

Can Justice Truly be Blind? - High School

<p>Time Frame: Approximately 2 weeks (adjustable by teacher based on need)</p> <p>Author: Bonnie Laughlin-Schultz</p>	<p>Grade Level/Content or Theme: Secondary Civics or Current Events Content/Theme: Supreme Court Justice Decision Making, with a deep dive into the <i>Flowers v. Mississippi</i> case.</p>
<p><u>IL Social Studies Standards</u> <u>SS.IS.1.9-12.</u> Address essential questions that reflect an enduring issue in the field. <u>SS.IS.4.9-12.</u> Gather and evaluate information from multiple sources while considering the origin, credibility, point of view, authority, structure, context, and corroborative value of the sources. <u>SS.IS.6.9-12.</u> Construct and evaluate explanations and arguments using multiple sources and relevant, verified information <u>SS.CV.1.9-12.</u> Distinguish the rights, roles, powers, and responsibilities of individuals and institutions in the political system. <u>SS.CV.3.9-12.</u> Analyze the impact of constitutions, laws, and agreements on the maintenance of order, justice, equality, and liberty. <u>SS.CV.4.9-12.</u> Explain how the U.S. Constitution established a system of government that has powers, responsibilities, and limits that have changed over time and are still contested while promoting the common good and protecting rights. <u>SS.CV.7.9-12.</u> Describe the concepts and principles that are inherent to American Constitutional Democracy <u>SS.H.2.9-12.</u> Analyze change and continuity within and across historical eras. <u>SS.H.7.9-12.</u> Identify the role of individuals, groups, and institutions in people’s struggle for safety, freedom, equality, and justice.</p>	<p><u>CCSS/ELA History/Social Studies Standards or other content standards</u></p> <p>From the C3 Framework https://www.socialstudies.org/c3 <u>D3.3.9-12.</u> Identify evidence that draws information directly and substantively from multiple sources to detect inconsistencies in evidence in order to revise or strengthen claims. <u>D4.1.9-12.</u> Construct arguments using precise and knowledgeable claims, with evidence from multiple sources, while acknowledging counterclaims and evidentiary weaknesses. <u>D2.Civ.4.9-12.</u> Explain how the U.S. Constitution establishes a system of government that has powers, responsibilities, and limits that have changed over time and that are still contested. <u>D2.Civ.7.9-12.</u> Apply civic virtues and democratic principles when working with others. <u>D2.Civ.12.9-12.</u> Analyze how people use and challenge local, state, national, and international laws to address a variety of public issues. <u>D2.His.1.9-12.</u> Evaluate how historical events and developments were shaped by unique circumstances of time & place as well as broader historical contexts.</p>
<p>Essential Question(s): Can justice truly be blind?</p>	

Supporting Question(s):

- 1: How do justices discover the facts of a case, and what facts and issues matter in deciding *Flowers v. Mississippi*?
- 2: How do justices focus on legal precedent as they decide cases?
- 3: What role does judicial philosophy and ideology play in Supreme Court decision-making?
- 4: In addition to facts, precedent, and ideology, what other factors influence justices?
- 5: How do oral arguments influence justices and highlight decision-making ideals?

Recommended Procedures:

In this learning segment, students will analyze the many factors that determine how Supreme Court justices decide cases and learn more about Supreme Court procedures and legal vocabulary through an in-depth examination of the recent Supreme Court case *Flowers v. Mississippi*. Prior to this unit, students should already have been introduced to the workings of the judicial branch and to how cases are selected by the Supreme Court. (And if they have not, I-Civics has great resources to use to teach those topics beforehand.) Students should also be introduced to important vocabulary prior to this lesson.

Staging the Question

The teacher may show video or use an excerpt from Justice Gorsuch's confirmation hearing in which he talks about judicial neutrality. Then ask students if they agree with him and post the questions (1) Is justice blind? (2) How DO justices decide? We'll examine these two questions with a deep dive into one case from last term, *Flowers v. Mississippi*. To introduce you to the case, show a quick news piece from the PBS News Hour and have students complete a S-I-T- organizer.

Supporting Question 1. How do justices discover the facts of a case, and what facts and issues matter in deciding *Flowers v. Mississippi*?

Students will use four key sources (Oyez Overview, Streetlaw Overview, Excerpts from Briefs for Respondent and Petitioner) to fill in the Q1 foursquare organizer as they find the answers to the questions posed above. The teacher may break students into groups of four (or pairs, or groups of eight) to facilitate cooperative learning, or this may be completed by students individually or worked on as a class.

Supporting Question 2: How do justices focus on legal precedent as they decide cases?

Students will complete a jigsaw activity to become familiar with the precedent cases for *Flowers* (see notes for teacher at the end of this lesson plan for a quick summary of them). Depending on the class, the teacher may choose to modify the Jigsaw to focus only on *Batson* and *Chatman* and may use only the Streetlaw summary or use both it and the APM reports longer explanation as well as asking students to research the case in Oyez. The teacher should divide students into groups of 2-5 students (depending upon how many precedent cases will be considered). In these initial groups (what we will call "expert groups"), students should focus on ONE case and fill out the relevant part of their graphic organizer. After the groups have considered and agreed on a summary of their individual case, the teacher should reshuffle the class into "teaching groups," with one student representing each case. The students then teach the case on which they are expert to the rest of the group. For further explanation of structuring a jigsaw activity, see <https://www.facinghistory.org/resource-library/teaching-strategies/jigsaw-developing-community-and-disseminating-knowledge>.

Supporting Question 3: What role does judicial philosophy and ideology play in Supreme Court decision-making?

Students will read one or both pieces from NEWSELA to better understand divergent viewpoints on the Constitution and judicial activism and to learn and define the terms originalism, living Constitution, plain meaning, judicial restraint, and judicial activism. The readings could be simply assigned, NEWSELA quizzes could be used, or a note-taking worksheet could be created. (The notes could be incorporated into the notes for the other reasons as well.) Or the teacher could lead students through a different exercise to define and explain the important vocabulary terms defined in the articles. The NEWSELA articles are available at varying reading levels.

Students will then use an I-Civics worksheet on Supreme Court nominations to review and expand understanding of judicial philosophy and the way that political calculations enter judicial selection. As an optional addition, the teacher may incorporate a few statistical pieces that show the way that we use judicial ideology to classify Court decisions and to understand the increasing role of ideology in nominations/confirmations of judges, both overall and in relationship to several issues at play in the *Flowers v. Mississippi* case. Finally, student knowledge will be extended through use of a resource from Street Law – a video and accompanying worksheet that compares judicial approaches to the Constitution. Students will watch a video that pits the ideas of originalist Antonin Scalia with Living Constitutionalist Stephen Breyer. Start the video at 15:30 and play until 24:30. If students need extra support, rewind key passages and watch again. Discuss the video and the points students recorded on their Viewing Guides. Answer questions that the students have about the justices' remarks.

Supporting Question 4: In addition to facts, precedent, and ideology, what other factors influence justices?

Justice Benjamin Cardozo eloquently stated, "The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judge by." (quoted in Epstein and Walker, *Constitutional Law for a Changing America*, 47) The many other factors that influence justices will be examined in this section of the IDM. Through a variety of exercises and readings, students will examine other factors that influence judicial decision-making including interest groups (including political actors), public opinion, media coverage, judicial sense of history, bias/subjectivity, etc. In this last element, students will be encouraged to consider their own implicit biases as a way to understand how these factors might be at work in legal decision making. It may be of use to introduce this quote to students. The law clerk description of the late Justice Frankfurter described him as someone who "felt very intensely about a lot of things, and sometimes he didn't realize that his feelings and his deeply felt values were pushing him as a judge relentlessly in one direction or another." (Quoted in Baum, *The Supreme Court*, 131) After a class reading of a short excerpt from Justice Breyer's 2010 book *Making Our Democracy Work*, students will participate in a stations/gallery walk activity that leads them through examining and weighing the four factors above. The factors will not be named; rather students will walk through a variety of examples and pieces of evidence, taking notes that ultimately culminate in them making a graphic organizer to bring together all they have learned thus far. This exercise could also be turned into a virtual gallery walk, particularly as some of the sources are already media sources.

Supporting Question 5: How do oral arguments influence justices and highlight decision-making ideals?

Students will listen to/read a transcript of portions of the oral arguments from *Flowers v. Mississippi*. Students should discuss the facts and focuses of the particular justices, and to follow in particular the questioning of those identified as liberal justices (Kagan, Breyer, Ginsburg in the excerpt provided) and conservative justices (Kavanaugh, Thomas, Roberts in the excerpts provided). Students could make suppositions about how they voted and think again about the way that the facts of the case and *Batson* precedent factor into judicial thinking. Students should also discuss the intensive nature of Supreme Court questioning. The teacher may also include (all of parts of) the “In the Dark” episode, which offers compelling clips and summaries of the oral arguments and goes back through some of the judicial philosophy, the *Batson* precedent, and the factual information from the case. Students could then sort the Street Law statements of arguments for both petitioner and respondent and identify that factors that they suspect most influenced justices and what kinds of arguments particular justices might agree with. Finally, students should be provided the handout on the decision of the Court in the case and be shown the video clip on the outcome from CBS Sunday Morning.

Summative Assessment (Argument and Extension)

At the close of the discussion, students will do a final reflection about how their thinking has changed/grown during this unit. (For that, the teacher should make use of http://www.visiblethinkingpz.org/VisibleThinking_html_files/03_ThinkingRoutines/03c_Core_routines/UsedToThink/UsedToThink_Routine.htm.) Alternately, the teacher could bring a close to the Socratic Seminar by showing this quote from Justice Breyer and asking students to respond to it with what they have learned during this unit:

“Words on paper, however, no matter how wise, are not sufficient to preserve a nation. Benjamin Franklin made this point when, in 1787, he told a Philadelphia questioner that the Constitutional Convention had created ‘a republic, Madam, if you can keep it.’ The separate institutions that the Constitution fashioned—Congress, the executive, the judiciary—were intended to bring about a form of government that would guarantee that democracy and liberty are not empty promises. But what would enable the Constitution to work not only in theory but also in practice? How could the nation make sure that the Constitution’s limits are respected, that our citizens enjoy its important protections, that our legal system resolves disputes fairly and impartially, and that our courts dispense justice?” (Stephen Breyer, *Making Our Democracy Work: A Judge’s View* (New York: Alfred A. Knopf, 2010, p. xi-xii)

Students will prepare for, participate in, and engage in self-evaluation of their performance in a Socratic Seminar centered on the essential question: can justice ever be truly blind? They will center discussion on the Curtis Flowers case but also expand out to discuss the judicial system in general.

Students will prepare for the discussion by not just preparing their notes (see the brainstorming/evidence gathering page in the Socratic Seminar lesson in the Google Drive) and will follow the Socratic Seminar procedures as outlined there. At the close of the discussion, students will do a final reflection about how their thinking has changed/grown during this unit. (For that, the teacher should make use of

http://www.visiblethinkingpz.org/VisibleThinking_html_files/03_ThinkingRoutines/03c_Core_routines/UsedToThink/UsedToThink_Routine.htm.)



Resources Required with Citations*:

All of the resources, handouts, and materials not linked to as a URL below can be found in this Google Drive folder: https://drive.google.com/open?id=1BLOou03uAvHGrv_P6hONztxVQw2rqJAw.

Staging the Question

Hearing before the Committee on the Judiciary United States Senate, March 20, 21, 22, and 23, 2017, U.S. Government Publishing Office, Washington, D.C., 2018,

<https://www.govinfo.gov/content/pkg/CHRG-115shrg28638/pdf/CHRG-115shrg28638.pdf>, 577 PBS

News Hour on case: <https://www.youtube.com/watch?v=xs0v5y087Hw>

S-I-T for facts of case <https://www.facinghistory.org/resource-library/teaching-strategies/s-i-t-surprising-interesting-troubling>

Supporting Question 1. How do justices discover the facts of a case, and what facts and issues matter in deciding *Flowers v. Mississippi*?

Q1 FourSquare Graphic Organizer

Oyez Overview Reading

Streetlaw Summary Reading

Excerpts from Briefs for Respondents and Petitioners

Other case materials at <https://www.scotusblog.com/case-files/cases/flowers-v-mississippi-2/>

Supporting Question 2: How do justices focus on legal precedent as they decide cases?

Streetlaw Summary of Precedents

Parker Yesko, "The Supreme Court Cases That Could Free Curtis Flowers," APMReports, March 14, 2019, <https://www.apmreports.org/story/2019/03/14/supreme-court-precedents-cases-that-could-free-curtis-flowers>

Alternately/additionally, you could assign students to research the five cases in Oyez instead of providing the article. <https://www.oyez.org/>

Jigsaw Notes page

Supporting Question 3: What role does judicial philosophy and ideology play in Supreme Court decision-making?

"How U.S. Supreme Court justices interpret the Constitution," https://newsela.com/read/lib-supreme-court-interpret-constitution?collection_id=339&search_id=50d4f5be-97d5-4aa3-b4ab-1b78f0d823f2

"What is judicial activism?," https://newsela.com/read/lib-judicial-activism-restraint/id/2000000914/?collection_id=339&search_id=3be8f121-0b52-4eea-9b56-85c1f157eb6b

Supreme Court nominations looks at some of issues of interpretation

https://www.icivics.org/node/2500268?referer=node/678&page_title=The%20Judicial%20Branch

Worksheets of Use – Supreme Court Nomination Activity – Table and Worksheet as well as the sheet Supreme Court Nominations

https://www.icivics.org/viewpdf?path=/sites/default/files/lesson_plan/Supreme%20Court%20Nominations_StudentsDocs.pdf

Background and Video Viewing Guide Handout, from How do judges interpret the Constitution?, Streetlaw,

<https://store.streetlaw.org/how-do-judges-interpret-the-constitution/>

2010 Leon Silverman Lecture Series Video with Scalia and Breyer, www.c-spanvideo.org/program/Intenta

[Optional Handout on Decision-Making Records](#)



Supporting Question 4: In addition to facts, precedent, and ideology, what other factors influence justices?

Excerpt, Stephen Breyer, 2010

Gallery Walk Organizer and Notes

Gallery Walk Items File (all but podcasts and videos linked below are in folder in Google drive)

- Street Law Handout, “Background Notes: Interest Groups and the Supreme Court” (separate doc not in Word file)
- I-Civics Readings on Interest Groups (separate doc not in Word file—use reading pages 2&3)
- Excerpts, Amicus Curiae Briefs from *Flowers v. Mississippi* (these include guiding questions for students, and students might reference the full briefs – could be open on tablet or laptop for scrolling)
- In the Dark/APM Website (teacher could have open on tablet or laptop—could be full site for browsing, or a particular episode or piece identified in the teacher’s guide to In the Dark), <https://www.apmreports.org/in-the-dark>
- *Rolling Stone* article on *Flowers v. Mississippi* case: Paul Alexander, “For Curtis Flowers, Mississippi Is Still Burning,” *Rolling Stone*, August 7, 2013, <https://www.rollingstone.com/politics/politics-news/for-curtis-flowers-mississippi-is-still-burning-188496/>
- Pew Research Center on Death Penalty, <https://www.pewresearch.org/fact-tank/2018/06/11/us-support-for-death-penalty-ticks-up-2018/>
- Bryan Stevenson excerpt from 2012 TED talk, “We Need to Talk about an Injustice,” excerpted from <https://www.facinghistory.org/resource-library/we-need-talk-about-injustice>
- Justice Elena Kagan Remarks on Justice Thurgood Marshall, in “For Justice Marshall,” *Texas Law Review* 71 (no. 1125, 1993), 1127, 1129
- Sonia Sotomayor, CNN story on her reference to a “wise Latina” during her confirmation hearing, <https://www.cnn.com/2009/POLITICS/06/05/sotomayor.speeches/index.html>
- Can You Solve This? <https://www.youtube.com/watch?v=vKA4w2O61Xo>
- Monkey Business Illusion: https://www.youtube.com/watch?v=IGQmdoK_ZfY
- Gary Trudeau, “Street Calculus,” *Doonesbury* Cartoon (posted at <https://www.facinghistory.org/resource-library/image/street-calculus>)

Supporting Question 5: How do oral arguments influence justices and highlight decision-making ideals?

Oral Argument Handout (excerpts from <https://www.oyez.org/cases/2018/17-9572>)

In the Dark Episode on Arguments (listen to again), <https://www.apmreports.org/story/2019/03/26/in-the-dark-s2e13>

Street Law Handout, What are the arguments in *Flowers v. Mississippi*?

Decision Handouts from Oyez and Street Law – run as back-to-back copies

Outcome - CBS Sunday Morning Clipping, <https://www.youtube.com/watch?v=TyRNqLJDHmU>

Summative Assessment (Argument and Extension)

Socratic Seminar Plan and Handouts

**Possible Service Learning Informed Action:**

The informed action in this unit centers on logical outcomes from the essential question and should show students reflecting upon how justice can be made blind. This might come in the form of specific follow up about the Flowers' case, or students could think more broadly. Students might conduct a research project about potential judicial reforms and/or advocate for them, in their local community and to their legislators. Alternately, they could think about the issue of blind justice within their own school, thinking about to what extent disciplinary policies are blind and proposing changes. Students could also host a guest speaker from a judicial reform advocate and find out what they could do to help in their own community.

Differentiation:

There are several places within the IDM where teachers are given options for differentiation (use of NEWSELA articles, options to use one or more readings, etc.) but this is text-heavy unit and support will have to be provided to students who are ELL in particular. The podcast In the Dark covers a lot of Supreme Court lingo and procedure, and listening to that will help students better understand the academic language and terminology and to better understand the readings. Teachers could also use the website Rewordify to assist in differentiation.

Formative Assessment of Supporting Questions:

In addition to listening to student talk and discussion and adapting instruction accordingly, teachers may review student work on the following:

Q1: Q1 foursquare organizer

Q2: Jigsaw Exercise

Q3: NEWSELA Quizzes may be used; Streetlaw Video Worksheet

Q4: Gallery Walk Organizer

Q5: Discussion of Oral Arguments

Other Considerations:

Students should prepare for the discussion by not just preparing their notes (see the brainstorming/evidence gathering page) but by reviewing expectations of civil discourse, listening, dialogue versus debate, etc. (<https://www.tolerance.org/magazine/publications/civil-discourse-in-the-classroom>; https://drive.google.com/file/d/1rqsH_VyK_WM76naz-MTIVLVGYBhlvsx_/view; <https://www.usip.org/sites/default/files/2017-01/Dialogue%2Bvs%2BDebate%2B-%2BUSIP%2BGlobal%2BCampus.pdf>) Students should also be reminded of the rigor expected and of the ways in which they can help facilitate the discussion and invite in missing voices/perspectives.

(<https://drive.google.com/file/d/1ywWiX9vhuL7YztfxqUiPguz2ghXgexmi/view>)

Because *Flowers v. Mississippi* centers on issues of race and justice in US history, class discussion may feel especially fraught. Teachers should review expectations of civil discourse, listening, dialogue versus debate, etc., in the attached worksheet and through teacher review of other materials on civil discourse and dialogue in the classroom (<https://www.tolerance.org/magazine/publications/civil-discourse-in-the-classroom>; https://drive.google.com/file/d/1rqsH_VyK_WM76naz-MTIVLVGYBhlvsx_/view; <https://www.usip.org/sites/default/files/2017-01/Dialogue%2Bvs%2BDebate%2B-%2BUSIP%2BGlobal%2BCampus.pdf>) Students should also be reminded of the rigor expected and of the ways in which they can help facilitate the discussion and invite in missing voices/perspectives.

(<https://drive.google.com/file/d/1ywWiX9vhuL7YztfxqUiPguz2ghXgexmi/view>)



Additional Background for Teachers on *Flowers v. Mississippi*

Curtis Flowers was first arrested in 1996 for the murder of four employees at the Tardy Furniture Store in Winona, Mississippi, a small town with (like much of the South and the greater United States) a long history of racist practices toward African Americans within both the community and its courtrooms. Flowers has been in jail since 1996 and has been tried six times, with the first five trials either having the verdict overturned on appeal because of prosecutorial misconduct or mistrial outcomes. In two of the episodes of misconduct, prosecutor Doug Evans was found to have tried to strike as many African American jurors as possible, and it is a similar illegal violation in the 2010 sixth trial that is at the heart of this case. Flowers appealed his 2010 conviction on several grounds, including that Mississippi had violated his Sixth and Fourteenth Amendment rights during the jury selection process by unfairly and illegally striking African American jurors. The Mississippi Supreme Court rejected this claim twice (the second time when the Supreme Court returned the question to them after another recent court case). The Supreme Court took his case after the most recent appeal, and will whether the Mississippi Supreme Court erred in how it applied *Batson v. Kentucky*, which declared a need for rigorous inspection of peremptory strikes that seemed on the basis of race. As they consider various materials related to the case (briefs, oral arguments, etc.) and evaluate the objective and subjective reasons behind judicial decision-making, students will consider the subjective and objective nature of Supreme Court decision-making and the essential question, can justice be truly blind?

Precedents for This Case

Justices routinely work to uphold the doctrine of *stare decisis*, not wanting to overturn precedent unless absolutely necessary. The fact that the Court has only overturned 163 precedents in its history is a mighty demonstration of this fact. The main precedents on which the Court will lean in *Flowers v. Mississippi* are *Batson v. Kentucky* (1986) and *Foster v. Chatman* (2016). In *Batson v. Kentucky*, the Court had ruled in favor of a petitioner who alleged racial bias in the peremptory strike of four jurors in his case. These race-based strikes were found to have violated the petitioner's Sixth and Fourteenth Amendment rights to a fair jury trial and to his Fourteenth Amendment right to equal protection under the law. The majority in *Batson* noted that the Equal Protection Clause "guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race."¹ Lawyers are not allowed to exclude potential jurors solely on the basis of race. As a remedy to prevent this, *Batson* "evolved into a tool employed to combat discrimination" and to a three-pronged test: (1) a defendant must make a prima facie case of purposeful discrimination; (2) the prosecutor then must provide race-neutral reasons for review; and (3) the defense must show that these reasons are not in fact race-neutral.² In the recent *Foster v. Chatman* (2016), the Court overturned the conviction of Timothy Foster, an African American man first charged in 1986 with the murder of an elderly white woman. Foster had been convicted by an all-white jury after four qualified African American jurors had been struck, and after a series of appeals and post-judgment discovery efforts, Foster submitted a *Batson* challenge based on the notes of the case prosecutor (which he discovered after using the Georgia Open Records Act).³ Although lower courts denied his petition, the Supreme Court granted certiorari. The main hinge in this case were the prosecutor's case files—recovered under that Georgia Open Records Act—as the prosecutor had done such things as note (B) by African American jurors. Such notations, the petitioner's

¹ *Batson v. Kentucky*, 1986, majority opinion, <https://supreme.justia.com/cases/federal/us/476/79/#tab-opinion-1956654>.

² Thomas Galan, "United States v. Ramirez Sobercines: Is sympathy towards minorities a race-neutral reason under *Batson v. Kentucky*?" *Touro Law Review*, 17 (March 2016), 680, 684.

³ *Foster v. Chatman* (2016), <https://www.oyez.org/cases/2015/14-8349>.



brief in this case asserted, “were a telltale sign that constitutionally forbidden racial bias was afoot.”⁴ The Court found in Foster’s favor. Writing for the majority, Chief Justice Roberts found that there was the kind of purposeful discrimination that *Batson* prohibited.⁵ There are a few additional cases which APM Reports identifies as critical to the case as well, including *Strauder v. West Virginia*, *Swain v. Georgia*, and *Miller-El v. Dretke*. In *Strauder*, the Court ruled that a jury pool (not jurors) had to be drawn from a diverse cross-section of the community. In *Swain*—decided 85 years after *Strauder*—the Court moved closer to declaring peremptory strikes on the basis of race in violation of the Fourteenth Amendment. In *Miller-El*, the Court advocated for rigorous examination of peremptory strikes. Students who find themselves invested in this case will want updates on the current status.

As of 4/22/2020, DA Doug Evans had recused himself and Mississippi had moved forward with the re-trial, naming a new prosecutor—and for the first time since his initial trial, Curtis Flowers was out on bail (though in hiding because of death threats). For future updates, a helpful reference site is <https://www.apmreports.org/in-the-dark/season-two/curtis-flowers-updates>.

⁴ Petitioner’s Brief on Writ of Cert to Mississippi Supreme Court (2017), 20.

⁵ *Foster v. Chatman* (2016), https://www.supremecourt.gov/opinions/15pdf/14-8349_6k47.pdf.