reasonably conclude that slaves were items of commerce and that trading in them, across state lines, was subject to congressional control (and, most feared, federal prohibition). While scholarly articles can tell this story, there is no doubt that visual aids, such as the EJUL videos, can far more successfully convey the drama of this human-interest aspect of *Gibbons*.

Burr: “Burr? Jefferson? Marshall? Who Was Guilty of What?”⁷⁶

The Supreme Court did not hear *United States v. Aaron Burr* (1807). The opinion that John Marshall penned in this case was written in his capacity as Circuit Justice for the Virginia Circuit Court of the United States (the federal court that had jurisdiction), because the allegedly treasonous acts of which the former Vice President stood accused took place at Blennerhasset’s Island on the Ohio River in what was then Virginia (it is now in West Virginia).⁷⁷ Ironically, in what was a classic confrontation with the Chief Justice that President Jefferson lost, Marshall heard the case by virtue of the fact that the 1802 Judiciary Act – passed by the Republican Congress and signed into law by Jefferson – restored the circuit-riding duties of the justices (an arduous task that had been eradicated by the same 1801 legislation that created the judgeships at issue in *Marbury*).⁷⁸

⁷⁶ "Documentary Films."

⁷⁷ Burr was acquitted of all the criminal charges brought against him, so this was not a case destined to end up at the U.S. Supreme Court.

⁷⁸ In a case from which Marshall recused himself, the Court upheld the 1802 Act very shortly after deciding *Marbury*. *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803). A strong argument can be made that *Burr* was the case in which the political and legal disagreements between Jefferson and Marshall were the most pronounced. Mark A. Graber, "Federalist or Friends of Adams: The Marshall Court and Party Politics," *Studies in American Political Development* 12 (1998): 252.

Although the film's final length was not well received by my students (see below), the decision by the EJUL producers to divide their dramatization of *Burr* into two parts makes sense because this was a case with two distinct halves – two separate opinions addressing two different issues. As Professor Swindler wrote, Act One was about “The Supreme Court and the President,” Act Two involved “The Supreme Court and the Individual.”⁷⁹

After his vice-presidency ended in March 1805, and no position for him remained in Jefferson's Administration, Aaron Burr engaged in numerous western exploits. In 1807, he was arrested, accused of engaging in treasonous and separationist activities, including the high misdemeanor of plotting to wage war against Mexico. Disregarding the fundamental principle of a person's innocence until proven guilty, prior to any legal proceedings in a message to Congress President Jefferson publicly condemned Burr and declared him guilty, a lack of substantive evidence notwithstanding. The subsequent judicial inquiries, before Marshall and District Judge Cyrus Griffin, addressed three questions. First, could a sitting President be subpoenaed, as Burr requested, to produce evidence in a criminal trial? It was with this question that Part One of the EJUL dramatization of the case was concerned. Although the issue was not entirely resolved, because this part of the case ended in stalemate as Jefferson refused to appear in person, and was only prepared to provide partial documentation pertaining to Burr's trial, the question was answered affirmatively. So this part of *Burr* established the important principle that a sitting president can be legally compelled to provide documents relating to a criminal trial.

Part Two of EJUL addressed the other two questions in *Burr*; namely (a) what is the proper definition of treason to be used? and (b) is a person accused of treason entitled to the due

⁷⁹ Swindler, *Chief Justice Marshall*, chapters three and four.

process rights guaranteed by the Fifth and Sixth Amendments? Article III, §3 of the Constitution states:

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

However, in *Burr* it was not obvious that the Court would apply this definition (and find Burr not guilty) because of Marshall's Supreme Court opinion, earlier that year, in *Ex Parte Bollman and Ex Parte Swartwout*.⁸⁰ In this case involving two of Burr's associates, Marshall employed the English common law definition of treason: "In treason all are principals." Application of this definition to Burr, who had been hundreds of miles away from Blennerhasset's Island when the treasonous activities were said to have occurred, would likely have meant a guilty verdict for the former Vice President.

As John P. Roche has observed,

For all its circumlocution, the *Bollman* opinion is considered a libertarian performance because Marshall clearly limited any approaches to doctrines of constructive treason. He appreciated the possibilities of political repression which would be encouraged by permissive definitions of treason.⁸¹

In *Burr*, Marshall expressed even greater fidelity to the concept of limited government, distinguishing the case from *Bollman*, and confirming, in a decision that remains today the American constitutional word on treason, that the Constitution's definition of treason is supreme. While this meant that Burr was guilty of all the charges before him, the decision also answered

⁸⁰ 8 U.S. (4 Cranch) 75 (1807).

⁸¹ John P. Roche, ed., *John Marshall: Major Opinions and Other Writings* (Indianapolis, IN: Bobbs-Merrill, 1967), 265.

the third question, relating to due process, with a resounding ‘yes.’ Even someone accused of treason, *Burr* confirmed, even an alleged traitor against their country, must be afforded the same fundamental protections of due process as any other defendant.

Students’ reactions to Burr

One might assume that the human-interest defense can be applied to *Burr*, as it was to *Gibbons*. The questionnaires suggest that such a defense would be misplaced. To be sure, the case involved treason charges levied by a President who sought to find a former Vice President guilty without the need for trial by jury; a former Vice President who had killed one of the most prominent constitutional lawyers of the young United States; and was set against the backdrop of social and political tensions resulting from the western expansion of the country. *Burr* raised so many issues, in fact, that the producers of EJUL chose to devote two films to its dramatization. Did they do so with good judgment? One reviewer has questioned the decision, and the reactions of my students suggest the answer to this question is a resounding ‘no’; almost every student considered it unnecessary to expand the coverage of this particular case to fill over an hour of tape.⁸² In addition to the one third of respondents who specifically expressed the opinion that *Burr* was “too long,” many other students complained that there was insufficient discussion of the legal intricacies of the decision and excessive emphasis on the personal and political context of the case. As with *Gibbons*, there was a noticeable feeling amongst the students that the ability of the producers to hold their attention and educate them about the case’s principles was not achieved as well as in *Marbury*, the only other EJUL film that they had, to this point, viewed. Most likely because of the fact that, to a far greater extent than with the other cases,

⁸² Ellis, "Review," 1042.

Burr was a decision about which all of the students knew very little, it mattered little whether the student was a political science major and/or taking my course on constitutional law. The call for more information about the legal details was widespread.⁸³

Interestingly, analyzing just what understanding of the case the students did take away from the film does not substantiate this criticism of the dramatization of *Burr*. A majority of the questionnaires indicated far more favorable reactions to and appreciation of the civil rights issues rather than executive power arguments. In fact, a person who knew nothing about *Burr* would be hard pressed to read the responses and describe the case as involving an important question of separation of powers. This is consistent with some historians' categorizations of the case.⁸⁴ However, as James F. Simon has noted, *Burr* was as important for what it said about executive privilege; it was not an odd choice for EJUL because it "contin[ued] the dialogue with Jefferson that he [Marshall] had begun in *Marbury*."⁸⁵ And both Justice Blackmun in his Salzburg notes, and the Supreme Court Historical Society in its yearbook considered the case an important opportunity to link the past to the present by raising the subject of Watergate. Blackmun devoted an unusually large amount of his notes to mentioning the twentieth century incarnation of the issues. He wrote:

The first film comes down to the issue of the propriety of a federal court's placing the President under subpoena....In a sense, this aspect of the controversy ended in a stalemate, but the principle of amenability of even the President was established. All this loomed most important in the first Nixon case when that President asserted executive privilege with respect to the tapes sought by the Special Prosecutor.

⁸³ Although not borne out by separating the questionnaire data based on responses from history majors, it is interesting to note that one student remarked – and did not do so for the other cases – that *Burr* was perhaps better suited for history, not public law, courses because of the nature of its content.

⁸⁴ For example, see Roche, ed., *John Marshall*, (discussing *Burr* in a chapter on the Marshall Court's civil rights rulings).

⁸⁵ Simon, *What Kind of Nation*, 241.

Continuing, Blackmun noted that in *United States v. Nixon*,⁸⁶ however, the Court – of which he was a part at the time – “held that the legitimate needs of the judicial process outweigh presidential privilege.”⁸⁷ As Chief Justice Burger observed in his opinion for the unanimous Court, the claim of executive privilege could not be asserted by ignoring the “fundamental demands of due process of law in the fair administration of criminal justice.”⁸⁸ That the students focused, in their responses, on the civil rights aspect of the case, including the importance of legal procedure and a fair trial, says that even in a political climate which is dominated by questions of executive power the EJUL dramatization of *Burr* made a successful civic educational impression on the audience even if there was a concurrent call for more legal details.

Overall evaluation

The stated objective of EJUL was “to clarify the role of the Supreme Court in relation to the other branches and levels of government in the United States by dramatizing the precedents established by Chief Justice John Marshall.”⁸⁹ The students’ responses to every film indicate there can be no doubt that this objective was achieved. However, it is equally clear that successfully balancing coverage of the legal and political aspects of the cases presented the producers with a very difficult challenge. The questionnaires suggest that the ability of EJUL “to dramatize the first principles of American constitutionalism for which the War of Independence

⁸⁶ 418 U.S. 683 (1974).

⁸⁷ *Burr* notes, SSN, HAB-LOC; cf. "Documentary Films," (asking, rhetorically, "Was there any similarity between the disappearance of the commissions and the erasing of a famed 18 1/2 minutes of tape in the byzantine litigation over Watergate?").

⁸⁸ 418 U.S. at 713.

⁸⁹ Video cover notes for 1987 *McCulloch* re-issue.

was fought” is strongly dependent upon the depth of a student’s prior knowledge of and interest in the subject matter.⁹⁰ It is unsurprising that the responses given by political science and history majors taking a course in constitutional law or studying about the Supreme Court demonstrated the greatest ability to determine, from the film alone, the key principles that the films were trying to explain. Therefore, it is possible to conclude that the films possessed civic educational value for all of my participating students, but that the degree of education received can vary enormously, and that use of EJUL as a *supplementary* teaching tool would be of greatest benefit only in classes that discussed the cases in great detail. In a general history or American government course, their value might be greater if used to demonstrate more generalized socio-political observations or to serve as an illustration of an important event from a particular time period.

Perhaps the most important conclusion that can be drawn from the four sets of questionnaires collectively is that every film left a majority of the students hungry for further explanation and discussion of the applicability of the cases’ principles to their twenty-first century lives. Echoing the thoughts of prominent scholars who commented on *Marbury*’s bicentennial in 2003, my students wrote of their desire to hear more about “judicial supremacy today” and “the importance of being final,” and to question whether judicial review is a “blessing or curse – or both?”⁹¹ After watching *Burr*, an overwhelming number desired more information, the questions of due process and executive power obviously relevant to current affairs. And *Gibbons* and *McCulloch* were greeted with a chorus of calls for further discussion of the

⁹⁰ "Documentary Films."

⁹¹ Daniel A. Farber, "Marbury at 200: Judicial Supremacy Today: The Importance of Being Final," *Constitutional Commentary* 20 (2003), "Judicial Review: Blessing or Curse - or Both - a Symposium in Commemoration of the Bicentennial of Marbury V. Madison," *Wake Forest Law Review* 38 (2003).

profound implications of the cases for the Court's interpretation of enumerated and implicit constitutional powers.

Conclusions

At his Supreme Court confirmation hearing in 1987, in response to a question from Senator Robert C. Byrd (D-WV), then-Judge Anthony M. Kennedy made the following observation about the relationship between the Marshall Court and the Court of the late twentieth-century. Today, he said:

The Court is in a superior advantage to the position held by Mr. Chief Justice Marshall when he was beginning to stake out the meanings of the Constitution in the great decisions that he wrote.

And this doesn't mean the Constitution changes. It just means that we have a better perspective of it. This is no disparagement of the Constitution. It is no disparagement of the idea that the intentions and the purposes of the framers should prevail. To say that new generations yield new insights and new perspectives does not mean the Constitution changes. It just means that our understanding of it changes.⁹²

Consistent with the concept of civic education outlined in this paper, the quotation from Kennedy illustrates why, correctly understood, the "long run" that the Supreme Court Historical Society anticipated for EJUL is actually not a period of time at all.⁹³ The films commissioned depict cases in which America's greatest Chief Justice penned opinions that discuss timeless principles of constitutionalism. The fundamentality of these issues of law and politics remains

⁹² United States Senate, Committee on the Judiciary, *Confirmation Hearings on the Nomination of Anthony M. Kennedy to Be Associate Justice of the Supreme Court of the United States*, 100th Cong., 1st sess., December 14, 15, and 16 1987, 230.

⁹³ "Documentary Films."

clear to this day, and therefore the EJUL dramatizations of *Marbury*, *Burr*, *Gibbons*, and *McCulloch* continue to be just as important as civic educational vehicles today as they were in 1977.

President John Adams once remarked said, “[m]y gift of John Marshall to the people of the United States was the proudest act of my life.”⁹⁴ If the educators who take EJUL into their classrooms are “bolstered by the autonomy of academic freedom and committed to the lonely and opaque task of teaching,” then there is little doubt that their students will benefit from the care and consideration that went into making dramatizations of cases that remain vital tools for the civic education of generations of Americans.⁹⁵ In other words, the members of the Judicial Conference of the United States can be proud of the gift that they gave to the American people.

⁹⁴ Quoted in Charles Warren, *The Supreme Court in United States History*, 2 vols., vol. 1 (Boston, MA: Little, Brown, 1926), 178.

⁹⁵ Thomas Ross, "Teaching Constitutional Law Stories," *Journal of Legal Education* 55 (2005): 137.

Appendix 1: Questionnaire completed by SUNY Oswego students

Section A

1. Name of case featured in video: _____
2. Current year of study (freshman, sophomore, junior, or senior): _____
3. Major: _____
4. Which of my courses are you currently taking? _____
5. If you are not currently taking American Constitutional Law, have you taken it in the past? _____
6. Have you ever seen this video before? If yes, briefly explain when and where: _____

Section B

7. How much (if anything) did you know about this Supreme Court case before watching the video?
8. What, if anything, did the video teach you about the constitutional/legal principles that were involved in the case?
9. If in one of your classes you had to read parts of the Court's opinions in this case, would you feel more confident about your ability to do this now you have watched the video?
10. Is there anything you think should have been included in the video to help you understand about the case? If yes, what? If no, why not?

Section C

11. Would you recommend this video to someone who wants to gain a *basic* understanding of the *political* issues related to this case? Explain your answer.
12. Would you recommend this video to someone who wants to gain a *basic* understanding of the *legal* issues involved in this case? Explain your answer.
13. Do you think that this video would make a useful teaching tool?

Section D

14. Ignoring the technical quality, has this video stood the test of time?
15. Who do you think was the originally intended audience for this series, and why?
16. Would you recommend that more dramatizations be made about other Court cases?
17. The stated objective of the video series is as follows: "to clarify the role of the Supreme Court in relation to the other branches and levels of government in the United States by dramatizing the precedents established by Chief Justice John Marshall." Do you think the producers of the series achieved this objective? Explain your answer.
18. If you had to advise the company that produced this video, what (if anything) would you tell them that they should have done differently?

Other comments about the video...

Appendix 2: Academic Departments and Colleges at SUNY Oswego

College of Arts and Sciences

Anthropology	Math
Art	Modern Languages and Literatures
Biological Sciences	Music
Chemistry	Philosophy
Communication Studies	Physics
Computer Science	Political Science
Earth Science	Psychology
Economics	Public Justice
English and Creative Writing	Sociology
History	Theatre

School of Business

Accounting, Finance and Law
Marketing and Management

School of Education

Counseling and Psychological Services
Curriculum and Instruction
Educational Administration
Health Promotion and Wellness
Technology
Vocational Teacher Preparation