

CONSTITUTION

MODULE 9

THE JUDICIAL SYSTEM AND CURRENT CASES



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Module 9: The Judicial System and Current Cases Lesson Plan

THE JUDICIAL SYSTEM AND CURRENT CASES

Article III of the Constitution establishes the judicial branch of the national government, which is responsible for interpreting the laws. At the highest level, the judicial branch is led by the U.S. Supreme Court, which consists of nine justices. In the federal system, the lower courts consist of the district courts and the courts of appeals. Federal courts—including the Supreme Court—exercise the power of judicial review. This power gives courts the authority to rule on the constitutionality of laws passed (and actions taken) by the elected branches. The Constitution also promotes the principle of judicial independence—granting federal judges life tenure (meaning that they serve until they die, resign, or are impeached and removed from office).

Learning Objectives

At the conclusion of this module, you should be able to:

1. Describe judicial review and explain it is a key component of the American constitutional system.
2. Describe judicial independence and explain why the Founding generation viewed it as an important feature of the federal judiciary.
3. Examine primary source writings on the Supreme Court in Federalist, No. 79.
4. Describe how a case gets to the Supreme Court.
5. Identify how the judicial nomination process works and how a justice ends up on the Supreme Court.

9.1 Activity: Supreme Court “Class Photo”

Purpose

Article III of the Constitution establishes the national government’s judicial branch: the federal judiciary, headed by a single Supreme Court. In this activity, you will examine the current justices of the Supreme Court and learn how a Supreme Court nominee gets appointed to the Supreme Court.

Process

As a class, discuss what you know about the Supreme Court and what you want to know by the end of this module.

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- What do you know about the Supreme Court justices?
- What do you want to know about them?

Next, review and discuss the [Info Brief: SCOTUS Class Photos](#) presentation.

Finally, read the [Info Brief: Supreme Court](#) document and complete the [Activity Guide: Supreme Court](#) “Class Photo” worksheet.

Activity 9.1 Notes & Teachers Comments

Launch

Display the image of the Supreme Court for students to view. As a large group, review a simple K-W-L activity to start student discussion based on the following questions:

- What do you know about the Supreme Court justices?
- What do you want to know about them?

Next, review the presentation with students and have them complete the worksheet. Ask students to compare and contrast the images of the court over time.

Finally, have students read the [Info Brief: Supreme Court](#) document and complete the Activity Guide: Supreme Court “Class Photo” worksheet. Have students share highlights with the class.

Activity Synthesis

Ask students to write three facts they learned about the Supreme Court and at least one question that they still have.

Activity Extension (Optional)

Now that students have a better understanding of the nominating process, students may research the nomination and Senate hearings process for a recent Supreme Court justice.

9.2 Activity: Key Terms

Purpose

It is important to remember that Article III is a very short provision and doesn't lay out many details about the Supreme Court and how it works—or even what the federal judiciary as a whole should look like. For example, it doesn't set the number of Supreme Court justices, how many lower-court judges there should be in the federal judiciary, or whether we should have any lower federal courts below the Supreme Court at all.

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Furthermore, Article III can be a bit hard to understand without some background first. The basic ideas are simple enough, but the language is a bit more technical than other parts of the Constitution. In this activity, you will review the key terms of the module to help deepen your understanding of Article III.

Process

Complete the [Activity Guide: Key Terms - Judicial System and Current Cases](#) worksheet.

After your worksheet is complete, your teacher will guide you through a bingo game using the key terms and definitions of Module 9.

Activity 9.2 Notes & Teachers Comments

Launch

Begin the key terms activity with the students. Have them review the definitions and answer questions. As a review, have students share their answers in the worksheet for all of the key terms. Finally, engage students in a fun, lighthearted activity of word bingo by reading the definitions of the terms. Have students build bingo sheets by placing the key terms on a bingo card or hand out premade cards. If your class needs more words for the bingo card, use a sampling of facts from the [Info Brief: Supreme Court](#) document. Don't forget the FREE spot! If the students have the correct word, they'll color, cover, or electronically mark in the box on their cards where the answer appears.

Activity Synthesis

Have students apply their knowledge of the terms. Read and mark up a current news article that uses the terms.

Activity Extension (Optional)

Now that students have a better understanding of key terms about the judiciary, ask the following questions:

- What is the primary role of the courts in our constitutional system?
- Why is it important for the judiciary to be independent of the other branches of government?
- How do the courts play a key role in our system of checks and balances?
- What part of the process did you learn about today that was new to you?
- What other questions do you have about the courts and their process for hearing cases?

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9.3 Activity: The Federalist No. 78 (Hamilton)

Purpose

The founders' vision of judicial independence grew out of the colonists' own experience under the British system. Judges were not independent within this system. Instead, colonial judges were seen as officers of the crown, who carried out the orders of the king and could be removed at his whim.

In this activity, you will learn more about the Founding generation's original vision for the Supreme Court and the federal court system.

Process

Read [Federalist No. 78](#) by Alexander Hamilton and complete the [Activity Guide: The Federalist No. 78](#) (Hamilton) worksheet.

Activity 9.3 Notes & Teachers Comments

Launch

The key arguments will fall under these big ideas:

- The judiciary is the weakest of the three branches of government.
- Judges have a duty to exercise judicial review to declare laws that are inconsistent with the Constitution unconstitutional.
- The power of judicial review is rooted in the principles of popular sovereignty—the idea that the powers of the government (and the authority of the Constitution) is derived from “We the People.” That authority is greater than the powers of elected officials.
- Judicial independence is a key component of the constitutional system—protecting judges from the influence of the other branches of government and leaving them free to exercise their independent judgment in a given case.

Each argument must be summarized and at least one quote has to be used to cite as evidence.

Activity Synthesis

Have students discuss whether or not they agree with each argument Hamilton discusses in Federalist No. 78. Why, or why not?

Activity Extension (Optional)

Now that students have a better understanding of the Founding generation's original vision of the judiciary, ask the following questions:

- What recent cases have been in the news about the Supreme Court?

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- Poll your family, friends, or community members to ask them their thoughts on the Supreme Court and its role in the government.
- Use this information to develop a graphic or one-page fact sheet on the history and role of the court, cite evidence from your readings, and share with people in your community.

9.4 Video Activity: History of the Supreme Court

Purpose

In this activity, you will learn about the history of the Supreme Court.

Process

Watch [the video](#) about the history of the Supreme Court.

Then, complete the [Video Reflection: History of the Supreme Court](#) worksheet.

Identify any areas that are unclear to you or where you would like further explanation. Be prepared to discuss your answers in a group and to ask your teacher any remaining questions.

Activity 9.4 Notes & Teachers Comments

Launch

Give students time to watch the video and answer the questions.

Activity Synthesis

Have students share their responses in small groups and then discuss as a class.

Activity Extension (Optional)

Now that students have a better understanding of the history of the Supreme Court, ask the following questions:

- What era of the Supreme Court history do you find most interesting and why?

9.5 Activity: How Does a Case Get to the Supreme Court?

Purpose

So, how does a constitutional case get to the Supreme Court? Someone—often a single person—goes to court and argues that a law, an arrest, or a regulation is in conflict with the Constitution. When this happens, they may eventually be able to petition the Supreme Court to hear their case. However, the Supreme Court has broad discretion to choose which cases it

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decides each year. The Supreme Court receives about 10,000 petitions per year, and only agrees to hear about 65 of them. That's not a lot! In this activity, you will study a real case and analyze how it got to the Supreme Court.

Process

Begin by reading the [Common Interpretation: Article III, Section 1](#) and the [Info Brief: How Does a Case Get to the Supreme Court](#) document for background information about Article III and the federal court system. Summarize by writing a paragraph about how the judicial branch works today.

Next, work as a group to chart the path of a case to the Supreme Court. Your group will choose a historical case from the list of choices provided. Read about the case and work with your group to build a simple road map graphic to show the progression of this case to the Supreme Court. Be creative in your design. You can draw the path, sketch it out in a Word document, or use tools such as [Piktochart](#).

Select a case from the historical case list.

Compare your road map to the [one provided on how the typical case gets to the Supreme Court today](#).

Activity 9.5 Notes & Teachers Comments

Launch

Have students read [Common Interpretation: Article III, Section 1](#) and Info Brief: How Does a Case Get to the Supreme Court. Then, discuss with students how the judicial branch works and how the cases start with We the People and get to the Supreme Court.

Activity Synthesis

As a final activity, have students select a historical court case to build their path to the Supreme Court infographic. Students should identify the typical path, shortcuts, and areas where cases get blocked by exploring data on how many cases are heard at each level of the court system and analyzing the criteria for cases to get past certain checkpoints.

Activity Extension (Optional)

Now that students have a better understanding of how a case gets to the Supreme Court, ask the following questions:

- What is one thing you learned about cases that reach the Supreme Court?
- What surprised you about these cases?
- Were there any similarities?

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- If you were to write a letter to the people in these cases before they took up the fight, what would you tell them?

9.6 Activity: Supreme Court in Review

Purpose

The Supreme Court's term typically lasts from the first Monday of October to the end of June.

Opinions are released throughout the term, with the last of the opinions (often on the most important and controversial cases) coming out at the end of June—although there's no deadline because the justices set their own schedule.

In this activity, you will explore some of the most significant cases that the Supreme Court heard last term.

Cases for 2021–2022 Term:

- [*Dobbs v. Jackson Women's Health Organization \(2022\)*](#)
- [*Kennedy v. Bremerton School District \(2022\)*](#)
- [*New York State Rifle & Pistol Association, Inc. v. Bruen \(2022\)*](#)

Process

After you review these three cases of the last term, use the information from the [NCC website](#) and [SCOTUSblog](#) to complete the [Activity Guide: Supreme Court in Review](#) worksheet.

Be prepared to share your briefs (explainers) you have developed in small groups.

Activity 9.6 Notes & Teachers Comments

Launch

Give students time to review three of the high-profile cases of the last term and write short briefs (explainers) for each case.

Activity Synthesis

Ask students to summarize the information from the lesson in three to five sentences.

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Activity Extension (Optional)

Now that students have a better understanding of current Supreme Court cases, ask students to write a short opinion for the Supreme Court for one case based on the facts presented and the constitutional issues in question.

9.7 Test Your Knowledge

Purpose

Congratulations for completing the activities in this module! Now it's time to apply what you have learned about the basic ideas and concepts covered.

Process

Complete the questions in the following quiz to test your knowledge.

- [Test Your Knowledge: The Judicial System and Current Cases](#)

9.8 Extended Activity: Building Consensus

Purpose

The Supreme Court can offer a model for how to offer arguments in a constructive, cooperative way so that people with opposing views can meaningfully listen to one another, consider different viewpoints, learn from one another, and possibly change positions or reach a compromise.

In this activity, you will explore the process for building consensus and the value of listening to arguments from other perspectives.

Process

Watch the [Supreme Court Spotlight video](#) from the National Constitution Center where U.S. Supreme Court Associate Justice Stephen Breyer (Ret.) provides an insider perspective on what happens behind closed doors at the Supreme Court.

As you watch the video, record the following information:

- Three interesting facts about the Supreme Court presented in the clip
- Two rules for discussion in the Supreme Court
- One word that is repeated by Justice Breyer

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Activity 9.6 Notes & Teachers Comments

Launch

Before you begin, have students think about an argument they've had recently and write down a few notes about it. Who was involved? What was the issue? Were you able to come to a resolution? Why? Why not? Share with the class if time permits.

Activity Synthesis

After viewing the video clip, students can share their 3-2-1 notes in their small group. Ask students to circle any ideas that are shared by more than one person. Have each group choose a representative to share out to the whole class. The teacher may choose to have different groups give their responses for only one aspect of the 3-2-1 notes. However, ask each group to share the one word that was repeated. This is powerful because the same word may be repeated many times signifying its importance. Encourage this because some students may be upset that another group already said their answer.

Activity Extension (Optional)

Looking for more tools on civil dialogue practice in your classroom? Check out the [civil dialogue toolkit](#) and corresponding lessons.

SCOTUS “CLASS PHOTO”



**The Roberts Court
in 2022**

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SCOTUS “CLASS PHOTO”



	<u>Appointed by :</u>	<u>Year:</u>
1.	John G. Roberts, Jr.	George W. Bush 2005
2.	Clarence Thomas	George H.W. Bush 1991
3.	Samuel A. Alito, Jr.	George W. Bush 2006
4.	Sonia Sotomayor	Barack Obama 2009
5.	Elena Kagan	Barack Obama 2010
6.	Neil M. Gorsuch	Donald Trump 2017
7.	Brett M. Kavanaugh	Donald Trump 2018
8.	Amy Coney Barrett	Donald Trump 2020
9.	Ketanji Brown Jackson	Joseph Biden 2022





The Chase Court in 1867

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The Taft Court in 1923





The Warren Court in 1965





The Rehnquist Court in 1998



THE JUDICIAL SYSTEM AND CURRENT CASES

Article III, Section 1 begins with (what scholars refer to as) a vesting clause—vesting the “judicial power of the United States” in *one* Supreme Court and in whatever inferior courts Congress decides to establish.

“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 Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”

In other words, *Congress* controls many of the key details of the national court system. This means that Congress has considerable authority to change the following:

- **The size of the Supreme Court:** The Supreme Court began at six justices. Over time, there’s been a low of five Justices and a high of 10 (during the Lincoln presidency). Congress has altered the size of the Supreme Court *six* times. The last time was in 1869. That’s how we got to the current number: *nine* justices.
- **The Supreme Court’s docket:** Congress sets the rules for how much control the Supreme Court has over the cases that it hears each year. For the modern Court, perhaps the most important move by Congress was its passage of the Judiciary Act of 1925. Chief Justice (and former President) William Howard Taft was the driving force behind (what we refer to today as) the “**Judges Bill**.” In many ways, Taft’s “Judges Bill” created the Supreme Court that we have today. Before 1925, the Court had limited control over the cases that it heard each year, and it had to hear a ton of cases each term. With the Judges Bill, Congress gave the Court broad control over the cases that it hears. That remains true today.
- **The structure of the federal judiciary:** Congress determines many of the details about the federal court system as a whole, including how many federal judges overall, how many courts of appeals, how many district courts, where they are located, how they are organized, and so forth.

Article III, Section 1, also tells us that federal judges—including Supreme Court justices—hold their offices for life (“during good behaviour”).

Generally speaking, there are no formal requirements in the Constitution for who may serve as a Supreme Court justice.

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9.1 Info Brief

Article II, Section 2, sets out the appointment power.

Here's the text of Article II, Section 2:

The president “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court.”

- The president has the power to nominate someone to fill a Supreme Court seat.
- The Senate has the power to confirm or reject the person that the president chooses. To serve on the Supreme Court, a president's nominee must receive the approval of the Senate.

But that's all that the Constitution's text says about the Supreme Court nomination process. The judicial nomination process today—the hearings, the questions, how qualified nominees must be, etc.—don't come from the Constitution's text. They're a product of norms created over time and the actions of Congress.

Generally speaking, here are the steps in that process today:

- A seat on the Supreme Court opens up. (So, a justice retires or dies.)
- The president considers a number of potential people for the position—reading about them, asking for advice from others (advisors, members of Congress, scholars, political leaders, interest groups, etc.), interviewing potential choices, and so forth.
- The president selects someone.
- That person accepts the nomination.
- The Senate Judiciary Committee—the Senate group in charge of the Supreme Court nomination process—holds confirmation hearings: The president's nominee shows up at the Senate. The senators ask their questions like in a job interview, trying to understand the nominee's judicial philosophy and experience. The nominee answers them.
- The Committee votes on whether to recommend confirmation to the rest of the Senate.
 - If they vote “yes,” then the nomination is sent to the full Senate.
 - If they vote “no,” then the whole process starts all over again.
- The full Senate debates the nominee and votes on her confirmation.
 - If she wins Senate approval, she then becomes a Supreme Court justice.
 - If not, then the whole process starts all over again.

Of course, there are exceptions to this general process, but this is how it usually works.

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9.1 Activity Guide

SUPREME COURT “CLASS PHOTO”

Article III of the Constitution establishes the national government’s judicial branch: the federal judiciary, headed by a single Supreme Court. In this activity, you will examine the current justices of the Supreme Court and learn how a Supreme Court nominee gets appointed to the Supreme Court.

Review the [Info Brief: SCOTUS Class Photos](#) presentation and read the [Info Brief: Supreme Court](#) document and answer the following questions.

What do you notice? How are the justices organized? (Why)

How many justices are there? Was that always the case?

How many justices can you name?

Who is the chief justice?

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9.1 Activity Guide

How many are people of color?

How many are women?

What are the formal requirements to become a Supreme Court justice?

Further Reflection

As you examined the photos of the Supreme Court, was there anything else you observed? Was there anything that you wondered? Write down your additional thoughts and questions here, and then discuss them with your class.

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9.2 Activity Guide

KEY TERMS - JUDICIAL SYSTEM AND CURRENT CASES

It is important to remember that Article III is a very short provision and doesn't lay out many details about the Supreme Court and how it works—or even what the federal judiciary as a whole should look like. For example, it doesn't set the number of Supreme Court justices, how many lower-court judges there should be in the federal judiciary, or when we should have any lower federal courts below the Supreme Court at all.

Furthermore, Article III can be a bit hard to understand without some background first. The basic ideas are simple enough, but the language is a bit more technical than other parts of the Constitution. In this activity, you will review the key terms of the module to help deepen your understanding of Article III.

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Key Term	Definition	Paraphrase <i>Describe each term in your own words.</i>	Give an example that highlights each term. <i>Either from the Constitution or a Supreme Court case that you've learned about.</i>
Judicial Review	The power to review the constitutionality of acts of the national and state governments.		
Judicial Supremacy	The idea that the Supreme Court is the final voice on the Constitution's meaning. <i>(Many scholars, lawyers, and judges debate this concept and whether it is a good idea.)</i>		
Judicial Independence	The idea that the federal courts must be independent from the control of the other branches of government.		

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Majority Opinion	The opinion in a case that has the support of a majority of the justices.		
Dissenting Opinion	An opinion in a case explaining why a justice disagrees with the majority opinion and why they would decide the case differently.		
Concurring Opinion	An opinion from a justice who agrees with the majority on who should win the case, but offers some additional thoughts on how to think about the constitutional issue in the case.		
Writ of Certiorari	When four of the nine justices decide to take a case, they will issue a writ of certiorari.		
Docket	The list of cases the Court will hear in a term.		
Advice and Consent	The Senate's power to approve or reject the president's nominees, including to the Supreme Court.		

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9.3 Primary Source

ALEXANDER HAMILTON, FEDERALIST NO. 78 (1788)

View the case on the National Constitution Center's website [here](#).

On May 28, 1788, Alexander Hamilton published *Federalist* No. 78—titled “The Judicial Department.” In this famous *Federalist Paper* essay, Hamilton offered, perhaps, the most powerful defense of judicial review in the American constitutional canon. On the one hand, Hamilton defined the judicial branch as the “weakest” and “least dangerous” branch of the new national government. On the other hand, he also emphasized the importance of an independent judiciary and the power of judicial review. With judicial independence, the Constitution put barriers in place—like life tenure and salary protections—to ensure that the federal courts were independent from the control of the elected branches. And with judicial review, federal judges had the power to review the constitutionality of the laws and actions of the government—ensuring that they met the requirements of the new Constitution. Other than *Marbury v. Madison* (1803), Hamilton’s essay remains the most famous defense of judicial review in American history, and it even served as the basis for many of Chief Justice John Marshall’s arguments in *Marbury* itself.

Excerpt:

Life tenure promotes judicial independence and is an essential feature of the federal judiciary. According to the plan of the convention, all judges who may be appointed by the United States are to hold their offices DURING GOOD BEHAVIOR; which is conformable to the most approved of the State constitutions and among the rest, to that of this State. . . . The standard of good behavior for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.

The judicial branch is the least dangerous of the three branches. Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth

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9.3 Primary Source

of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments. . . .

The judiciary must exercise judicial review to strike down unconstitutional laws, actions, and practices by the government; when it does so, it enforces our nation’s highest law set out by the American people in the Constitution. There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.

On its own, Congress can’t be trusted to decide on the constitutionality of its own laws; we need a check like judicial review as an additional layer of constitutional protection; the judiciary helps to ensure that Congress acts within the limits set out by the people in the Constitution. If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their WILL to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a 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. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

This doesn’t make the judiciary supreme; instead, it simply acknowledges that the Constitution’s commands, as set out by the people, are superior to any branch of government. Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental. . . .

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9.3 Primary Source

Life tenure gives federal judges the independence necessary to check the legislative branch. If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

Judicial independence is essential to protecting the rights of the people from abuses by the government. This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. . . . Until the people have, by some solemn and authoritative act, annulled or changed the established form [of government], it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge, of their sentiments, can warrant their representatives in a departure from it, prior to such an act. But it is easy to see, that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community.

***Bold sentences give the big idea of the excerpt and are not a part of the primary source.**

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9.3 Activity Guide

THE FEDERALIST NO. 78 (HAMILTON)

The founders' vision of judicial independence grew out of the colonists' own experience under the British system. Judges were not independent within this system. Instead, colonial judges were seen as officers of the crown, who carried out the orders of the king and could be removed at his whim. In this activity, you will learn about the Founding generation's original vision for the Supreme Court and the federal court system.

Read [Federalist No. 78](#) and identify three to five of Alexander Hamilton's main arguments in favor of the federal judiciary.

Complete the chart below.

	Argument Summary	Supporting or clarifying ideas	At least one direct quotation as evidence to support the argument
1			
2			

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3			
4			
5			



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9.4 Video Reflection

HISTORY OF THE SUPREME COURT

In this activity, you will learn about the history of the Supreme Court.

Watch the [video](#) and complete the worksheet to help organize the information about Article III.

Article III

What are some details about the Supreme Court and federal courts that are established in Article III?

What is left to Congress and historical practice?

Federalist No. 78

How does Alexander Hamilton describe the judiciary? Why?

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9.4 Video Reflection

Why do independent judges have the power to strike down unconstitutional laws?

What role do the people play in this process?

Marbury v. Madison (1803)

Facts: Who are all the people (parties) associated with the case? What was the dispute between them?

Issue: What is the issue in the case? What constitutional provision is at issue? What is the constitutional question that the Supreme Court has to answer?

Outcome/Ruling: How does the Court rule? What was the outcome in the case? Who won and who lost? How did the justices vote? What sort of rule does the Court come up with to resolve the issue?

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9.5 Info Brief

HOW DOES A CASE GET TO THE SUPREME COURT?

Let's turn now to a basic question: *How does a case get to the Supreme Court?*

The Court's term typically lasts from the first Monday of October to the end of June.

The Court sets oral arguments for cases, which usually run through April and occur the first two weeks of each month.

Opinions are released throughout the term, with the final opinions (often on the most important and controversial cases) coming at the end of June—although there's no formal deadline because the justices set their own docket (and schedule).

Remember, all of this is not in the Constitution itself, but the result of over two centuries of Supreme Court practice.

So, how *does* a case get to the Supreme Court?

Most constitutional cases start with a simple argument: *The government has violated the Constitution.* It may be a law passed by Congress, by a state legislature, or by a town council. Or it may be an action taken by the president or the governor or some other government official—whether it's an arrest, a new government regulation, you name it. But someone—often a single person—comes to court and argues that a law or arrest or regulation violates the Constitution. Constitutional cases often begin with “We the People” or even “Me the Individual.”

The Supreme Court receives about 10,000 petitions a year.

The justices use the “Rule of Four” to decide if they will take the case. If four of the nine justices determine that a case has merit, they will issue a writ of certiorari. This is a legal order from the high court for the lower court to send the records of the case to them for review.

When all is said and done, the Supreme Court will hear about 65–70 cases a year.

This tells us that most petitions are denied. Why? It's not the Supreme Court's job to hear every case.

Since 1925 (and thanks to Chief Justice William Howard Taft's advocacy before Congress), the justices themselves have had almost total control over which cases they decide to hear each year.

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But how *does* a case end up before the Supreme Court?

Here's how nearly every case works its way up the national court system. In nearly every case, someone brings a new case in (what's called) a district court. This is the lowest level of court in the national courts system.

There are *94* district courts in the United States. It's where nearly every case starts—and where most of them end.

A single judge presides over (or manages) the case. And the case is decided by either a judge or a jury.

Someone wins, and someone loses.

The loser might decide to appeal the district court's ruling by having the next level of court (the court of appeals) take a look at the case.

There are *13* Circuit Courts of Appeals. Twelve geographic circuits, and the Federal Circuit. Unlike the Supreme Court, the court of appeals doesn't control which cases it hears. If someone appeals their case to this court, the judges have to decide it.

Generally speaking, they have two options: (1) say that the district court got it right; or (2) say that the district court got it wrong—and then explain why and reach a new decision.

Again, someone wins, and someone loses. And it doesn't have to be the same people as the first time.

Finally, the loser in the court of appeals might try to get the Supreme Court to decide her case. The fancy (lawyerly) words for this is that they can "petition for a writ of certiorari." Or if you want to sound like a real insider: "file for cert."

This simply means that the loser (in the court of appeals) wants the Supreme Court to take their case and decide it. But that isn't very likely.

Again, the Supreme Court has nearly total control over which cases it takes and it says no to nearly every petition.

How many justices does it take to get your case heard?

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Today, there are nine justices on the Supreme Court. The justices read the challenger’s “cert. petition” asking the Court to take the case and again, *four* of the justices must vote to take a case before they decide to hear it.

Again, this is the “The Rule of Four.” So, that’s four out of nine justices—so, just short of a majority.

Or, if you want to sound like a real insider: When the Court takes a case, we generally call that “granting cert.” But again, the Supreme Court rejects nearly every petition out of the nearly 10,000 filed annually.

Generally speaking, the Court will sometimes take cases that involve questions of national significance. But the main reason it takes a case is usually a “circuit split.” This is when the lower courts can’t agree on how to interpret the law involved and/or when different lower courts have interpreted the law differently.

Why does the Supreme Court care about circuit splits?

When the lower courts decide cases differently, it can lead to confusion. By taking a case that involves an issue that has led to differing opinions in the lower courts, the Supreme Court creates a precedent that every court in the country has to follow.

This ensures that the laws are applied equally to all people, no matter where they live.

In other words, by settling circuit splits, the Supreme Court looks to promote the value of legal uniformity throughout the nation.

WHAT HAPPENS AFTER THE SUPREME COURT TAKES A CASE?

Finally, what happens after the Court agrees to hear a case?

The winner and loser from the court of appeals file briefs before the Supreme Court. These are little books that lawyers write—presenting the constitutional arguments on their side of the case.

Others affected by the case can also write briefs—known as “Friend of the Court” or “amicus curiae” briefs—explaining why the Court should choose one side as the winner over the other. These briefs can come from all sorts of people—ordinary Americans, government officials (at the national, state, and local levels), scholars, businesses, various organizations/groups, etc.

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The justices then read the briefs in the case, and the Supreme Court holds oral argument. This is when the lawyers on each side get to state their case and the justices get to ask questions. These arguments usually last under two hours—so, the lawyers don't get a lot of time.

The justices then get together once or twice a week to vote on the cases. This is known as the Justices' "Conference"—and these conferences are held in secret. No one but the justices are allowed in the room.

At conference, the justices discuss the cases heard at oral argument, decide by vote which cases to take, and each justice is allowed to speak to their views on the cases before her fellow justices.

The justices give their votes at conference by seniority, starting with the chief justice. If the chief justice is in the majority, the chief assigns who writes the majority opinion. This is where a lot of the chief justice's formal authority lies.

And if the chief justice is in the minority (the dissent), then the most senior justice (the justice serving the longest) in the majority assigns which justice writes the majority opinion.

The justices then spend months writing their opinions in the case.

In nearly every case, one justice writes a majority opinion—which has the support of a majority of the justices.

In some cases—often the most closely watched cases—one or more justices might write a dissenting opinion, explaining why they disagree with the majority and why they would decide the case differently.

And finally, one or more justices might write a concurring opinion—often agreeing with the majority on who should win the case, but offering some additional thoughts on how to think about the constitutional issue in the case.

After the justices finalize their opinions and finalize their votes in the case, the Court's decision is then released to the public.

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HOW DOES A CASE GET TO THE SUPREME COURT GRAPHIC

Constitutional Question

Most constitutional cases start with a simple argument: **THE GOVERNMENT HAS VIOLATED THE CONSTITUTION.** Someone—often a single ordinary American—comes to court and argues that a law or arrest or regulation violates the Constitution.

District Court

In nearly every case, someone brings a new case in (what's called) a district court.

This is the lowest level of court in the national courts system. There are 94 in the US.

It's where nearly every case starts—and where most of them end!

A single judge presides over (or manages) the case.

And the case is decided by either a judge or a jury.

In the end, someone wins, and someone loses.

Say that the district court got it right

Court of Appeals

The loser might decide to appeal—or challenge—the district court's ruling by having the next level of court (the court of appeals) take a look at the case.

If someone appeals their case to this court, the judges have to decide it. Generally speaking, they have two options

Say that the district court got it wrong. — and then explain why and reach a new decision.

Filing for Cert

Finally, the loser in the court of appeals might try to get the Supreme Court to decide her case. They can “petition for a writ of certiorari” or “file for cert.” This simply means that the loser (in the court of appeals) wants the Supreme Court to take their case and decide it.

The Rule of Four and Granting Cert

If four of the nine justices vote to take a case, the Court will hear it. We call that “granting cert.”

The justices read the challenger’s “cert. petition”—and vote on whether or not to hear the case.

If less than four justices vote to hear the case, the Court will not hear it.

The Supreme Court rejects nearly every petition.

(The Court accepts only 60 to 100 of the more than 7,000 to 10,000 that it is asked to review each year.)

Briefs

Each side files briefs, or little books that lawyers write, presenting their constitutional arguments.

Others affected by the case can also write briefs—known as “Friend of the Court” or “amicus” briefs.

The justices then read the briefs in the case.

Oral Arguments

The Supreme Court holds oral arguments. This is when the lawyers on each side get to state their case and the justices get to ask questions.

The Friday Conference

The justices then get together once a week to discuss and vote on the cases. This is known as the Conference—and they are held in secret.

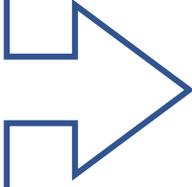
Decision

The Justices give their votes at conference by seniority, starting with the chief justice. After they reach a decision, they will assign justices to write the opinions. The justices then spend months writing their opinions in the cases.



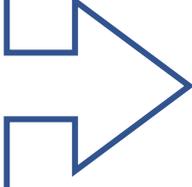
Majority Opinion

In nearly every case, one justice writes a majority opinion—which has the support of a majority of the justices.



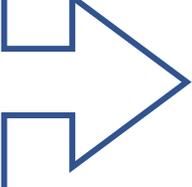
Dissenting Opinion(s)

In some cases—often the most closely watched cases—one or more justices might write a dissenting opinion, explaining why they disagree with the majority and why they would decide the case differently.



Concurring Opinion(s)

One or more justices might write a concurring opinion—often agreeing with the majority on who should win the case, but offering some additional thoughts on how to think about the constitutional issue in the case.



Announcement

After the justices finalize their opinions and finalize their votes in the case, the Court's decision is then released to the public.

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MARBURY V. MADISON (1803)

View the case on the Constitution Center's website [here](#).

SUMMARY

William Marbury received a judicial appointment from President John Adams, but his commission was not delivered before Adams's term ended. When President Jefferson refused to deliver Marbury's commission, Marbury asked the Supreme Court to order the new administration to deliver it and finalize his appointment under the Judiciary Act of 1789. Although the Supreme Court held that it could not provide a remedy for Marbury's claim because the relevant part of the Judiciary Act was unconstitutional, the Court's decision in *Marbury* confirmed the principle of judicial review—that the Court has the power to declare laws unconstitutional.

[Read the Full Opinion](#)

Excerpt: Majority Opinion, Chief Justice Marshall

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognise certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing; if these limits may, at any time, be passed by those intended to be restrained? The

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distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void. This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

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MCCULLOCH V. MARYLAND (1819)

View the case on the Constitution Center's website [here](#).

SUMMARY

McCulloch v. Maryland involves one of the first disputes in American history over the scope of the new national government's powers: whether Congress could incorporate a Bank of the United States. This was controversial in the 1790s because Southern members of Congress and the executive branch, such as James Madison and Thomas Jefferson, believed that a national bank would benefit only Northern mercantile interests and would create a financial aristocracy; they believed that the new nation should depend on farmers and what they called "agrarian virtue." They generally feared a powerful national government. Alexander Hamilton and others, on the other hand, argued that a national bank was critical to facilitating commerce and the borrowing of money, both of which would be indispensable to the new nation.

[Read the Full Opinion](#)

Excerpt: Majority Opinion, Chief Justice Marshall

This government is acknowledged by all, to be one of enumerated powers. . . . But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, so long as our system shall exist. In discussing these questions, the conflicting powers of the general and state governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled.

If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action. . . . [T]his question is not left to mere reason: the people have, in express terms, decided it, by saying, 'this constitution, and the laws of the United States, which shall be made in pursuance thereof,' 'shall be the supreme law of the land,' . . .

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. . . .

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the

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prolixity of a legal code, and could scarcely be embraced by the human mind. . . . In considering this question, then, we must never forget that it is a constitution we are expounding. . . .

The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished. . . .

But the constitution of the United States has not left the right of congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added, that of making 'all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this constitution, in the government of the United States, or in any department thereof.' . . .

This provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. . . .

[T]he sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional. . . .

It being the opinion of the court, that the act incorporating the bank is constitutional; and that the power of establishing a branch in the state of Maryland might be properly exercised by the bank itself, we proceed to inquire . . . [w]hether the state of Maryland may, without violating the constitution, tax that branch? . . .

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. . . .

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If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint This was not intended by the American people. They did not design to make their government dependent on the states. . . .

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DRED SCOTT V. SANDFORD (1857)

View the case on the Constitution Center's website [here](#).

SUMMARY

Dred Scott, an enslaved man who was taken by his enslaver into a free state and also to free federal territory, sued for freedom for himself and his family based on his stay in free territory. The Court refused to permit Scott constitutional protections and rights because he was not a citizen. Therefore, he did not have the right to sue because the relevant constitutional provision granted federal courts jurisdiction only between “citizens” of different states. The Court also held that the federal Missouri Compromise abolishing slavery in the Upper Louisiana Territory was in fact unconstitutional because the enslaver’s property rights in the enslaved person were violated. This holding pushed back efforts for the abolition of slavery and created a standard that African Americans were not American citizens, confirming that they had no constitutional protections or rights.

[Read the Full Opinion](#)

Excerpt: Majority Opinion, Chief Justice Taney

It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. But the public history of every European nation displays it in a manner too plain to be mistaken.

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. . . .

[I]t is too clear for dispute that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration, for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted....

[I]f persons of the African race are citizens of a State, and of the United States, they would be entitled to all of these privileges and immunities in every State, and the State could not restrict

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them And these rights are of a character and would lead to consequences which make it absolutely certain that the African race were not included under the name of citizens of a State, and were not in the contemplation of the framers of the Constitution when these privileges and immunities were provided for the protection of the citizen in other States. . . .

No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted.

And upon a full and careful consideration of the subject, the court is of opinion, that, upon the facts stated in the plea in abatement, Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts; and, consequently, that the Circuit Court had no jurisdiction of the case, and that the judgment on the plea in abatement is erroneous. . . .

[T]he power of Congress over the person or property of a citizen can never be a mere discretionary power under our Constitution and form of Government. The powers of the Government and the rights and privileges of the citizen are regulated and plainly defined by the Constitution itself. And when the Territory becomes a part of the United States, the Federal Government enters into possession in the character impressed upon it by those who created it. It enters upon it with its powers over the citizen strictly defined, and limited by the Constitution, from which it derives its own existence and by virtue of which alone it continues to exist and act as a Government and sovereignty. It has no power of any kind beyond it, and it cannot, when it enters a Territory of the United States, put off its character and assume discretionary or despotic powers which the Constitution has denied to it. It cannot create for itself a new character separated from the citizens of the United States and the duties it owes them under the provisions of the Constitution. The Territory being a part of the United States, the Government and the citizen both enter it under the authority of the Constitution, with their respective rights defined and marked out, and the Federal Government can exercise no power over his person or property beyond what that instrument confers, nor lawfully deny any right which it has reserved.

A reference to a few of the provisions of the Constitution will illustrate this proposition.

For example, no one, we presume, will contend that Congress can make any law in a Territory respecting the establishment of religion, or the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people of the Territory peaceably to assemble and to petition the Government for the redress of grievances. . . .

These powers, and others in relation to rights of person which it is not necessary here to enumerate, are, in express and positive terms, denied to the General Government, and the rights of private property have been guarded with equal care. Thus, the rights of property are

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united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law. . . .

[T]he right of property in a slave is distinctly and expressly affirmed in the Constitution. The right to traffic in it, like an ordinary article of merchandise and property, was guaranteed to the citizens of the United States in every State that might desire it for twenty years. And the Government in express terms is pledged to protect it in all future time if the slave escapes from his owner. This is done in plain words – too plain to be misunderstood. And no word can be found in the Constitution which gives Congress a greater power over slave property or which entitles property of that kind to less protection than property of any other description. The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights.

Excerpt: Dissent, Justice McLean

There is no averment in this plea which shows or conduces to show an inability in the plaintiff to sue in the Circuit Court. It does not allege that the plaintiff had his domicil in any other State, nor that he is not a free man in Missouri. He is averred to have had a negro ancestry, but this does not show that he is not a citizen of Missouri, within the meaning of the act of Congress authorizing him to sue in the Circuit Court. It has never been held necessary, to constitute a citizen within the act, that he should have the qualifications of an elector. Females and minors may sue in the Federal courts, and so may any individual who has a permanent domicil in the State under whose laws his rights are protected, and to which he owes allegiance.

Being born under our Constitution and laws, no naturalization is required, as one of foreign birth, to make him a citizen. The most general and appropriate definition of the term citizen is 'a freeman.' Being a freeman, and having his domicil in a State different from that of the defendant, he is a citizen within the act of Congress, and the courts of the Union are open to him. . . .

Our independence was a great epoch in the history of freedom, and while I admit the Government was not made especially for the colored race, yet many of them were citizens of the New England States, and exercised, the rights of suffrage when the Constitution was adopted . . .

Excerpt: Dissent, Justice Curtis

To determine whether any free persons, descended from Africans held in slavery, were citizens of the United States under the Confederation, and consequently at the time of the adoption of the Constitution of the United States, it is only necessary to know whether any such persons

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were citizens of either of the States under the Confederation, at the time of the adoption of the Constitution.

Of this there can be no doubt. At the time of the ratification of the Articles of Confederation, all free native-born inhabitants of the States of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, though descended from African slaves, were not only citizens of those States, but such of them as had the other necessary qualifications possessed the franchise of electors, on equal terms with other citizens. . . .

That Constitution was ordained and established by the people of the United States, through the action, in each State, or those persons who were qualified by its laws to act thereon, in behalf of themselves and all other citizens of that State. . . . It would be strange, if we were to find in that instrument anything which deprived of their citizenship any part of the people of the United States who were among those by whom it was established.

I can find nothing in the Constitution which, proprio vigore, deprives of their citizenship any class of persons who were citizens of the United States at the time of its adoption, or who should be native-born citizens of any State after its adoption; nor any power enabling Congress to disfranchise persons born on the soil of any State, and entitled to citizenship of such State by its Constitution and laws. And my opinion is, that, under the Constitution of the United States, every free person born on the soil of a State, who is a citizen of that State by force of its Constitution or laws, is also a citizen of the United States. . . .

One may confine the right of suffrage to white male citizens; another may extend it to colored persons and females; one may allow all persons above a prescribed age to convey property and transact business; another may exclude married women. But whether native-born women, or persons under age, or under guardianship because insane or spendthrifts, be excluded from voting or holding office, or allowed to do so, I apprehend no one will deny that they are citizens of the United States.

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PLESSY V. FERGUSON (1896)

View the case on the Constitution Center’s website [here](#).

SUMMARY

In 1890, Louisiana passed a law segregating railroad cars within the state—separating African American passengers from white passengers. This law was a symbol of the collapse of African American civil and political rights and the rise of Jim Crow laws throughout the South in the late 1800s. Homer Plessy—an African American—challenged the law, arguing that it violated the 14th Amendment’s Equal Protection Clause. However, the Supreme Court—in a 7-1 vote—upheld the Louisiana law, concluding that laws providing for “separate but equal” facilities for African Americans and white Americans were consistent with the Constitution. Over a half a century later, the Supreme Court would finally overrule the infamous *Plessy* decision in *Brown v. Board of Education* (1954).

[Read the Full Opinion](#)

Excerpt: Majority Opinion, Justice Brown

The object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools, which have been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced. . . .

So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and, with respect to this, there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort and the preservation of public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is

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unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures. . .

We consider the underlying fallacy of [Plessy's] argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices must be overcome by legislation, and that equal rights cannot be secured . . . except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary assent of individuals. . . .

Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation.

Excerpt: Dissent, Justice Harlan

The white race deems itself to be the dominant race in this country. And so it is in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race. . . .

In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott Case. It was adjudged in that case that the descendants of Africans who were imported into this country and sold as slaves were not included nor intended to be included under the word 'citizen' in the Constitution, and could not

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claim any of the rights and privileges which that instrument provided for and secured to citizens of the United States; that, at the time of the adoption of the Constitution, they were 'considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them.' The recent amendments of the Constitution, it was supposed, had eradicated these principles from our institutions. But it seems that we have yet, in some of the states, a dominant race—a superior class of citizens, which assumes to regulate the enjoyment of civil rights, common to all citizens, upon the basis of race. The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments to the Constitution

The destinies of the two races in this country are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens. That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana. . . .

The surest guarantee of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, National and State, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States, without regard to race. State enactments regulating the enjoyment of civil rights upon the basis of race, cunningly devised to defeat the legitimate results of the [Civil War] under the pretence of recognizing equality of rights, can have no other result than to rend permanent peace impossible and to keep alive a conflict of races the continuance of which must do harm to all concerned.

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WEST VIRGINIA STATE BOARD OF EDUCATION V. BARNETTE (1943)

View the case on the Constitution Center's website [here](#).

SUMMARY

Barnette involved a West Virginia state law that compelled students in public schools to salute the American flag as part of the school's activities. The law was enacted just after America entered World War II. It was in that context that the Supreme Court decided this famous First Amendment case and addressed whether Jehovah's Witnesses, who had religious scruples against saluting the flag, could nevertheless be compelled to do so. The Barnette children—Marie and Gathie, eight and eleven years old—were Jehovah's Witnesses instructed by their parents to not salute the flag or say the pledge and were expelled from school for following their parents' instructions.

[Read the Full Opinion](#)

Excerpt: Majority Opinion, Justice Jackson

To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind. . . .

The question which underlies the flag salute controversy is whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution. . . .

To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end. . . .

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. . . . We set up government by consent of the governed, and the Bill of Rights denies those in power any legal

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opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority. . . .

We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.

Excerpt: Concurrence, Justices Black and Douglas

No well-ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do. The First Amendment does not go so far. Religious faiths, honestly held, do not free individuals from responsibility to conduct themselves obediently to laws which are either imperatively necessary to protect society as a whole from grave and pressingly imminent dangers or which, without any general prohibition, merely regulate time, place or manner of religious activity. . . . [W]e cannot say that a failure, because of religious scruples, to assume a particular physical position and to repeat the words of a patriotic formula creates a grave danger to the nation. Such a statutory exaction is a form of test oath, and the test oath has always been abhorrent in the United States. . . .

Love of country must spring from willing hearts and free minds, inspired by a fair administration of wise laws enacted by the people's elected representatives within the bounds of express constitutional prohibitions. These laws must, to be consistent with the First Amendment, permit the widest toleration of conflicting viewpoints consistent with a society of free men. . . .

Excerpt: Concurrence, Justice Murphy

[T]here is before us the right of freedom to believe, freedom to worship one's Maker according to the dictates of one's conscience, a right which the Constitution specifically shelters. Reflection

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has convinced me that as a judge I have no loftier duty or responsibility than to uphold that spiritual freedom to its farthest reaches.

The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all, except in so far as essential operations of government may require it for the preservation of an orderly society Official compulsion to affirm what is contrary to one's religious beliefs is the antithesis of freedom of worship

It is in that freedom and the example of persuasion, not in force and compulsion, that the real unity of America lies. . . .

Excerpt: Dissent, Justice Frankfurter

One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should whole-heartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores. As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard. The duty of a judge who must decide which of two claims before the Court shall prevail, that of a State to enact and enforce laws within its general competence or that of an individual to refuse obedience because of the demands of his conscience, is not that of the ordinary person. It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench. The only opinion of our own even looking in that direction that is material is our opinion whether legislators could in reason have enacted such a law. In the light of all the circumstances, including the history of this question in this Court, it would require more daring than I possess to deny that reasonable legislators could have taken the action which is before us for review. Most unwillingly, therefore, I must differ from my brethren with regard to legislation like this. I cannot bring my mind to believe that the 'liberty' secured by the Due Process Clause gives this Court authority to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely, the promotion of good citizenship, by employment of the means here chosen. . . .

The constitutional protection of religious freedom terminated disabilities, it did not create new privileges. It gave religious equality, not civil immunity. Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma. Religious loyalties may be exercised without hindrance from the state, not the state may not exercise that

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which except by leave of religious loyalties is within the domain of temporal power. Otherwise each individual could set up his own censor against obedience to laws conscientiously deemed for the public good by those whose business it is to make laws.

The prohibition against any religious establishment by the government placed denominations on an equal footing—it assured freedom from support by the government to any mode of worship and the freedom of individuals to support any mode of worship. Any person may therefore believe or disbelieve what he pleases. He may practice what he will in his own house of worship or publicly within the limits of public order. But the lawmaking authority is not circumscribed by the variety of religious beliefs, otherwise the constitutional guaranty would be not a protection of the free exercise of religion but a denial of the exercise of legislation.

The essence of the religious freedom guaranteed by our Constitution is therefore this: no religion shall either receive the state's support or incur its hostility. Religion is outside the sphere of political government. This does not mean that all matters on which religious organizations or beliefs may pronounce are outside the sphere of government. Were this so, instead of the separation of church and state, there would be the subordination of the state on any matter deemed within the sovereignty of the religious conscience. . . .

The subjection of dissidents to the general requirement of saluting the flag, as a measure conducive to the training of children in good citizenship, is very far from being the first instance of exacting obedience to general laws that have offended deep religious scruples. Compulsory vaccination, food inspection regulations, the obligation to bear arms, testimonial duties, compulsory medical treatment—these are but illustrations of conduct that has often been compelled in the enforcement of legislation of general applicability even though the religious consciences of particular individuals rebelled at the exaction.

Law is concerned with external behavior and not with the inner life of man. It rests in large measure upon compulsion. Socrates lives in history partly because he gave his life for the conviction that duty of obedience to secular law does not presuppose consent to its enactment or belief in its virtue. . . .

One's conception of the Constitution cannot be severed from one's conception of a judge's function in applying it. The Court has no reason for existence if it merely reflects the pressures of the day. Our system is built on the faith that men set apart for this special function, freed from the influences of immediacy and from the deflections of worldly ambition, will become able to take a view of longer range than the period of responsibility entrusted to Congress and legislatures. We are dealing with matters as to which legislators and voters have conflicting views. Are we as judges to impose our strong convictions on where wisdom lies? That which three years ago had seemed to five successive Courts to lie within permissible areas of legislation is now outlawed by the deciding shift of opinion of two Justices. What reason is there to believe that they or their successors may not have another view a few years hence? Is that

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which was deemed to be of so fundamental a nature as to be written into the Constitution to endure for all times to be the sport of shifting winds of doctrine? . . .

Of course patriotism cannot be enforced by the flag salute. But neither can the liberal spirit be enforced by judicial invalidation of illiberal legislation. Our constant preoccupation with the constitutionality of legislation rather than with its wisdom tends to preoccupation of the American mind with a false value. The tendency of focusing attention on constitutionality is to make constitutionality synonymous with wisdom, to regard a law as all right if it is constitutional. Such an attitude is a great enemy of liberalism. Particularly in legislation affecting freedom of thought and freedom of speech much which should offend a free-spirited society is constitutional. Reliance for the most precious interests of civilization, therefore, must be found outside of their vindication in courts of law. Only a persistent positive translation of the faith of a free society into the convictions and habits and actions of a community is the ultimate reliance against unabated temptations to fetter the human spirit.

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KOREMATSU V. UNITED STATES (1944)

View the case on the Constitution Center's website [here](#).

SUMMARY

Fred Korematsu was a Japanese-American citizen who refused to relocate to one of the detention camps created during World War II by executive order specifically created to detain Japanese Americans. Korematsu was convicted for disobeying this executive order. He appealed his conviction, and his case eventually reached the Supreme Court. There, the Court held that the executive order and the state laws that followed it were constitutional because they furthered a "military necessity." In so doing, the Court placed national security above protection of its citizens even with regard to laws "curtail[ing] the civil rights of a single racial group." The Korematsu decision was not overruled by the Supreme Court until 2018.

[Read the Full Opinion](#)

Excerpt: Majority Opinion, Justice Black

[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can. . . .

We uphold the exclusion order as of the time it was made and when the petitioner violated it. . . .

It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. Regardless of the true nature of the assembly and relocation centers—and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies—we are dealing specifically with nothing but an exclusion order. To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from

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the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.

Excerpt: Dissent, Justice Roberts

This is not a case of keeping people off the streets at night . . . , nor a case of temporary exclusion of a citizen from an area for his own safety or that of the community, nor a case of offering him an opportunity to go temporarily out of an area where his presence might cause danger to himself or to his fellows. On the contrary, it is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. If this be a correct statement of the facts disclosed by this record, and facts of which we take judicial notice, I need hardly labor the conclusion that Constitutional rights have been violated.

Excerpt: Dissent, Justice Murphy

This exclusion of “all persons of Japanese ancestry, both alien and non-alien,” from the Pacific Coast area on a plea of military necessity in the absence of martial law ought not to be approved. Such exclusion goes over “the very brink of constitutional power” and falls into the ugly abyss of racism.

In dealing with matters relating to the prosecution and progress of a war, we must accord great respect and consideration to the judgments of the military authorities who are on the scene and who have full knowledge of the military facts. The scope of their discretion must, as a matter of necessity and common sense, be wide. And their judgments ought not to be overruled lightly by those whose training and duties ill-equip them to deal intelligently with matters so vital to the physical security of the nation.

At the same time, however, it is essential that there be definite limits to military discretion, especially where martial law has not been declared. Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support. Thus, like other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled.

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Excerpt: Dissent, Justice Jackson

A citizen's presence in the locality . . . was made a crime only if his parents were of Japanese birth. Had Korematsu been one of four—the others being, say, a German alien enemy, an Italian alien enemy, and a citizen of American-born ancestors, convicted of treason but out on parole—only Korematsu's presence would have violated the order. The difference between their innocence and his crime would result, not from anything he did, said, or thought, different than they, but only in that he was born of different racial stock.

Now, if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable. Even if all of one's antecedents had been convicted of treason, the Constitution forbids its penalties to be visited upon him, for it provides that "no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained." . . . But here is an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign. If Congress in peace-time legislation should enact such a criminal law, I should suppose this Court would refuse to enforce it. . . .

The armed services must protect a society, not merely its Constitution . . . But if we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient. This is what the Court appears to be doing, whether consciously or not. . . .

Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period, a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. . . . A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. Nothing better illustrates this danger than does the Court's opinion in this case.

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BROWN V. BOARD OF EDUCATION OF TOPEKA (1954)

View the case on the Constitution Center’s website [here](#).

SUMMARY

Brown is a consolidated case addressing the constitutionality of school segregation. There, the challengers—African American children and their parents—attacked the “separate but equal” doctrine created in *Plessy v. Ferguson*. They argued that school segregation violated the 14th Amendment by depriving the African American students of equal educational opportunities. In a unanimous decision authored by Chief Justice Earl Warren, the Court agreed—overturning *Plessy* and declaring school segregation unconstitutional. As part of its analysis, the Court cited the negative impact of segregation on children’s mental and emotional development. With this landmark decision, the Court took an important step in desegregating our nation’s schools, opening the door to further legal challenges to Jim Crow laws in other contexts, and reinvigorating the promise of the 14th Amendment’s Equal Protection Clause.

[Read the Full Opinion](#)

Excerpt: Majority Opinion, Chief Justice Warren

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion.

In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, they had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called “separate but equal” doctrine announced by this Court in *Plessy v. Ferguson* Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. . . .

The plaintiffs contend that segregated public schools are not “equal” and cannot be made “equal,” and that hence they are deprived of the equal protection of the laws. . . .

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In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race. The doctrine of “separate but equal” did not make its appearance in this Court until 1896 in the case of *Plessy v. Ferguson*, . . . involving not education but transportation. American courts have since labored with the doctrine for over half a century. In this Court, there have been six cases involving the “separate but equal” doctrine in the field of public education. In *Cumming v. County Board of Education* . . . and *Gong Lum v. Rice* . . . the validity of the doctrine itself was not challenged. In more recent cases, all on the graduate school level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. . . . In none of these cases was it necessary to reexamine the doctrine to grant relief to the Negro plaintiff. And in *Sweatt v. Painter* . . . , the Court expressly reserved decision on the question whether *Plessy v. Ferguson* should be held inapplicable to public education.

In the instant cases, that question is directly presented. Here . . . , there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other ‘tangible’ factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education. . . .

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other “tangible” factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does. . . .

To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt

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compelled to rule against the Negro plaintiffs: “Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.”

Whatever may have been the extent of psychological knowledge at the time of Plessy, this finding is amply supported by modern authority. Any language in Plessy contrary to this finding is rejected.

We conclude that in the field of public education the doctrine of “separate but equal” has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of [equal protection of the laws].

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TINKER V. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT (1969)

View the case on the Constitution Center’s website [here](#).

SUMMARY

Tinker v. Des Moines Independent School District is a landmark case addressing the free speech rights of public school students. In *Tinker*, a group of high school students wore black armbands to school to protest the Vietnam War. The students were disciplined by the school for wearing the armbands, and the students filed a lawsuit arguing that their armbands were a form of symbolic protest protected by the First Amendment. In a 7-2 decision, the Supreme Court agreed with the students. In his opinion for the Court majority, Justice Abe Fortas held that the students retained their First Amendment rights while at school as long as their expressive acts did not “materially or substantially interfere” with the school’s operation. In *Tinker*, there was no actual interference. The school only feared potential disruption. This was not enough to survive a First Amendment challenge. While *Tinker* is an important defense of free speech rights for students, it also emphasized the limits of free speech rights in the school context—namely, schools may limit student speech when it “materially or substantially interfere[s]” with a school’s operations and its central mission, teaching students.

[Read the Full Opinion](#)

Excerpt: Majority Opinion, Justice Fortas

Petitioner John F. Tinker, 15 years old, and petitioner Christopher Eckhardt, 16 years old, attended high schools in Des Moines, Iowa. Petitioner Mary Beth Tinker, John’s sister, was a 13-year-old student in junior high school.

In December, 1965, a group of adults and students in Des Moines held a meeting at the Eckhardt home. The group determined to publicize their objections to the hostilities in Vietnam and their support for a truce by wearing black armbands during the holiday season and by fasting on December 16 and New Year’s Eve. . . .

The principals of the Des Moines schools became aware of the plan to wear armbands. On December 14, 1965, they met and adopted a policy that any student wearing an armband to school would be asked to remove it, and, if he refused, he would be suspended until he returned without the armband. Petitioners were aware of the regulation that the school authorities adopted.

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On December 16, Mary Beth and Christopher wore black armbands to their schools. John Tinker wore his armband the next day. They were all sent home and suspended from school until they would come back without their armbands. They did not return to school until after the planned period for wearing armbands had expired – that is, until after New Year’s Day. This complaint was filed . . . by petitioners, through their fathers It prayed for an injunction restraining the respondent school officials and the respondent members of the board of directors of the school district from disciplining the petitioners

[T]he wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to “pure speech” which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment.

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years

On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities. . . .

The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment. It does not concern aggressive, disruptive action or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to “pure speech.”

The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners’ interference, actual or nascent, with the schools’ work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.

Only a few of the 18,000 students in the school system wore the black armbands. Only five students were suspended for wearing them. There is no indication that the work of the schools or any class was disrupted. Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises.

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The District Court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands. But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom – this kind of openness – that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,” the prohibition cannot be sustained.

In the present case, the District Court made no such finding, and our independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students. . . .

On the contrary, the action of the school authorities appears to have been based upon an urgent wish to avoid the controversy which might result from the expression, even by the silent symbol of armbands, of opposition to this Nation's part in the conflagration in Vietnam. . . .

It is also relevant that the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance. The record shows that students in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of Nazism. The order prohibiting the wearing of armbands did not extend to these. Instead, a particular symbol – black armbands worn to exhibit opposition to this Nation's involvement in Vietnam – was singled out for prohibition. Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school, as well as out of school, are “persons” under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system,

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students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. . . .

The principle of [our previous] cases is not confined to the supervised and ordained discussion which takes place in the classroom. The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others. But conduct by the student, in class or out of it, which for any reason – whether it stems from time, place, or type of behavior – materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.

Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle, but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom.

If a regulation were adopted by school officials forbidding discussion of the Vietnam conflict, or the expression by any student of opposition to it anywhere on school property except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the constitutional rights of students, at least if it could not be justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school.

In the circumstances of the present case, the prohibition of the silent, passive "witness of the armbands," as one of the children called it, is no less offensive to the Constitution's guarantees.

As we have discussed, the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred. These petitioners merely went about their ordained rounds in school. Their deviation consisted only in

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wearing on their sleeve a band of black cloth, not more than two inches wide. They wore it to exhibit their disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them. They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder. In the circumstances, our Constitution does not permit officials of the State to deny their form of expression.

Excerpt: Dissent, Justice Black

The Court's holding in this case ushers in what I deem to be an entirely new era in which the power to control pupils by the elected "officials of state supported public schools . . ." in the United States is in ultimate effect transferred to the Supreme Court. The Court brought this particular case here on a petition for certiorari urging that the First and Fourteenth Amendments protect the right of school pupils to express their political views all the way "from kindergarten through high school." Here, the constitutional right to "political expression" asserted was a right to wear black armbands during school hours and at classes in order to demonstrate to the other students that the petitioners were mourning because of the death of United States soldiers in Vietnam and to protest that war which they were against. Ordered to refrain from wearing the armbands in school by the elected school officials and the teachers vested with state authority to do so, apparently only seven out of the school system's 18,000 pupils deliberately refused to obey the order. . . .

Assuming that the Court is correct in holding that the conduct of wearing armbands for the purpose of conveying political ideas is protected by the First Amendment, . . . the crucial remaining questions are whether students and teachers may use the schools at their whim as a platform for the exercise of free speech – "symbolic" or "pure" – and whether the courts will allocate to themselves the function of deciding how the pupils' school day will be spent. While I have always believed that, under the First and Fourteenth Amendments, neither the State nor the Federal Government has any authority to regulate or censor the content of speech, I have never believed that any person has a right to give speeches or engage in demonstrations where he pleases and when he pleases. This Court has already rejected such a notion. . . .

While the record does not show that any of these armband students shouted, used profane language, or were violent in any manner, detailed testimony by some of them shows their armbands caused comments, warnings by other students, the poking of fun at them, and a warning by an older football player that other nonprotesting students had better let them alone. There is also evidence that a teacher of mathematics had his lesson period practically "wrecked," chiefly by disputes with Mary Beth Tinker, who wore her armband for her "demonstration."

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Even a casual reading of the record shows that this armband did divert students' minds from their regular lessons, and that talk, comments, etc., made John Tinker "self-conscious" in attending school with his armband. While the absence of obscene remarks or boisterous and loud disorder perhaps justifies the Court's statement that the few armband students did not actually "disrupt" the classwork, I think the record overwhelmingly shows that the armbands did exactly what the elected school officials and principals foresaw they would, that is, took the students' minds off their classwork and diverted them to thoughts about the highly emotional subject of the Vietnam war. And I repeat that, if the time has come when pupils of state-supported schools, kindergartens, grammar schools, or high schools, can defy and flout orders of school officials to keep their minds on their own schoolwork, it is the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary. . . .

The truth is that a teacher of kindergarten, grammar school, or high school pupils no more carries into a school with him a complete right to freedom of speech and expression than an anti-Catholic or anti-Semite carries with him a complete freedom of speech and religion into a Catholic church or Jewish synagogue. Nor does a person carry with him into the United States Senate or House, or into the Supreme Court, or any other court, a complete constitutional right to go into those places contrary to their rules and speak his mind on any subject he pleases. It is a myth to say that any person has a constitutional right to say what he pleases, where he pleases, and when he pleases. Our Court has decided precisely the opposite. . . .

In my view, teachers in state-controlled public schools are hired to teach there. . . . [A] teacher is not paid to go into school and teach subjects the State does not hire him to teach as a part of its selected curriculum. Nor are public school students sent to the schools at public expense to broadcast political or any other views to educate and inform the public. The original idea of schools, which I do not believe is yet abandoned as worthless or out of date, was that children had not yet reached the point of experience and wisdom which enabled them to teach all of their elders. It may be that the Nation has outworn the old-fashioned slogan that "children are to be seen, not heard," but one may, I hope, be permitted to harbor the thought that taxpayers send children to school on the premise that, at their age, they need to learn, not teach. . . .

[E]ven if the record were silent as to protests against the Vietnam war distracting students from their assigned class work, members of this Court, like all other citizens, know, without being told, that the disputes over the wisdom of the Vietnam war have disrupted and divided this country as few other issues ever have. Of course, students, like other people, cannot concentrate on lesser issues when black armbands are being ostentatiously displayed in their presence to call attention to the wounded and dead of the war, some of the wounded and the dead being their friends and neighbors. It was, of course, to distract the attention of other students that some students insisted up to the very point of their own suspension from school that they were determined to sit in school with their symbolic armbands.

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Change has been said to be truly the law of life, but sometimes the old and the tried and true are worth holding. The schools of this Nation have undoubtedly contributed to giving us tranquility and to making us a more law-abiding people. Uncontrolled and uncontrollable liberty is an enemy to domestic peace. We cannot close our eyes to the fact that some of the country's greatest problems are crimes committed by the youth, too many of school age. School discipline, like parental discipline, is an integral and important part of training our children to be good citizens – to be better citizens. Here a very small number of students have crisply and summarily refused to obey a school order designed to give pupils who want to learn the opportunity to do so. One does not need to be a prophet or the son of a prophet to know that, after the Court's holding today, some students in Iowa schools – and, indeed, in all schools – will be ready, able, and willing to defy their teachers on practically all orders. This is the more unfortunate for the schools since groups of students all over the land are already running loose, conducting break-ins, sit-ins, lie-ins, and smash-ins. Many of these student groups, as is all too familiar to all who read the newspapers and watch the television news programs, have already engaged in rioting, property seizures, and destruction. They have picketed schools to force students not to cross their picket lines, and have too often violently attacked earnest but frightened students who wanted an education that the pickets did not want them to get. Students engaged in such activities are apparently confident that they know far more about how to operate public school systems than do their parents, teachers, and elected school officials. It is no answer to say that the particular students here have not yet reached such high points in their demands to attend classes in order to exercise their political pressures. Turned loose with lawsuits for damages and injunctions against their teachers as they are here, it is nothing but wishful thinking to imagine that young, immature students will not soon believe it is their right to control the schools, rather than the right of the States that collect the taxes to hire the teachers for the benefit of the pupils. This case, therefore, wholly without constitutional reasons, in my judgment, subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students. I, for one, am not fully persuaded that school pupils are wise enough, even with this Court's expert help from Washington, to run the 23,390 public school systems in our 50 States. I wish, therefore, wholly to disclaim any purpose on my part to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students. I dissent.

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9.6 Activity Guide

SUPREME COURT IN REVIEW

The Supreme Court's term typically lasts from the first Monday of October to the end of June.

Opinions are released throughout the term, with the last of the opinions (often on the most important and controversial cases) coming out at the end of June—although there's no deadline because the justices set their own schedule.

In this activity, you will explore some of the most significant cases that the Supreme Court heard last term.

Review these three cases of the last Supreme Court term and write short briefs for each case. Use the chart below to help organize key details about each case.

Case (1 of 3)	<i>Dobbs v. Jackson Women's Health Organization</i> (2022)
Facts: Who are all the people (parties) associated with the case? What was the dispute between them?	
Issue: What is the issue in the case? What constitutional provision is at issue? What is the constitutional question that needs to be answered?	
Ruling: How does the Court rule? What was the outcome in the case? Who won and who lost? How did the justices vote? What sort of rule does the Court come up with to resolve the issue?	
Who was the author of the majority opinion?	
Were there any concurring or dissenting opinions? Who authored them? What did they say? How would the justices who authored them have ruled in the case?	

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Case (2 of 3)	<u><i>Kennedy v. Bremerton School District (2022)</i></u>
<p>Facts: Who are all the people (parties) associated with the case? What was the dispute between them?</p>	
<p>Issue: What is the issue in the case? What constitutional provision is at issue? What is the constitutional question that needs to be answered?</p>	
<p>Ruling: How does the Court rule? What was the outcome in the case? Who won and who lost? How did the justices vote? What sort of rule does the Court come up with to resolve the issue?</p>	
<p>Who was the author of the majority opinion?</p>	
<p>Were there any concurring or dissenting opinions? Who authored them? What did they say? How would the justices who authored them have ruled in the case?</p>	

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Case (3 of 3)	<u><i>New York State Rifle & Pistol Association, Inc. v. Bruen</i></u> <u>(2022)</u>
Facts: Who are all the people (parties) associated with the case? What was the dispute between them?	
Issue: What is the issue in the case? What constitutional provision is at issue? What is the constitutional question that needs to be answered?	
Ruling: How does the Court rule? What was the outcome in the case? Who won and who lost? How did the justices vote? What sort of rule does the Court come up with to resolve the issue?	
Who was the author of the majority opinion?	
Were there any concurring or dissenting opinions? Who authored them? What did they say? How would the justices who authored them have ruled in the case?	



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9.7 Test Your Knowledge

THE JUDICIAL SYSTEM AND CURRENT CASES

Complete the questions in the following quiz to test your knowledge of basic ideas and concepts covered in this module.

- _____
1. The power of the Supreme Court to review the constitutionality of acts of the national and state governments is known as _____.
 - a. Executive orders
 - b. Judicial orders
 - c. Judicial review
 - d. Line item vetoes
 2. How many justices currently serve on the Supreme Court?
 - a. 6
 - b. 8
 - c. 9
 - d. 10
 3. Which of the following is a formal constitutional requirement to be nominated as a justice of the Supreme Court?
 - a. Must be at least 40 years old
 - b. Must have participated in at least 100 cases
 - c. Must be born in the United States
 - d. None of the above
 4. To become a justice of the Supreme Court, a person must be nominated by _____ and confirmed by _____.
 - a. The president, the Senate
 - b. Their home state, the president
 - c. The president, the other justices
 - d. Congress, direct popular vote
 5. What does Article III say about what courts should exist in the United States?
 - a. There must be a District Court, an Appellate Court, and a Supreme Court.
 - b. There must be a Supreme Court but Congress can establish lower courts, as well.
 - c. There can only be a Supreme Court; all other courts are illegal.
 - d. The Supreme Court must consult with the president on important cases.

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6. Article III of the Constitution says that judges of the Supreme Court will hold their offices for what period of time?
 - a. For life, pending good behavior
 - b. For two terms of four years each
 - c. Until they turn 70 years of age
 - d. As long as they keep winning reelection

7. *Federalist* No. 78, which focused on the judiciary department, was authored by which famous founder in 1788?
 - a. John Marshall
 - b. John Jay
 - c. James Madison
 - d. Alexander Hamilton

8. Why did Alexander Hamilton consider the judiciary to be “the least dangerous” branch in the government?
 - a. The judiciary holds no influence over the ability to declare war (the sword).
 - b. The judiciary holds no influence over the wealth of society (the purse).
 - c. The judges were weak by nature and easily corruptible.
 - d. Both A and B

9. According to *Federalist* No. 78, why could no legislative act that was contrary to the Constitution ever be valid?
 - a. The Constitution allowed only the president to make the laws.
 - b. The representatives of the people would then be superior to the people themselves.
 - c. The judges could never keep track of which laws were unconstitutional.
 - d. It would show that the Constitution was the supreme law of the land.

10. Which of the following statements is true of the Constitution, according to *Federalist* No. 78?
 - a. The judicial power is superior to the legislative power.
 - b. The legislative power is superior to the judicial power.
 - c. The power of the people is superior to the legislative and judicial powers.
 - d. Both the legislative and judicial powers are superior to the people.

11. The contested election of 1800 resulted in a tie between which two candidates?
 - a. John Adams and Thomas Jefferson
 - b. Thomas Jefferson and Aaron Burr
 - c. John Adams and James Madison
 - d. James Madison and William Marbury

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12. Who served as chief justice of the United States during the landmark decision of *Marbury v. Madison*, that dealt with the notion of judicial review?
 - a. John Marshall
 - b. John Jay
 - c. James Madison
 - d. William Marbury

13. What was the Supreme Court's ruling in the case of *Marbury v. Madison*?
 - a. The Court said that Marbury was entitled to his commission.
 - b. The Court admitted that it had no authority to order Madison to deliver the commission.
 - c. The Court declared that the Judiciary Act was unconstitutional and strengthened the judicial review power of the Court.
 - d. All of the above

14. Justices who disagree with the Court's majority ruling can still submit their own opinions on the case. These are known as _____.
 - a. Unanimous opinions
 - b. Dissenting opinions
 - c. Concurring opinions
 - d. Inflated opinions

15. Which of these cases would likely be heard by the justices of the Supreme Court?
 - a. A person who is on trial for a speeding ticket
 - b. A person who is accused of robbing a bank
 - c. A debate about the meaning of the Third Amendment
 - d. A debate about using fireworks during a Fourth of July celebration

16. How many justices must agree to hear a case before it can be argued before the Supreme Court?
 - a. All of the justices must agree to it
 - b. At least four justices
 - c. At least seven justices
 - d. The justices do not get to decide what cases the court hears

17. What do the justices wear while the Supreme Court is in session?
 - a. Elaborate red robes with powdered wigs
 - b. Suits and ties
 - c. Black robes
 - d. Very casual attire

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9.7 Test Your Knowledge

18. Who is the current chief justice of the United States?
- John Roberts
 - John Marshall
 - Judge Judy
 - Sandra Day O'Connor
19. During the Civil War, the Supreme Court consisted of 10 justices. What would be a major problem with having an even number of justices on the court?
- The Constitution says there must be nine.
 - There aren't that many chairs in the courtroom.
 - The court could be deadlocked on close decisions.
 - All of the above
20. The first African American to serve on the Supreme Court was _____.
- Frederick Douglass
 - Thurgood Marshall
 - Clarence Thomas
 - Ketanji Brown-Jackson

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9.7 Test Your Knowledge

Answer Key

1. C
2. C
3. D
4. A
5. B
6. A
7. D
8. D
9. B
10. C
11. B
12. A
13. D
14. B
15. C
16. B
17. C
18. A
19. C
20. B