

PART III:

"MENDING WALL" AND THE SEPARATION OF POWERS

Introduction

In 1995, the Supreme Court decided *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211. 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, and 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 understandings of separation of powers, both justices turned to Robert Frost's classic American poem "Mending Wall."

In this exercise, you will first consider the perspectives on the need to build and maintain walls expressed in the poem. You will then use the poem to discuss Justice Scalia's and Justice Breyer's perspectives on separation of powers.

Step One: Reading and Discussing "Mending Wall"

Robert Frost's "Mending Wall" was initially published in 1915 in a volume of Frost's poetry titled *North of Boston*. Read through the poem, paying particular attention to its description of walls and the two figures of the poem's narrator (the "I" voice) and the neighbor.

"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."

"Mending Wall" from THE POETRY OF ROBERT FROST edited by Edward Connery Lathem, © 1969 Henry Holt and Company. Reprinted by permission Henry Holt and Company, LLC

Focus Questions for Discussing the Poem

1. What does the poem suggest about the nature of walls? Why is it necessary to "mend wall" each year?
2. 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)?
3. Put yourself in the place of the poem's narrator (the "I" voice). List no more than five words you think he might use to describe his neighbor.
4. Now put yourself in the place of the neighbor described in the poem. List no more than five words you think he might use to describe the poem's narrator.
5. Identify the two phrases that are repeated twice in the poem. What do you think is the significance of these lines?

Tips for “Mending Wall” and the Separation of Powers

Whether you are a lawyer or judge visiting a classroom or a teacher using the Dialogue with your students, consider these tips for exploring “Mending Wall” and the separation of powers.

- Before you begin a discussion of “Mending Wall” and the excerpts from *Plaut v. Spendthrift Farm*, you’ll want to make sure that students have a good understanding of the poem.
- Poems typically condense both thoughts and language into carefully crafted, but sometimes difficult verses. Students will benefit from the opportunity to read the poem several times.
- You might ask students to first read the poem to themselves, and then ask one or more students to read the poem aloud to the class.
- Ask the students if there were passages that they thought were difficult to understand or contained unfamiliar vocabulary words.
- Consider having this discussion over the course of two class periods. The first period could be used for a reading and discussion of the poem. The second period would then be used to discuss the excerpts from the *Plaut* opinions.
- If you are a lawyer or a judge visiting a classroom, ask the teacher to discuss the poem and accompanying focus questions during the class period before your visit. You can then ask the students for a summary of their thoughts about the poem before you begin the discussion of the excerpts from the *Plaut* opinions.

Step Two: Using “Mending Wall” to Discuss *Plaut v. Spendthrift Farm*

In *Plaut v. Spendthrift Farm, Inc.*, Supreme Court Justices Antonin Scalia and Stephen Breyer use “Mending Wall” to support two different perspectives on the system of separation of powers established by the U.S. Constitution. Read through the following excerpts from their opinions.

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.

*prophylactic = preventive.

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.”

Focus Questions for Discussing *Plaut v. Spendthrift Farm*

1. 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.
2. Are there passages in the poem that suggest circumstances in which high walls might be required? Can you think of any provisions in the Constitution that place high walls between the branches of government?
3. Are there passages in the poem that suggest circumstances in which a need for walls would be lessened? Can you think of any provisions in the Constitution that lower or leave gaps in the walls between the branches of government?
4. 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?