

# LAW WISE



KANSAS BAR ASSOCIATION

PUBLISHED BY THE KANSAS BAR ASSOCIATION

OCTOBER 2009

Editor: Sarah Shipman, staff attorney, Silver Lake Bank, Topeka

Coordinators: Kathryn Gardner, a career law clerk to the Hon. Sam A. Crow, and Meg Wickham, Kansas Bar Association

Greetings from the Kansas Supreme Court and the Kansas Bar Association (KBA). Welcome to this edition of *Law Wise* and the second edition of the 2009-2010 school year. The theme of October's edition is "A Civics Lesson" for educators.

## IN THIS ISSUE

|  |   |
|--|---|
| Welcome .....                            | 1 |
| Calendar of Events .....                 | 1 |
| Going Green .....                        | 1 |
| Constitutional Rights Foundation.....    | 2 |
| Supreme Court Summer Institute .....     | 4 |
| Courts in Kansas .....                   | 5 |
| Law Wise Survey .....                    | 6 |
| Capitol Roundtable Activity.....         | 7 |
| New Kansas Courts Video Available.....   | 7 |
| Technology for Teachers .....            | 7 |
| Resources for Law-Related Education .... | 8 |

## WELCOME

By Sarah Shipman, *Law Wise* editor

Former Justice Sandra Day O'Connor has launched a web-based civics education initiative. When discussing the motives behind the creation of the program, Justice O'Connor has observed that most people can name the judges on American Idol but less than 15 percent of the general public can name a chief justice of the Supreme Court. A stated goal of the Law-Related Education Committee of the Kansas Bar Association is to provide civics and law related information and resources for educators. This issue of *Law Wise* includes links to Justice O'Connor's Web site, among others, an article and lesson on the independence of the judiciary, information about the structure of the Kansas Court System, and information about an opportunity for educators to study at the Supreme Court Summer Institute.

## CALENDAR OF EVENTS

|              |  |
|--------------|--|
| Nov. 9, 2009 | Accepting interest statements for Supreme Court Summer Institute 2010                                  |
| Jan. 8, 2010 | Last day for Supreme Court Summer Institute interest statements  |
| Spring 2010  | Kansas Bar Association YLS Mock Trial Competition.<br><b>Presented by Shook, Hardy &amp; Bacon LLP</b> |
| May 1, 2010  | Law Day  |



## GOING GREEN



*This will be the last school year Law Wise will be printed for distribution. We will instead e-mail the publication. We will make exceptions to those who are unable to access a computer. Please e-mail to [mwickham@ksbar.org](mailto:mwickham@ksbar.org) the e-mail address where you would like to receive your copy of Law Wise. Thank you.*

*Law Wise* is a tool for educators statewide to find new avenues of presenting civics lessons and ideas. The KBA also feels a responsibility to educate through example by going green. We will continue to offer the printed mailed version for the 2009-2010 school year, but would like to present the choice of going paperless by providing the publication through e-mail. Please e-mail Meg Wickham, KBA manager of public services to receive your "green" issue of *Law Wise* and be taken off the paper mailing list. You can always access past *Law Wise* issues on our Web site at [http://www.ksbar.org/public/public\\_resources/lawwise](http://www.ksbar.org/public/public_resources/lawwise). Thank you for helping us "go green!"

# CONSTITUTIONAL RIGHTS FOUNDATION

## BILL OF RIGHTS IN ACTION, SPRING 1998 (14:2)

### INDEPENDENCE OF THE JUDICIARY

#### AN INDEPENDENT JUDICIARY

Source: <http://www.crf-usa.org/bill-of-rights-in-action/bria-14-2-c.html>

One hundred years ago, a spirit of reform swept America. Led by the progressives, people who believed in clean government and that government had to help solve society's problems, the movement elected representatives to Congress and to statehouses around America. Progressives passed legislation aimed at improving working conditions, breaking up business monopolies, creating welfare programs for the poor, and assuring pure food and drug standards. Businesses hurt by this new legislation often opposed the new laws and challenged them in court.

Many of these lawsuits ended up in the U.S. Supreme Court led by Chief Justice Melville Weston Fuller. Fuller and a majority of the justices at the time often took a dim view of government regulation and believed that social problems would best be solved by the workings of a free and uncontrolled market. They based many of their court opinions on the due process clause of the 14th Amendment, which says no state shall "deprive any person of life, liberty, or property, without due process of law . . ." In interpreting this clause, they developed the doctrine of substantive due process.

Under this doctrine, the Court would review the substance of governmental laws and would find unconstitutional those laws that interfered with a right to property, or freedom to make contracts, or some other liberty. For example, in 1897 the state of New York passed a labor law forbidding employees of a company from working more than 60 hours in one week. An employer sued claiming that the law violated the Constitution. The Supreme Court, in the case of *Lochner v. New York* (1905), struck down the law reasoning that there was "no reasonable ground for interfering with the liberty of persons or the right of free contract, by determining the hours of labor." The Court went on to strike down dozens and dozens of progressive-passed laws.

The actions of the Supreme Court raised a storm of controversy. Progressives complained that the Court was countering the will of the majority and usurping the powers of the Legislature. Others claimed that the Court lack judicial restraint and was too eager to declare laws unconstitutional. Yet, the Fuller Court's decisions stood until the 1930s when a later Court all but abandoned the doctrine of substantive due process.

Criticism of the role of courts in our society, however, did not end. Ironically, in recent years, conservatives often complain about "activist" judges or fear that judges are legislating from the bench. Some have favored laws that would restrict judicial power by limiting courts' jurisdiction or judges' discretion in sentencing. Other groups target judges who render unpopular decisions for removal from office through impeachment, recall, or re-election.

Defenders of the courts worry that political attacks on judges and basic changes to our judicial system could undermine the independence of the judiciary and seriously affect the delicate balance of powers contained in our constitutional system. But how did an independent judiciary come about and what does it mean to have one?

#### THE THIRD BRANCH OF GOVERNMENT

When the framers of the Constitution arrived in Philadelphia in 1787 to consider a new form of government for the United States, it was a foregone conclusion that it would have three branches. Well-educated students of history, the framers had been influenced by great political thinkers of the past, including the Frenchman Montesquieu. Central to his ideas about government was the concept of separation of powers. He believed that the best way to preserve individual liberty and avoid tyranny was to divide the powers of government into the legislative, executive, and judicial function. In this way, none of the branches would possess all of the power and each would balance one another off.

Those at the Constitutional Convention worried about power too. Fresh from the revolutionary experience, they wanted to make sure that the government had enough power to solve the country's problems, but not too much power to ride roughshod over the states or individual citizens. Many viewed the judicial branch as, in the words of Alexander Hamilton, "the least dangerous to the political rights of the Constitution" and as a necessary buffer between the powerful presidency and Congress.

Article III of the Constitution states: "The judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The article goes on to describe what kinds of cases the "judicial Power" would be empowered to hear. Language in the article suggests that the framers wanted the judicial branch to serve an independent role free from political pressure. It stated that judges should "hold their Offices during good Behavior." This meant judges could only be removed for misconduct. It also stated that judges should receive a salary that could not be reduced during the time they held office. This would assure that judges could not be punished by salary reductions if they made unpopular decisions.

Though the framers created an independent judiciary in Article III, they also included some checks and balances against too much judicial power. The Constitution gave the president the power to appoint judges with the "Advice and Consent of the Senate." It gave Congress the power to create or eliminate lower federal courts and determine what cases could be appealed to them.

(Continued on next page)

Oddly, the Constitution says nothing about the one job the Supreme Court is most known for today. That is the power to review federal and state laws to determine whether or not they are constitutional. Some scholars have argued that the framers assumed that the Supreme Court would have this power without having to spell it out in the Constitution. They cite, for example, Alexander Hamilton in *The Federalist Papers*, a series of articles published to support the ratification of the Constitution. He wrote:

*The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by judges, as fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body.*

Once the Constitution was ratified, the First Congress of the United States went about establishing the rest of the federal courts under the powers given to it. The Federal Judiciary Act of 1789 laid out a plan that today has grown into an extensive system of federal trial and appeal courts. It also gave federal courts the power to take appeals from state decisions.

### THE POWER OF JUDICIAL REVIEW

The judiciary asserted its independence and power when John Marshall became the Supreme Court's fourth Chief Justice in 1801. The question of whether the court could declare governmental actions unconstitutional had not yet been settled. The opportunity came with the case of *Marbury v. Madison* in 1803.

In the last hours of his administration, President John Adams had appointed William Marbury as a justice of the peace in the District of Columbia. Unfortunately, Marbury did not receive the appointment papers before Adams left office. The new president, Thomas Jefferson, ordered Secretary of State James Madison not to deliver the appointment to Marbury. Marbury sued to get his appointment, citing the Judiciary Act of 1789. This law had given the Supreme Court the power to order judges and government officials to act.

In his majority opinion in the case, Marshall agreed that Marbury had a right to the appointment. He ruled, however, that the Supreme Court did not have the power to order Madison to deliver the appointment and make it official. The section of the Judiciary Act in question, he determined, gave the Supreme Court a power that it did not have under the Constitution. Since the Constitution was the supreme law of the land, Marshall reasoned, any statute that violated it could not stand and it was the duty of the Supreme Court to overturn the statute. In giving up the power in the Judiciary Act, Marshall carved out for the court a much greater one — the power of judicial review.

Over the years, the court expanded the power of judicial review to cover not only acts of Congress, but executive and administrative orders as well. In time, it also became the power of the lower federal courts and many state courts as well. In many ways, this power was unique to the American experience. Even England, the origin of so many of our political and legal principles, did not give its judges the power to overrule acts of parliament on constitutional grounds.

Judicial review does have limits. Judges can only review laws or other governmental acts that are challenged in court. And once a ruling is made, judges must rely on the other branches

of government to enforce them.

While judicial review expanded the power of the judiciary, it also placed judges in a new role. In deciding whether a governmental act meets constitutional standards, judges had to interpret the meaning of the Constitution. Their interpretation, even if based on law and reason, can run contrary to the views of legislators, presidents, or the public. As we saw with the Fuller court and its doctrine of substantive due process, this can lead to political controversy and charges that the court is not interpreting the Constitution, but making its own laws.

### POLITICS AND THE JUDICIARY

Ever since the time of John Marshall, the judiciary has been embroiled in political squabbles, some that have threatened its independence. In fact, the famous case of *Marbury v. Madison* itself began when President Adams tried to appoint a loyal federalist party man to a judgeship, and the new president Jefferson rejected the appointment favoring judges from his own political viewpoint.

President Andrew Jackson quarreled with Chief Justice Marshall over the court's decision in the case of *Worcester v. Georgia*. Jackson reportedly said, "Well, John Marshall has made his decision, now let him enforce it." Though it is likely that Jackson never really used these words, the statement illustrates one of the real limits on judicial power. It must rely on the other branches of government to enforce its rulings.

Democratic President Franklin Roosevelt, frustrated with Supreme Court actions striking down much of his New Deal legislation, proposed a plan to increase the number of justices so that his appointees would be able to outvote the sitting justices. He also once prepared a radio address to tell the American people why he would not comply with a Supreme Court ruling, but at the last minute the court voted in his favor. Roosevelt's proposed plan to "pack" the Supreme Court set off a firestorm of public criticism, even from his own supporters. Viewed as a naked attack on the independence of the judiciary, no one ever proposed such a strategy again. (Later, the number of Supreme Court Justices was set at nine by federal statute.)

At times the court has also made decisions that have run contrary to the will of Congress. Under the Constitution, Congress has numerous checks that it can use against the judiciary. First, it has control over funding the federal judiciary's budget. Though it cannot lower judges' salaries during their terms in office, it can reduce staff, lower operating costs, and withhold money for court-ordered actions. Second, Congress can propose new laws or constitutional amendments to override specific court decisions. Third, it can restrict the kinds of cases that can be appealed to the federal courts. In fact, though unlikely, Congress has the power to completely abolish the lower federal courts.

### COURTS IN CONTROVERSY

Over the last five decades, America's independent judiciary has done much to shape our history. Through its decisions, the court extended voting rights, abolished laws legalizing racial segregation, recognized the rights of those accused of crime, and expanded the rights of free speech and the press. While many of these decisions became accepted by the vast majority of Americans, others have raised ongoing controversy. Court decisions guaranteeing a woman's right to an abortion,

*(Continued on next page)*

banning prayers and Bible reading in schools, excluding illegally seized evidence in criminal trials, and permitting the burning of the American flag have led to charges that the court has gone too far in interpreting the Constitution.

These decisions have given rise to new calls for limiting the power of the judiciary. In recent years, Congress has passed legislation limiting the discretion federal judges have in determining sentences in criminal trials. Proposals have been made to limit the jurisdiction of federal courts in certain matters. The Senate has also shown its willingness to carefully scrutinize presidential appointments to the Supreme Court and to the lower federal courts under its “advice and consent” power. The trend toward limiting the power of the judiciary can also be seen at the state level.

Some worry that if these trends continue, the delicate balance between the powers of the judiciary and the other branches of government in our system could be undone. Others fear that these trends could compromise judicial independence

making judges less likely to make decisions based on law and conscience and more likely to make decisions that serve political ends.

As we have seen, these debates are not new to our history. It is likely that they will continue into the new millennium and beyond.

### FOR DISCUSSION AND WRITING

1. What evidence in the Constitution suggests that the framers wanted an independent judiciary?
2. What checks against judicial power did the Constitution give Congress?
3. How did the power of judicial review increase the political pressure on judges?
4. Do you agree or disagree with Hamilton’s statement that the judiciary is the “least dangerous” branch of government? Why?

## S U P R E M E C O U R T S U M M E R I N S T I T U T E 2 0 1 0

Since it began in 1995, the Supreme Court Summer Institute for teachers has brought together over 700 teachers from across the country to convene in Washington, D.C., for six days of educational activities related to teaching about the U.S. Supreme Court. The Institute is co-sponsored by the Supreme Court Historical Society.

The Institute includes sessions led by Supreme Court experts, journalists, authors, and attorneys, who give teachers an in-depth understanding of how the Court chooses and decides cases, and what it is like to argue before the Court. Teachers even learn about the personalities of each justice. This exciting opportunity culminates with a visit to the Court to hear decisions handed down and a private reception at the Court.

The Institute prepares teachers to use innovative teaching methods as well as cutting edge technology. Beyond the content-rich sessions and activities, teachers are also equipped with the skills and tools to train fellow teachers at home.

At the time of this publication Institute dates were unavailable. Dates will be published in the November issue of *Law Wise*.

The KBA Law Related Education (LRE) Committee will be accepting interest statements beginning Nov. 2, 2009. Statements will be taken through Jan. 8, 2009. The committee will nominate one teacher to attend this institute as well as covering the cost of the institute and travel. Interest statements should include the following information:

- Name
- E-mail
- Phone
- Organization
- Address
- School name
- School address
- Fax
- Professional title
- Years teaching
- What subjects and grade levels you teach
- What subjects/responsibilities will you integrate information you acquire from the Institute
- Related extracurricular activities
- Describe experience in law related education
- Professional development experience: Describe your experience leading professional development. Where have you done training and for whom?
- Organizational affiliations
- 2-3 sentence description of yourself

Please contact Meg Wickham, KBA public services manager for more details [mwickham@ksbar.org](mailto:mwickham@ksbar.org) or call at (785) 234-5696.

# COURTS IN KANSAS

Source: <http://www.kscourts.org/kansas-courts/general-information/you-and-the-courts/courts.asp>

There are several different levels of courts in Kansas to handle various kinds of cases. These courts are:

## MUNICIPAL COURTS

Municipal (city) courts deal with alleged violations of city ordinances committed within the city limits. The cases usually involve traffic and other minor offenses. A person charged with an offense in municipal court may be represented by a lawyer. The judge hears the cases without a jury. Anyone convicted in municipal court may appeal to the district court of the county in which the municipal court is situated.

## DISTRICT COURTS

District courts are created by the Constitution. They are the trial courts of Kansas, with general original jurisdiction over all civil and criminal cases, including divorce and domestic relations, damage suits, probate and administration of estates, guardianships, conservatorships, care of the mentally ill, juvenile matters, and small claims. It is here that the criminal and civil jury trials are held. Kansas is divided into judicial districts, with varying numbers of judges in each district. There is a district court in each county, and an office of the clerk of the court where cases may be filed.

The state is also divided into six judicial departments, each of which includes several judicial districts. One justice of the Kansas Supreme Court serves as departmental justice over each department. The departmental justice may assign judges from one judicial district to another.

Judges of the district court must be lawyers. Some counties have district magistrate judges, who may or may not be lawyers, and whose jurisdiction is limited. There is at least one resident judge in each county.

The Court appoints a district judge as chief judge for each judicial district. The chief judge, in addition to his or her judicial responsibilities, has general control over the assignment of cases within the district, and general supervisory authority over the clerical and administrative functions of the court.

Appeals may be taken from the district courts to the Court of Appeals, or to the Supreme Court.

You may visit your district court at any time.

## COURT OF APPEALS

The Kansas Court of Appeals is located in Topeka in the Kansas Judicial Center and is an intermediate appellate court. The Court of Appeals hears all appeals from orders of the State Corporation Commission, and all appeals from the district courts in both civil and criminal cases except those which may be appealed directly to the Supreme Court. It also has jurisdic-

tion over original actions in habeas corpus.

The Court may hear appeals en banc (all 12 judges) but the court usually sits in panels of three. The Court of Appeals may sit anywhere in the State. Hearings are scheduled regularly in Hays, Garden City, Wichita, Chanute, Kansas City, Olathe, and Topeka, and hearings have also been held in other cities for the convenience of the parties.

## SUPREME COURT

The Kansas Supreme Court sits in Topeka in the Kansas Judicial Center and is the state court of last resort. It hears direct appeals from the district courts in the most serious criminal cases and appeals in any case in which a statute has been held unconstitutional. It may review cases decided by the Court of Appeals, and may transfer cases from that court to the Supreme Court. It also has original jurisdiction in several types of cases.

The Court, by constitutional mandate, has general administrative authority over all Kansas courts. Its rules govern appellate practice in the Supreme Court and the Court of Appeals, and procedures in the district courts. Supreme Court rules also provide for the examination and admission of attorneys, set forth the code of professional responsibility which governs the conduct of attorneys, and include the canons of judicial ethics, which govern the conduct of judges. Rules also provide for the examination and certification of official court reporters. The Court may discipline attorneys, judges and nonjudicial employees.

All of the nonjudicial employees of the Kansas court system are under a personnel plan adopted and administered by the Court. Personnel and payroll records of all court employees throughout the State are maintained in the Office of Judicial Administration. The Court adopts and submits to the Kansas Legislature an annual budget for the entire judicial branch of state government.

## KANSAS SUPREME COURT JUSTICES

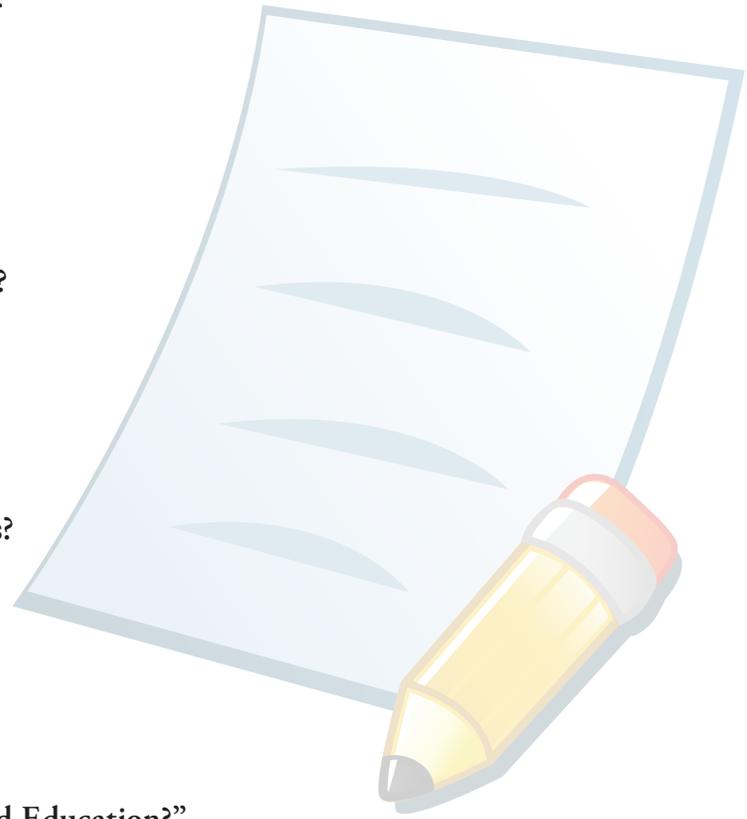
Chief Justice Robert E. Davis  
Justice Lawton Nuss  
Justice Marla J. Luckert  
Justice Carol A. Beier  
Justice Eric S. Rosen  
Justice Lee A. Johnson  
Justice Dan Biles

<http://www.kscourts.org/kansas-courts/supreme-court/justice-bios/default.asp>

# Law Wise Survey

How can we help you...

(or take this online at [www.ksbar.org/surveys](http://www.ksbar.org/surveys))



(Circle all that apply)

1) What features of Law Wise do you use or like best?

- a) feature stories
- b) lesson plans
- c) terrific technology
- d) guest authors

2) What have been your favorite or most used themes?

- a) Law Day
- b) Constitution Day
- c) 4th Amendment
- d) General Civics
- e) Other

3) Have you ever used the “Resources for Law-Related Education?”

a) If you have used the Resources for LRE, what have you used?

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b) What would be helpful additional resources?

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c) Were you aware the KBA ships the resources free to you? Y / N

4) Other comments or suggestions:

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You can also take this survey online at [www.ksbar.org/surveys](http://www.ksbar.org/surveys)



**Once you’ve completed the survey, please mail to:**

Kansas Bar Association  
c/o Meg Wickham  
1200 SW Harrison St.  
Topeka, KS 66612

## ACTIVITY: CAPITOL ROUNDTABLE

1. Divide the class into triads. Assign each member of the triad one of the following roles: President of the United States, Chief Justice of the United States, Senate Majority Leader. (If any students are left over, designate them Speaker of the House and assign them to a group.)
2. Each member of the triad should review the article, paying particular attention to information about the powers and positions of their branch of government.
3. Each triad should discuss the following questions from the point of view of their role:
  - a. What dangers to American democracy are there if the courts are too independent.?
  - b. If not for a strong independent judiciary, how would the rights of minorities be protected and who would make sure that the Constitution is followed?
4. Conclude the activity by discussing the two questions as a class.

## COURT EDUCATION VIDEO AVAILABLE

The Kansas Supreme Court has released a new educational video along with talking points on four court-related topics. The video, called Justice in Kansas, and the talking points may be accessed below.

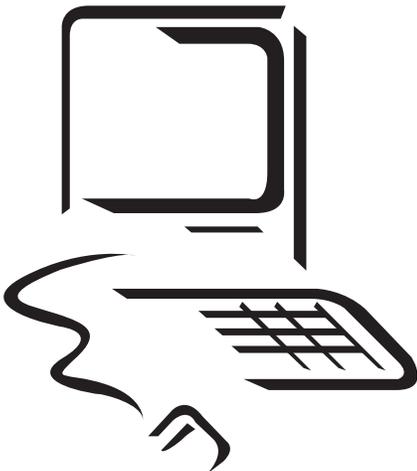
**Justice in Kansas Video:** Published by the Kansas Supreme Court, produced in January 2009 and hosted by Chief Justice Robert E. Davis, the video provides information regarding the structure and function of the Kansas Judicial Branch. Copies of the video are available upon request to teachers or anyone interested in law-related education. Contact Ron Keefover, Education and Information Officer of the Office of Judicial Administration, Topeka, (785) 296-4872 to order. Video is approximately seven (7) minutes in length. Window Media Player 9.0 or above is required. [Free Download for WMP.](#)

### Talking Points:

- Interesting facts regarding the Kansas Judicial System
- Types of courts
- Case statistics
- Jury service in Kansas
- About Kansas courts

- Ron Keefover  
Education-Information Officer  
Kansas Judicial Center  
301 W. 10th  
Topeka, KS 66612  
(785) 296-4872  
Fax (785) 296-7076  
[keefover@kscourts.org](mailto:keefover@kscourts.org)

## TERRIFIC TECHNOLOGY FOR TEACHERS



### Check out these great websites ...

Justice Sandra Day O'Connor's civics resource site  
<http://www.ourcourts.org/>

Courts in the Classroom is a collaboration of the Judicial Branch of California and Constitutional Rights Foundation  
<http://www.courtsed.org/>

Legal system lesson plans  
<http://www.civicallyspeaking.org/legalsystem.pdf>

An interactive web based program for learning about the judicial branch  
[http://www.congressforkids.net/games/judicialbranch/2\\_judicialbranch.htm](http://www.congressforkids.net/games/judicialbranch/2_judicialbranch.htm)



## *Resources at the Law-Related Education Inventory*

1. *CIVITAS: A Framework for Civic Education K-12* book. Suggests guidelines for developing civic education instructional programs in elementary and secondary schools to promote civic competence, civic responsibility, and participation of youth in social and political life. Library numbers 372.8./C333c.
2. *Marbury v. Madison*. H/S Video. Examines the events which led to the famous confrontation between Jefferson's administration and the Supreme Court. The program explains how Marshall's historic decision managed to both satisfy President Jefferson and permanently strengthen the power of the Supreme Court. Library number 348.04/Su76/1.
3. *The Process of U.S. Government*. Elem.-H/S video. Political process is how a group of people uses the tools of government to reach decisions that are binding for the entire community. In the case of the United States, the most important keys to the process lie with its adult citizens and the influential tool that they all wield – the right to vote! 324.65/P9417.

**Update:** *The Kansas Bar Association Law-Related Education Clearinghouse Inventory catalog has been updated. To request a new copy, please call Meg Wickham, KBA Public Services Manager, at (785) 234-5696 or e-mail her at [mwickham@ksbar.org](mailto:mwickham@ksbar.org).*

The Law-Related Education Inventory has many resources to help teach about law-related topics. The Kansas Bar Association and the lawyers in your community sponsor the Law-Related Education Inventory. To order a catalog, call Meg Wickham at the Kansas Bar Association, (785) 234-5696. The clearinghouse will mail free copies of law-related posters, games, mock trials, booklets, lesson plans, and other aids. It is open Monday through Thursday, 8 a.m. to 7 p.m., and Friday, 8 a.m. to 5 p.m. The director of the Teachers College Resource Center, which houses the Law-Related Education Inventory, Janice Romeiser, can be reached at [jromeise@emporia.edu](mailto:jromeise@emporia.edu).

*Law Wise* is published by the Kansas Bar Association during the school year. The Kansas Bar Foundation, with Interest on Lawyers' Trust Accounts funding, provides support for this publication. It is published free, on request, for teachers or anyone interested in law-related education and is edited by Sarah Shipman, Topeka. For further information about any projects or articles, contact Kathryn Gardner, Topeka, (785) 295-2626; or Meg Wickham, manager of public services of the Kansas Bar Association, Topeka, (785) 234-5696. *Law Wise* is printed at the Kansas Bar Association, 1200 S.W. Harrison, Topeka, KS 66612-1806.