GRADE LEVEL: 9-12

TIME REQUIRED: Two class periods

CONCEPTS/VOCABULARY:

Separation of powers; branches of government; checks and balances; constitutionality; cases and controversies; majority opinion; concurring opinion

MAIN IDEAS:

1. Article III of the U.S. Constitution gives courts the exclusive power to decide cases and controversies.
2. Under the doctrine of separation of powers, Congress cannot reopen final decisions of the federal courts.
3. In deciding a case, Supreme Court justices may agree on the outcome but disagree as to the reasoning underlying that outcome.

GPS CORRELATION:

SSCG3: The student will demonstrate understanding of the United States Constitution.
   c. Explain the fundamental principles upon which the United States Constitution is based; include the rule of law, popular sovereignty, separation of powers, checks and balances, and federalism.

SSCG4: The student will demonstrate knowledge of the organization and powers of the national government.
   b. Analyze the relationship between the three branches in a system of checks and balances and separation of powers.

SSCG16: The student will demonstrate knowledge of the operation of the federal judiciary.
   c. Describe how the Supreme Court decides cases.

ELAALRL1: The student demonstrates comprehension by identifying evidence (i.e., examples of diction, imagery, point of view, figurative language, symbolism, plot events and main ideas) in a variety of texts representative of different genres (i.e., poetry, prose [short story, novel, essay, editorial, biography], and drama) and using this evidence as the basis for interpretation.

The student identifies, analyzes, and applies knowledge of the structures and elements of American fiction and provides evidence from the text to support understanding; the student:

a. Locates and analyzes such elements in fiction as language and style, character development, point of view, irony, and structures (i.e., chronological, in medias res, flashback, frame narrative,
epistolary narrative) in works of American fiction from different time periods.

b. Identifies and analyzes patterns of imagery or symbolism.

c. Relates identified elements in fiction to theme or underlying meaning.

d. Analyzes, evaluates, and applies knowledge of the ways authors use techniques and elements in fiction for rhetorical and aesthetic purposes.

The student identifies and analyzes elements of poetry from various periods of American literature and provides evidence from the text to support understanding; the student:

a. Identifies, responds to, and analyzes the effects of diction, tone, mood, syntax, sound, form, figurative language, and structure of poems as these elements relate to meaning.

b. Analyzes and evaluates the effects of diction and imagery (i.e., controlling images, figurative language, extended metaphor, understatement, hyperbole, irony, paradox, and tone) as they relate to underlying meaning.

INSTRUCTIONAL STRATEGIES:

- Literary analysis
- Large group discussion

OBJECTIVES:

The student will:

1. consider the perspectives on the need to build and maintain walls expressed in the poem “Mending Wall” by Robert Frost
2. use the poem to discuss Justice Scalia’s and Justice Breyer’s different perspectives on separation of powers in their opinions in *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211 (1995)
3. analyze the use of literary citations as rhetorical persuasion in support of legal arguments

TEACHER BACKGROUND:

Each of the three branches of the federal government has a defined role. The legislative branch, composed of the House of Representatives and the Senate and also referred to as Congress, is responsible for making laws. The executive branch, headed by the President of the United States, makes sure that the law is carried out. The judicial branch, which is composed of the United States Supreme Court and the lower federal courts, interprets or explains the law.
Separation of powers means that the powers of government are divided among the three branches of government. Checks and balances is a related concept and refers to the limited control that each branch of government has over the power of the other branches.

In 1995, the Supreme Court decided *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211 (1995). The case asked the Court to consider the constitutionality of an act of Congress that reopened certain cases that had been given final judgment in the federal courts. The Court declared this act unconstitutional. It held that Article III of the Constitution gives courts the exclusive power to decide cases and controversies according to the court’s determination of what the law is at the time the case is decided. These decisions are subject to review only within the hierarchy of the federal court system. Once finalized, these decisions cannot be reopened by Congress.

Justice Scalia wrote the opinion for the majority. Justice Breyer agreed with the outcome but not with all of the reasoning of the majority’s opinion; he therefore wrote a concurring opinion. A key point of difference between Justices Scalia and Breyer was what the doctrine of separation of powers requires. In defining their different understanding of separation of powers, both justices turned to Robert Frost’s classic American poem “Mending Wall.” “Mending Wall” was initially published in 1915 in a volume of Frost’s poetry titled, *North of Boston*.

**MATERIALS AND RESOURCES:**

**Handouts**

1. “Mending Wall” by Robert Frost
2. Excerpts from *Plaut v. Spendthrift Farms, Inc.*

**Optional Resources**


**PROCEDURES:**

**Period One**

1. Distribute Handout 1 (“Mending Wall” by Robert Frost) to each student. Ask the students to read the poem silently to themselves. Then ask one or more students to read the poem aloud.
2. Ask the students whether there were any passages that they thought were difficult to understand or contained unfamiliar vocabulary words. Ensure that students understand the literal language of the poem before continuing the discussion.

3. Discuss the poem using the following focus questions:
   a. What does the poem suggest about the nature of walls? Why is it necessary to “mend wall” each year?
   b. Does the poem suggest any “constant” reasons for maintaining a wall? Does it suggest any “conditional” reasons for maintaining a wall (reasons that might change or come and go from year to year)?
   c. Put yourself in the place of the poem’s narrator (the “I” voice). What words do you think he might use to describe his neighbor? (Try to limit the students’ response to no more than five words.)
   d. Now put yourself in the place of the neighbor described in the poem. What words do you think he might use to describe the poem’s narrator? (Try to limit the students’ responses to no more than five words.)
   e. Identify the two phrases that are repeated twice in the poem. (“Something there is that doesn’t love a wall” and “Good fences make good neighbours.”) What do you think is the significance of these lines?

Period Two

1. Distribute Handout 2 (Excerpts from Plaut v. Spendthrift Farms, Inc.) to each student. Ask the students to read the excerpts silently to themselves.

2. Remind students of the points covered during the discussion of the poem in Period One. Explain that, in Plaut v. Spendthrift Farms, Inc., Justices Scalia and Breyer both relied on “Mending Wall” for support of their different perspectives on the meaning of separation of powers.

3. Discuss the excerpts from Justice Scalia’s and Justice Breyer’s opinions using the following focus questions:
   a. Which point of view in “Mending Wall” – the narrator’s or the neighbor’s – most closely resembles Justice Scalia’s point of view on separation of powers? Which most closely resembles Justice Breyer’s point of view? Provide reasons for your answers.
   b. Are there passages in the poem which suggest circumstances in which high walls might be required? Can you think of any provisions in the Constitution which place high walls between the branches of government?
   c. Are there passages in the poem which suggest circumstances in which a need for walls would be lessened? Can you think of any provisions in the Constitution which lower or leave gaps in the walls between the branches of government?
   d. What factors do you think should be considered when deciding what type of “wall” should be endorsed when considering separation of powers...
issues? What are the benefits and risks in Justice Scalia’s endorsement of high walls between the branches? What are the benefits and risks in Justice Breyer’s endorsement of less distinct walls?

EVALUATION:

To assess the students’ understanding of this lesson, distribute Handout 3 (Supporting Legal Arguments with Literary Citations), which contains four other examples of Supreme Court opinions in which a literary reference was used to support a legal argument. Students should select one example and write a two- to three-page essay analyzing the judge’s use of the literary reference in support of his or her legal argument. Questions to guide the students’ analysis are provided at the top of the handout. Alternatively, use the excerpts and suggested questions as the basis for a class discussion, and analyze student responses for evidence of their understanding.

ENRICHMENT:

Provide students with recent newspaper articles raising issues with respect to the separation of powers in the federal government, such as the Terry Schiavo case, the ability of suspected terrorists to challenge their detentions in court, and the assertion of executive privilege with respect to the Miers memos. Ask students to summarize the issue raised by the article, explain how that issue relates to the separation of powers, and identify any ways in which the article illustrates the concept of checks and balances. Discuss whether the branches of government involved in each article exercised appropriate checks and balances on the other branches.

Links to appropriate articles for this activity can be found at http://www.abanet.org/publiced/lawday/schools/lessons/hs_seppowers.html.
“MENDING WALL” BY ROBERT FROST

Something there is that doesn’t love a wall,  
That sends the frozen-ground-swell under it,  
And spills the upper boulders in the sun;  
And makes gaps even two can pass abreast.  
The work of hunters is another thing:  
I have come after them and made repair  
Where they have left not one stone on a stone,  
But they would have the rabbit out of hiding,  
To please the yelping dogs. The gaps I mean,  
No one has seen them made or heard them made,  
But at spring mending-time we find them there.  
I let my neighbour know beyond the hill;  
And on a day we meet to walk the line  
And set the wall between us once again.  
We keep the wall between us as we go.  
To each the boulders that have fallen to each.  
And some are loaves and some so nearly balls  
We have to use a spell to make them balance:  
“Stay where you are until our backs are turned!”  
We wear our fingers rough with handling them.  
Oh, just another kind of out-door game,  
One on a side. It comes to little more:  
There where it is we do not need the wall:  
He is all pine and I am apple orchard.  
My apple trees will never get across  
And eat the cones under his pines, I tell him.  
He only says, “Good fences make good neighbours.”  
Spring is the mischief in me, and I wonder  
If I could put a notion in his head:  
“Why do they make good neighbours? Isn’t it  
Where there are cows? But here there are no cows.  
Before I built a wall I’d ask to know  
What I was walling in or walling out,  
And to whom I was like to give offence.  
Something there is that doesn’t love a wall,  
That wants it down.” I could say “Elves” to him,  
But it’s not elves exactly, and I’d rather  
He said it for himself. I see him there  
Bringing a stone grasped firmly by the top  
In each hand, like an old-stone savage armed.  
He moves in darkness as it seems to me,  
Not of woods only and the shade of trees.  
He will not go behind his father’s saying,  
And he likes having thought of it so well  
He says again, “Good fences make good neighbours.”
JUSTICE SCALIA, WRITING FOR THE MAJORITY:

[T]he doctrine of separation of powers is a structural safeguard rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified. In its major features . . . it is a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict . . .. Separation of powers, a distinctively American political doctrine, profits from the advice authored by a distinctively American poet: Good fences make good neighbors.

JUSTICE BREYER, IN A CONCURRING OPINION:

. . . Indeed, the unnecessary building of such walls [as endorsed in the majority opinion] is, in itself, dangerous, because the Constitution blends, as well as separates, powers in its effort to create a government that will work for, as well as protect the liberties of, its citizens. . . . That doctrine does not “divide the branches into watertight compartments,” nor “establish and divide fields of black and white.” . . . And, important separation-of-powers decisions of this Court have sometimes turned, not upon absolute distinctions, but upon degree. . . . As the majority invokes the advice of an American poet, one might consider as well that poet’s caution, for he not only notes that “Something there is that doesn’t love a wall,” but also writes, “Before I built a wall I’d ask to know/ What I was walling in or walling out.”
You have seen how Justices Scalia and Breyer used Robert Frost’s “Mending Wall” to support their respective perspectives on separation of powers in their opinions in *Plaut v. Spendthrift Farms, Inc.* Below are summaries of and excerpts from four other Supreme Court cases in which the author of the opinion used a literary reference to support a legal argument. Select one of these cases and write a two- to three-page essay analyzing the judge’s use of the literary citation. In writing your essay, you should consider the following questions:

1. Why did the judge select this particular literary work to support his or her argument?
2. Is there anything in the selected literary work which provides the judge with knowledge about how to solve the real world problem at issue in the case?
3. What, if anything, about the selected literary work creates an emotional response? How might this emotional response support the judge’s position?
4. What, if anything, about the issue in the case suggests that an emotional or non-legal appeal would be particularly persuasive? Does the judge’s literary citation urge you to look beyond the law and logic to find the “right” answer?
5. Does the literary citation appear in a majority opinion, a concurring opinion, or a dissenting opinion? Who is the intended audience? Is anyone in that audience more likely to be convinced by an emotional or non-legal appeal?
6. Is the judge trying to use associations surrounding the literary citation to color the reader’s perception of the issue at hand? If so, what are those associations?
7. Does the literary citation enable you to better imagine the act at issue in the case? To imagine what might flow from that act? How might this affect the persuasiveness of the judge’s argument?

1. **Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978):**

   **Case Summary:**

   The Administrative Procedure Act (“APA”) establishes the procedural requirements Congress has determined must be imposed upon federal agencies engaged in rulemaking proceedings. After extensive review of, and hearings on, issues of environmental impact and radiological health and safety, the Atomic Energy Commission (“AEC”) granted Consumers Power Company a permit to construct two nuclear reactors. The process used by the AEC complied with the requirements of the APA. Among the reports considered by the AEC was one from the Advisory Committee on Reactor Safeguards (“ACRS”), a group of distinguished experts in the field of atomic
energy. The report referred to certain generic safety concerns which had been fully explained in other ACRS reports in the public record. In response to a challenge to the construction permit filed by environmental groups, the Court of Appeals for the District of Columbia Circuit held that the AEC’s Licensing Board should have returned the ACRS report to the ACRS for further elaboration, “in terms understandable to a layman and replete with cross-references to previous reports in which the ‘other problems’ were detailed” and that its failure to do so had violated the APA.

The majority held that the APA establishes the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures. Agencies are free to grant additional procedural rights in the exercise of their discretion, but they are not required to do so. Reviewing courts may not engraft their own notions of proper procedures upon agencies entrusted with substantive functions by Congress. Therefore, the Court of Appeals improperly intruded into the AEC’s decisionmaking process in violation of the separation of powers.

Justice Rehnquist, writing for the majority:

. . . To say that the Court of Appeals' final reason for remanding is insubstantial, at best, is a gross understatement. Consumers Power first applied in 1969 for a construction permit - not even an operating license, just a construction permit. The proposed plant underwent an incredibly extensive review. The reports filed and reviewed literally fill books. The proceedings took years, and the actual hearings themselves over two weeks. To then nullify that effort seven years later because one report refers to other problems, which problems admittedly have been discussed at length in other reports available to the public, borders on the Kafkaesque.

Literary reference: Franz Kafka


Case Summary:

The International Whaling Commission (“IWC”) established certain limitations on the whaling practices of its member nations, including the United States and Japan. To enforce the conservation efforts of the IWC, Congress passed statutes providing that, if the Secretary of Commerce (“Secretary”) certified that foreign nationals were conducting fishing operations in such a manner as to “diminish the effectiveness” of the IWC’s quotas, the Executive Branch must impose economic sanctions on the offending nation. When Japan refused to comply with the IWC’s regulations in 1984, however, the Secretary agreed not to certify Japan as an offending nation if Japan agreed to adhere to certain harvest limits and to cease commercial whaling by 1988. Several wildlife conservation groups filed suit, seeking a court order compelling the Secretary to certify Japan for the imposition of sanctions. The issue before the Court was whether the Secretary was obligated by Congress to automatically certify Japan once it failed to comply with the limitations established by
the IWC or, instead, whether he had discretion to determine that whale conservation would be better served by accepting Japan’s pledges of future compliance.

The majority held that Congress had given the Secretary discretion in determining whether Japan’s actions “diminished the effectiveness” of the IWC’s whale conservation plan. Therefore, having concluded that Japan had not met this threshold, the Secretary had the authority to enter into the challenged agreement. Justice Marshall, joined by Justices Brennan, Blackmun, and Rehnquist, dissented. In the dissent’s view, the Secretary had clearly concluded that Japan’s actions diminished the effectiveness of the whale conservation program. His agreement with Japan was actually an attempt to substitute his judgment for Congress’ on the issue of how best to punish Japan’s intentional violations of the harvest limits; accordingly, his action violated the separation of powers.

Justice Marshall, in a dissenting opinion:

. . . I am troubled that this Court is empowering an officer of the Executive Branch, sworn to uphold and defend the laws of the United States, to ignore Congress’ pointed response to a question long pondered: “whether Leviathan can long endure so wide a chase, and so remorseless a havoc; whether he must not at last be exterminated from the waters, and the last whale, like the last man, smoke his last pipe, and then himself evaporate in the final puff.”

Literary reference: Moby Dick, by Herman Melville


Case Summary:

A Florida county sheriff’s office received an anonymous tip that Riley was growing marijuana on his property. When the investigating officer discovered that he could not observe from ground level the contents of Riley’s greenhouse, he circled twice over the property in a helicopter. From a height of 400 feet, he was able to see through openings in the greenhouse’s roof and sides, and he observed marijuana plants. He obtained a search warrant based on this observation; the search revealed the marijuana, and Riley was charged with possession. The issue before the Court was whether the helicopter surveillance from 400 feet constituted a “search” under the Fourth Amendment, for which a warrant was required; if so, the marijuana must be suppressed as the “fruit” of an unlawful search.

The majority held that the helicopter surveillance was not a search because helicopter flights at 400 feet are routine. Accordingly, Riley did not have a reasonable expectation that the contents of his open greenhouse would be protected from official inspection from the air. Justice Brennan, joined by Justices Marshall and Stevens, dissented, arguing that the standard under the Fourth Amendment should be whether the form of police surveillance at issue so diminished the amount of privacy and freedom remaining to citizens as to be “inconsistent with the aims of a free and open society.”
Justice Brennan, in a dissenting opinion:

... The Court today approves warrantless helicopter surveillance from an attitude of 400 feet. ... I hope it will be a matter of concern to my colleagues that the police surveillance methods they would sanction were among those described forty years ago in George Orwell’s dread vision of life in the 1980’s:

“The black-mustachio’d face gazed down from every commanding corner. There was one on the house front immediately opposite. BIG BROTHER IS WATCHING YOU, the caption said. ... In the far distance, a helicopter skimmed down between the roofs, hovered for an instant like a bluebottle, and darted away again with a curving flight. It was the Police Patrol, snooping into people’s windows.”

Literary reference: 1984, by George Orwell


Case Summary:

The Virginia Military Institute (“VMI”) boasted a long and proud tradition as Virginia’s only exclusively male public undergraduate institution of higher learning. The United States brought suit against Virginia and VMI, alleging that the school’s male-only admissions policy was an unconstitutional violation of the Fourteenth Amendment’s equal protection clause. Virginia, in an attempt to salvage VMI’s male-only status, proposed to create the Virginia Women’s Institute for Leadership (“VWIL”) as a parallel program for women. The issue before the Court was whether Virginia’s creation of a female-only academy, as a program offering substantively comparable educational benefits to those at VMI, would satisfy the equal protection clause.

The majority held that “separate but equal” facilities are unconstitutional, whether the classification is race-based or gender-based. VMI’s male-only admissions policy was not created or maintained in order to further educational diversity, which might have constituted a persuasive justification for gender-biased admissions. The VWIL would not provide women with the same rigorous military training, faculty, courses, facilities, financial opportunities, or alumni reputation and connections that VMI affords its male cadets. Therefore, the creation of the VWIL as a substitute for opening VMI to female students failed to meet the requirements of the equal protection clause.

Justice Ginsburg, writing for the majority:

The Fourth Circuit plainly erred in exposing Virginia’s VWIL plan to a deferential analysis, for “all gender-based classifications today” warrant “heightened scrutiny.” ... Valuable as VWIL may prove for students who seek the program offered, Virginia’s remedy affords no cure at all for the opportunities and advantages withheld from women who want a VMI education and can make the grade. ...
“Plato questioned whether women should be afforded equal opportunity to become guardians, those elite Rules of Platonic society. Ironically, in that most undemocratic system of government, the Republic, women’s native ability to serve as guardians was not seriously questioned. The concern was over the wrestling and exercise class in which all candidates for guardianship had to participate, for rigorous physical and mental training were prerequisites to attain the exalted status of guardian. And in accord with Greek custom, those exercise classes were conducted in the nude. Plato concluded that their virtue would clothe the women’s nakedness and that Platonic society would not thereby be deprived of the talent of qualified citizens for reasons of mere gender.” . . . Virginia, not bound to ancient Greek custom in its “rigorous physical and mental training” programs, could more readily make the accommodations necessary to draw on “the talent of [all] qualified citizens.”

**Literary reference:** The Republic, by Plato