# Chapter 2

# The Supreme Court in the Constitutional System



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## ⊡ CRITICAL THINKING QUESTIONS

1. Should the Constitution be amended to provide for the election of federal judges? If the appointive system should be retained, should federal judges be appointed to set terms of office, perhaps eight years in length? What about requiring judges to be reconfirmed by the Senate every eight years?

2. If you were president of the United States and had the opportunity to appoint a justice to the Supreme Court, what qualities would you look for in a nominee? Would your nominee be likely to face serious opposition in the Senate?

3. Is Chief Justice Marshall's opinion in *Marbury v. Madison* an example of an interpretivist or a noninterpretivist approach to constitutional interpretation?

4. How, if at all, could the Supreme Court have avoided the political controversy presented by the *Dred Scott* case?

5. In *Dred Scott v. Sandford* (1857) Chief Justice Roger B. Taney truly believed that his opinion, which declared Scott to be property thus lacking access to federal courts and saying slave owners could not have their rights to travel with their property limited by statute, had solved the slavery question once and for all. History certainly ruled otherwise. What factors might Taney have been considering that lead him to such a conclusion?

6. How can contemporary judges discern the intentions of the Framers of our eighteenth-century Constitution? How important is it that judges be able to discern the intentions of the Framers? Do you believe that to be the proper role of modern Supreme Court justices?

7. What would be the effect on the Supreme Court's decision making if Congress were to increase the number of justices on the Court to fifteen? Would the Court be rendered more or less efficient in disposing of cases? Under the terms of the Constitution, could the Court be subdivided into panels for decision-making purposes, much as the U.S. Courts of Appeals routinely decide cases?

8. Is the judiciary still the "least dangerous branch" of the federal government? What would Alexander Hamilton say? Do you think that Hamilton would reconsider his defense of life-tenured appointments if he thought the federal courts no longer the "least dangerous"?

9. Generally speaking, should the Supreme Court seek to play a more or less active role in the determination of the great policy issues facing this country?

10. Should Supreme Court sessions, including oral arguments and the announcement of decisions, be televised? Why or why not?

11. Consider the doctrine of standing, which determines who may challenge government policies and, to some extent, what types of policies may be challenged. Should the standing requirement be relaxed to prevent excessive barriers to access to the federal courts? Why or why not?

12. Consider the political questions doctrine, which refers to those issues that are likely to draw the courts into a political battle with the executive or legislative branch, or that are simply more amenable to executive or legislative decision making; and thus, are inappropriate for judicial resolution. For example, should the Supreme Court have intervened in the 2000 presidential election? In other words, did the Court enter into the "political thicket" when it granted certiorari in *Bush v. Gore*, or did the Court resolve a legitimate legal issue?

13. Consider Justice Gibson's rejoinder to the use of judicial review in the federal courts. How would the modern Supreme Court's role in the federal government be different if his conception had historically been accepted? How would the contemporary Court function without the power of judicial review?

14. *Ex parte McCardle* (1869) reminds us that Congress has ultimate authority over the Supreme Court's jurisdiction to hear many types of cases. Historically, if Congress has this power, why has it been exercised so rarely?

## ⊡ LECTURE LAUNCHERS

**How to Discuss the Dred Scott Case.**

One of the most controversial cases in the Court's history, the *Dred Scott* ruling, upheld slave owner's rights in traveling with their property into territories where slavery had been prohibited. In writing the Court's opinion, Roger B. Taney argued that because Scott was not a citizen he lacked access to the federal courts to review his claim. This ruling had the practical effect of declaring the Missouri Compromise unconstitutional, as that statute had prohibited slavery in much of the lands acquired in the Louisiana Purchase. Yet, the actual implications of the decision were far greater reaching.

The instructor should start the tale by reminding students that regionalism had been a problem from the beginning of the country's founding. The Civil War was by no means a flash conflict, but rather a controversy that had been building since prior to the constitutional convention. Additionally instructors will want to tell the story of the Missouri Compromise. How and why was such a measure passed by Congress in the first place? This approach will engage students while establishing the background information necessary for putting the conflict and case into its proper perspective.

Next, the instructor should introduce Dred Scott, the man. Tell his biographical story noting how he was similarly situated as so many other slaves during the 1850s. Telling the story of Scott's travels with Dr. Emerson up and down the Midwest helps to create a visual of the question at hand for the justices. Additionally, mentioning the very odd procedural history of the case provides context clues to the level of sophistication of the courts in Missouri and the federal courts during this era. You may also want to mention how Elisa Sanford came to own Dred Scott and his family, and how her move back to the east coast appeared to have impacted the jurisdiction question in this case.

Finally, tell the story of the Court's ruling. The instructor may simply wish to read the words written by Taney himself, as the opinion is both biting and matter-of-fact in explaining the Court's conception of Dred Scott's total lack of legal rights. Pause and allow the opinion to sink in for students, as it provides an excellent moment of reflection. Discussing the aftermath of such an important case is of utmost necessity. Instructors will want to remind the class that the Court's opinion cannot rightfully be said to have caused the Civil War, but it certainly didn't help. Some historians have referred to it as the last legal straw, or the second to last straw before Lincoln's election. It is worth mentioning that Taney's expectation to the reaction of the ruling was far different, believing he had solved the slavery question once and for all. The aftermath of Scott's tale is interesting as well, how he eventually is emancipated to live out his life as somewhat of a celebrity bell man at a St. Louis hotel.

The tale of Dred Scott is one of the great stories in American history, and the *Dred Scott* case remains one of the Court's most infamous rulings. The reaction to the ruling was severe, as ultimately the Civil War and the Thirteenth, Fourteenth, and Fifteenth Amendments were needed to change the legal status of slaves in the United States. This serves as a firm reminder of the great effort necessary to overturn choices of the Supreme Court. Scott's story is inspiring not because it was unique; in fact the opposite is true, his tale represents the struggles of so many similarly situated Americans during his era. Instructors should remind the class that Dred Scott,

like so many individuals to be discussed in this course, become representative of issues so much greater than any one person.

## ⊡ HYPOTHETICAL PROBLEM (FOR CLASSROOM DISCUSSION OR ESSAY EXAMINATION)

1. Suppose that Congress, in a very close vote, gives the President "fast track" authority to negotiate trade agreements with other countries. Essentially, this means that Congress cannot propose amendments to any trade agreement; it can only vote "yes" or "no" on the entire agreement as negotiated by the President. After signing the bill, the President announces his intention to quickly conclude a new trade agreement with Japan and submits the agreement to Congress for fast track approval. Several members of Congress from both houses who voted against the legislation decide to go to court to block its implementation. Would these members have standing to bring this suit? What arguments would the plaintiffs make to support their claim of standing to sue? Whom would they name as defendants in the lawsuit? Assuming the plaintiffs have standing, what other threshold issues might come into play? Assuming the federal district court reaches the merits of this case, what arguments would the plaintiffs likely make in attacking the constitutionality of fast track legislation? If you were the federal district judge presiding in this case, how would you be likely to rule? How would the current Supreme Court dispose of this litigation? What are the constitutional, political, and prudential considerations surrounding lawsuits generally involving members of Congress and the executive branch?
2. Suppose that Congress, upset by a series of Supreme Court decisions that limited the effectiveness of military tribunals in keeping the enemy combatants out of the federal courts, passes a law that prohibits the federal courts from hearing any appeal on cases from any person who has been designated by the United States military an enemy combatant. Upon passage of this act, dozens of enemy combatants as defined by the United States military immediately question the constitutionality of the act on Due Process grounds. What arguments are the plaintiffs likely to make in attacking the constitutionality of such an act? How would the government defend the act as constitutional? What precedents would the Supreme Court need to consider in determining whether to grant certiorari? What are the possible political implications of such a case and how could that impact the Court's perspective in deciding how to act? If you were a federal judge in this case, how would you be likely to rule?

## ⊡ KEY TERMS

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| judicial review | Generally, the review of any issue by a court of law. In American constitutional law, the authority of a court to invalidate acts of government on constitutional grounds. |
| trial courts | Courts whose primary function is the conduct of civil and/or criminal trials. |
| appellate courts | Judicial tribunals that review decisions from lower tribunals. |
| federal courts | The courts operated by the U.S. government. |

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| jurisdiction | "To speak the law." The geographical area within which, the subject matter with respect to which, and the persons over whom a court can properly exercise its power. |
| court of last resort | The highest court in a judicial system; the last resort for deciding appeals. |
| U.S. District Courts | The principal trial courts in the federal system that sit in ninety-four districts where usually one judge hears proceedings and trials in both civil and criminal cases. |
| U.S. Courts of Appeals | The intermediate appellate courts of appeals in the federal system that sit in geographical areas of the United States and in which panels of appellate judges hear appeals in civil and criminal cases primarily from the U.S. District Courts. |
| U.S. Supreme Court | The highest court in the United States, consisting of nine justices, with jurisdiction to review, by appeal or writ of certiorari, the decisions of lower federal courts and many decisions of the highest courts of each state. |
| Judiciary Act of 1789 | Landmark statute establishing the federal courts system. |
| federal question jurisdiction | The authority of federal courts to decide issues of national law. |
| diversity of citizenship jurisdiction | The authority of federal courts to hear lawsuits in which the parties are citizens of different states and the amount in controversy exceeds $75,000. |
| appeals by right | An appeal brought to a higher court as a matter of right under federal or state law. |
| writ of certiorari | An order from a higher court to a lower court directing that the record of a particular case be sent up for review. |
| original jurisdiction | The authority of a court of law to hear a case in the first instance. |
| concurrent jurisdiction | Jurisdiction that is shared by different courts of law. |
| appellate jurisdiction | The legal authority of a court of law to hear an appeal from or otherwise review a decision by a lower court. |
| rules of procedure | Rules promulgated by courts governing civil, criminal, and appellate procedure. |
| civil suit | *See:* civil action. A lawsuit brought to enforce private rights and to remedy violations thereof. |
| criminal prosecutions | Legal action brought against a person accused of a crime. |
| plaintiff | The party initiating legal action; the complaining party. |
| defendant | A person charged with a crime or against whom a civil action is brought. |
| class action | A lawsuit brought by one or more parties on behalf of themselves and others similarly situated. |

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| respondent | A person asked to respond to a lawsuit or writ. |
| actual damages | Money awarded to a plaintiff in a civil suit to compensate for injuries to that party's rights. |
| punitive damages | A sum of money awarded to the plaintiff in a civil case as a means of punishing the defendant for wrongful conduct. |
| specific performance | A court-imposed requirement that a party perform obligations incurred under a contract. |
| declaratory judgment | A judicial ruling conclusively declaring the rights, duties, or status of the parties but imposing no additional order, restriction, or requirement on them. |
| injunction | A judicial order requiring a person to do, or to refrain from doing, a designated thing. |
| demurrer | An action of a defendant admitting to a set of alleged facts but nevertheless challenging the legal sufficiency of a complaint or criminal charge. |
| indictment | A formal document handed down by a grand jury accusing one or more persons of the commission of a crime or crimes. |
| pretrial motion | Any of a variety of motions made by counsel prior to the inception of a trial. |
| writ of habeas corpus | A judicial order issued to an official holding someone in custody, requiring the official to bring the prisoner to court for the purpose of allowing the court to determine whether that person is being held legally. |
| standing | The right to initiate a legal action or challenge based on the fact that one has suffered or is likely to suffer a real and substantial injury. |
| mootness | Term referring to a question that does not involve rights currently at issue in, or pertinent to, the outcome of a case. |
| ripeness doctrine | The doctrine under which courts consider only those questions that are deemed to be "ripe for review." |
| exhaustion of remedies | The requirement that a party seeking review by a court first exhaust all legal options for resolution of the issue by nonjudicial authorities or lower courts. |
| doctrine of abstention | The doctrine that federal courts should refrain from interfering with state judicial processes. |
| political questions doctrine | The doctrine that holds that courts should avoid ruling on political questions. |
| certification | A procedure under which a lower court requests a decision by a higher court on specified questions in a case, pending a final decision by the lower court. |

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| *in forma pauperis* | "In the manner of a pauper." Waiver of filing costs and other fees associated with judicial proceedings to allow an indigent person to proceed. |
| memorandum decision | A judicial decision rendered without a supporting Opinion of the Court. |
| law clerk | A judge's staff attorney. |
| discuss list | The list of petitions for certiorari that are deemed worthy of discussion in conference. |
| preterm conference | The Supreme Court's conference held prior to the beginning of its annual term in which the Court disposes of numerous petitions for certiorari. |
| rule of four | U.S. Supreme Court rule whereby the Court grants certiorari only on the agreement of at least four justices. |
| precedent | A judicial decision cited as authority controlling or influencing the outcome of a similar case. |
| plenary review | Full, complete review by an appellate court. |
| summary decisions | Decisions made by appellate courts without the submission of briefs or oral arguments. |
| error correction | The function of appellate courts in correcting more or less routine errors committed by lower courts. |
| brief | (1) In the judicial process, a document submitted by counsel setting forth legal arguments germane to a particular case. (2) In the study of constitutional law, a summary of a given case, reviewing the essential facts, issues, holdings, and reasoning of the court. |
| *amicus curiae* | "Friend of the court." An individual or organization allowed to take part in a judicial proceeding, not as one of the adversaries, but as a party interested in the outcome. Usually an amicus curiae files a brief in support of one side or the other but occasionally takes a more active part in the argument of the case. |
| oral argument | A hearing before an appellate court in which counsel for the parties appear for the purpose of making statements and answering questions from the bench. |
| conference | As applied to the appellate courts, a private meeting of judges to decide a case or to determine whether to grant review in a case. |
| affirm | To uphold, ratify, or approve. |
| reverse | To set aside a decision on appeal. |
| vacate | To annul, set aside, or rescind. |
| Opinion of the Court | An opinion announcing both the decision of the court and its supporting rationale. The opinion can either be a majority opinion or a unanimous opinion. |

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| majority opinion | An appellate court opinion joined in by a majority of the judges who heard the appeal. |
| concurring opinion | An opinion by a judge or justice agreeing with the decision of the court. A concurring opinion may or may not agree with the rationale adopted by the court in reaching its decision. |
| dissenting opinion | A written opinion by a judge or justice setting forth reasons for disagreeing with a particular decision of the court. |
| opinion concurring in the judgment | A judicial opinion in which the author agrees with the decision of the court, but for reasons other than those stated in the court's principal opinion. |
| *per curiam* | "By the court." Term referring to an opinion attributed to a court collectively, usually not identified with the name of any particular member of the court. |
| case reporters | A series of books reprinting the decisions of a given court or set of courts. For example, the decisions of the U.S. Courts of Appeals are reported in the Federal Reporter, published by West Publishing Company. |
| English common law | A system of legal rules and principles recognized and developed by English judges prior to the colonization of America and accepted as a basic aspect of the American legal system. |
| substantive due process | Doctrine that the Due Process Clauses of the Fifth and Fourteenth Amendments require legislation to be fair and reasonable in content as well as application. |
| judicial activism | Approach to jurisprudence whose underlying philosophy is that judges should exercise power vigorously, as opposed to exercising judicial restraint. |
| presumption of validity | *See:* presumption of constitutionality. The doctrine of constitutional law holding that laws are presumed to be constitutional with the burden of proof resting on the plaintiff to demonstrate otherwise. |
| discrete and insular minorities | Minority groups that are locked out of the political process. |
| judicial restraint | Approach to jurisprudence whose underlying philosophy is that judges should exercise power cautiously and show deference to precedent and to the decisions of other branches of government, as opposed to exercising judicial activism. |
| doctrine of strict necessity | The doctrine under which courts engage in judicial review only when strictly necessary to the settlement of a case. |
| statutory construction | The official interpretation of a statute rendered by a court of law. |
| doctrine of saving construction | The doctrine under which courts adopt an interpretation of a statute that saves the statute from being declared unconstitutional. |

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| presumption of constitutionality | The doctrine of constitutional law holding that laws are presumed to be constitutional with the burden of proof resting on the plaintiff to demonstrate otherwise. |
| strict scrutiny | The most demanding level of judicial review in cases involving alleged infringements of civil rights or liberties. |
| fundamental rights | Those rights, whether or not explicitly stated in the Constitution, deemed to be basic and essential to a person's liberty and dignity. |
| narrowness doctrine | The doctrine that judicial decisions should be framed in the narrowest possible terms or based on the narrowest possible grounds. |
| *stare decisis* | "To stand by decided matters." The principle that past decisions should stand as precedents for future decisions. This principle, which supports the proposition that precedents are binding on later decisions, is said to be followed less rigorously in constitutional law than in other branches of the law. |
| severability | The doctrine under which courts will declare invalid only the offending provision of a statute and allow the other provisions to remain in effect. |
| unconstitutional as applied | Declaration by a court of law that a statute is invalid insofar as it is enforced in some particular context. |
| limiting doctrines | Doctrines by which courts may refuse to render a decision on the merits in a case. See: abstention; exhaustion of remedies; political questions doctrine; mootness; standing. |
| compelling government interest | A government interest sufficiently strong that it overrides the fundamental rights of persons adversely affected by government action or policy. |
| impeachment | (1) A legislative act bringing a charge against a public official that, if proven in a legislative trial, will cause his or her removal from public office. (2) Impugning the credibility of a witness by introducing contradictory evidence or proving his or her bad character. |
| subpoena | "Under penalty." A judicial order requiring a person to appear in court in connection with a designated proceeding. |
| contempt | An action that embarrasses, hinders, obstructs, or is calculated to lessen the dignity of a judicial or legislative body. |
| judicial behavior | The way judges make decisions; the academic study thereof. |
| myth of legality | The belief that judicial decisions are a function of legal rules, procedures, and principles rather than the ideological leanings or policy preferences of judges. |
| voting blocs | Groups of individuals who usually vote together. |

# ⊡ INSTRUCTOR RESOURCES

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# ⊡ NOTES ON EXCERPTED CASES

## THE FEDERALIST NO. 78
(Alexander Hamilton)

Alexander Hamilton penned the "The Judiciary Department" to justify the creation of the powers of the judiciary in the proposed Constitution. Like all of the essays that comprise *The Federalist Papers*, the attempt of this work was to argue in favor of the newly proposed government to convince the Anti-Federalists to ratify the Constitution. Hamilton is particularly aware of the concerns the federal courts represented for those opposed to ratification. Most notable was the concern that federal judges would be unelected actors serving life tenure. Hamilton passionately argued that judges with this level of independence from the whims of politics are the only ones who can protect from absolute tyranny. *Federalist* No. 78 also discusses the use of the power of judicial review. Hamilton argues herein that the federal courts have authority to declare acts of the legislature void that violate the Constitution. "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…"

## MARBURY V. MADISON
*1 Cranch (5 U.S.) 137; 2 L.Ed. 60 (1803)*
Vote: 4–0

William Marbury was appointed Justice of the Peace for the District of Columbia by outgoing President John Adams. The commission was signed and sealed but not delivered to Marbury before President Adams's term ended. The new Jefferson Administration refused to deliver the commission. Marbury brought suit in the Supreme Court under its original jurisdiction, asking the Court to issue a writ of mandamus to force James Madison (Jefferson's Secretary of State) to deliver the commission. The Marshall Court determined that although Marbury was entitled to the commission, and that the writ of mandamus was the appropriate remedy, the Court was powerless to issue the writ. The Court held that Section 13 of the Judiciary Act of 1789, which was interpreted as empowering the Court to issue writs of mandamus in cases arising under its original jurisdiction, was null and void. In the Court's view, Section 13 represented an unconstitutional expansion of the Court's original jurisdiction, which, unlike its appellate jurisdiction, is fixed by Article III of the Constitution and may not be altered by Congress. It was in this context that Chief Justice John Marshall made his frequently quoted assertion that "[i]t is emphatically the province and duty of the judicial department, to say what the law is." In defending the power of judicial review, Marshall stressed the fact that judges take an oath to support and defend the Constitution.

## EAKIN V. RAUB, GIBSON J., (DISSENTING)
12 Sergeant & Rawle (Pennsylvania Supreme Court) 330 (1825)

Although the specific issue before the Pennsylvania Supreme Court in this otherwise unremarkable case is of little interest today, Justice Gibson's dissenting opinion remains important for its rejoinder to John Marshall's defense of judicial review. Justice Gibson contended that the courts had no more authority to strike down legislative acts than the legislatures had to strike down judicial decisions. In Gibson's view, each branch of the government is ultimately responsible to the people for the constitutionality of its own acts. In support of this argument, Gibson noted that "[t]he oath to support the Constitution is not peculiar to the judges, but is taken indiscriminately by every officer of the government..." Gibson suggests

that each branch is sworn to uphold the Constitution, and thus it is a mistake to assume that the Courts will always be the best branch to do so. His articulated argument remains one of the best and most cited critiques of the Court's use of judicial review.

## SCOTT V. SANDFORD (THE DRED SCOTT CASE)

*19 Howard (60 U.S.) 393; 15 L.Ed. 691 (1857)*
Vote: 7–2

Dred Scott was a slave belonging to a surgeon in the U.S. Army. He was taken by his master into territories where slavery was forbidden by the Missouri Compromise of 1820. Upon his return to Missouri, Scott brought suit in federal court, arguing that his residency in a "free" territory had abolished his servitude. On appeal, the Supreme Court held that, since Scott as a Negro was not a citizen, he had no right to sue in the federal courts. The Court further ruled that the Missouri Compromise was unconstitutional under the Due Process Clause of the Fifth Amendment, in that it represented an arbitrary interference with the property rights of would-be slaveholders residing in the "free" territories.

## EX PARTE MCCARDLE

*7 Wall. (74 U.S.) 506; 19 L.Ed. 264 (1869)*
Vote: 8–0

After the Civil War, Congress passed the Reconstruction Acts that, among other things, imposed military rule on most of the southern states formerly comprising the Confederacy. As part of this program, military tribunals were authorized to try civilians who interfered with Reconstruction. William H. McCardle, editor of the *Vicksburg Times*, published a series of editorials highly critical of Reconstruction. Consequently, he was arrested by the military and held for trial by a military tribunal. McCardle sought release from custody through a petition for habeas corpus in federal court. Congress in 1867 had extended federal habeas corpus jurisdiction to cover state prisoners, which applied to McCardle, since he was in the custody of the military government of Mississippi. The 1867 Act also provided a right of appeal to the Supreme Court. Having lost his bid for relief in the lower court, McCardle exercised his right to appeal. After the case was argued in the Supreme Court, Congress enacted legislation withdrawing the Supreme Court's appellate jurisdiction in habeas corpus cases. The legislation went so far as to deny the Court's authority to decide a case already argued. The obvious motive was to prevent the Court from ruling on the constitutionality of the Reconstruction Acts, which McCardle had challenged in his appeal. The Court could have declared unconstitutional this blatant attempt to prevent the Court from exercising its power of judicial review, but the Court chose to capitulate. By acquiescing in the withdrawal of its jurisdiction in McCardle, the Court avoided a direct confrontation with Congress at a time when that institution was dominant in the national government.

## COOPER V. AARON

*358 U.S. 1; 78 S.Ct. 1401; 3 L.Ed. 2d 5 (1958)*
Vote: 9–0

This case stemmed from the efforts of Arkansas governor Orval Faubus and other state and local officials to block the court-ordered desegregation of Central High School in Little Rock in 1957. The Governor's action caused the Little Rock School Board to petition the federal district court for a delay in the implementation of its desegregation order. In reviewing the case, the Supreme Court refused to allow the delay. In an unusual step, the Court produced an opinion co-authored

by all nine justices. The opinion issued a stern rebuke to Governor Faubus, reminding him of his duty to uphold the Constitution.

## BAKER V. CARR

*369 U.S. 186; 82 S.Ct. 691; 7 L.Ed. 2d 663 (1962)*
Vote: 6–2

Residents of Knoxville, Chattanooga, Nashville, and Memphis, Tennessee brought suit in federal court to challenge the apportionment of the state legislature, which had not changed since 1901. The district court dismissed the case on the authority of *Colegrove v. Green* (1946) where the Court had ruled that concerns of legislative apportionment were political questions best left for other branches of government to settle. On appeal, the Supreme Court reversed and reinstated the complaint, dividing 6–2. Writing for the majority, Justice Brennan held legislative malapportionment to be a "justiciable" question in federal court. This landmark decision launched the "reapportionment revolution" of the 1960s.

## ELK GROVE UNIFIED SCHOOL DISTRICT V. NEWDOW

*542 U.S. 1; 124 S.Ct. 2301; 159 L.Ed.2d 98 (2004)*
Vote: 8–0

In March 2000, Michael A. Newdow filed a lawsuit challenging a California statute requiring "every public elementary school" to begin each day with "appropriate patriotic exercises." Elk Grove Unified School District implemented the state law by requiring each class to recite the pledge of allegiance to the flag, which included the words "under God." Newdow, the non-custodial parent of a kindergartner attending a school within the Elk Grove Unified School District, argued the words "under God" violated the Establishment and Free Exercise Clauses of the First Amendment of United States Constitution, and sought an injunction to prevent the School District from requiring students to recite the Pledge of Allegiance. Sandra Banning, the child's mother and legal custodial parent, intervened in Newdow's lawsuit stating "that it was not in the child's interest to be a party to Newdow's lawsuit." The Supreme Court held Newdow lacked standing to bring his lawsuit, and stated "it is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing." The Court went on to state "there is a vast difference between Newdow's right to communicate with his child . . . and his claimed right to shield his daughter from influences to which she is exposed in school despite the terms of the custody order."

# Chapter 2: Exam

## MULTIPLE CHOICE QUESTIONS

1. _____ courts exist to correct legal errors made by trial courts and to settle controversies about disputed legal principles.
   a. Superior
   b. Common-law
   c. Equity
   d. Appellate

   ANS: D REF: 34

2. The authority of a court of law to hear and decide certain types of cases is known as its
   a. certiorari.
   b. mandamus.
   c. power of judicial review.
   d. jurisdiction.

   ANS: D REF: 34

3. Prior to the Judiciary Act of 1891, a short-lived measure created six separate _____ in 1801.
   a. U.S. District Courts
   b. U.S. Courts of Appeals
   c. U.S. Supreme Courts
   d. None of the above is true.

   ANS: B REF: 35

4. When all of the judges on an appellate court participate in the oral argument of a case it is said that they are sitting _____.
   a. en banc
   b. habeas corpus
   c. all together
   d. certiorari

   ANS: A REF: 36

5. Routine cases in the U.S. Courts of Appeals are decided by panels of _____ judges.
   a. three
   b. five
   c. seven
   d. nine

   ANS: A REF: 36

6. Crimes committed by persons in the military services are normally tried before
   a. federal district courts.
   b. state criminal courts.
   c. the Court of Military Justice.
   d. courts-martial.

   ANS: D REF: 36

7. According to the Administrative Office of the U.S. Courts, approximately _____ criminal and civil cases were filed in the federal district courts from September 2007 to September 2008.
   a. 100,000
   b. 200,000
   c. 300,000
   d. None of the above is true.

   ANS: C REF: 36

8. The _____ is an Article III court, in that Congress has created this tribunal by exerting its authority under Article III of the United States Constitution.
   a. Court of International Trade
   b. Court of Federal Claims
   c. Tax Court
   d. Court of Appeals for Veterans' Claims

   ANS: A REF: 36

9. Congress has also created a number of _____ courts, so called because the authority to create these courts is presumed to flow from the legislative article, rather than from the judicial article.
   a. Article I
   b. Article II
   c. Article III
   d. Article IV

   ANS: A REF: 36

10. Judges on all Article III courts are appointed for _____ by the president with Senatorial consent.
   a. two years
   b. five years
   c. ten years
   d. life

   ANS: D REF: 36

11. In the Judiciary Act of 1801, quickly passed in the ending days of the John Adams Administration, Congress decreased the number of Supreme Court justices to _____.
   a. three
   b. four
   c. five
   d. six

ANS: C REF: 37

12. Although recognized by Article III of the Constitution, the Supreme Court was not formally established until passage of the _____ of 1789.
    a. Supreme Court Act
    b. Articles of Confederation
    c. Judiciary Act
    d. Alien and Sedition Acts

    ANS: C REF: 37

13. There have been 9 justices on the Supreme Court since _____.
    a. 1789
    b. 1869
    c. 1937
    d. 1985

    ANS: B REF: 37

14. It is the _____ that ultimately controls making any changes to the Supreme Court's jurisdiction.
    a. president
    b. Supreme Court
    c. Congress
    d. states

    ANS: B REF: 37

15. Large groups of "similarly situated" individuals sometimes institute _____ to redress injuries they share in common.
    a. criminal prosecutions
    b. writs of habeas corpus
    c. class actions
    d. None of the above is true.

    ANS: C REF: 39

16. The party who initiates a civil suit is referred to as the _____.
    a. defendant
    b. appellant
    c. respondent
    d. plaintiff

    ANS: D REF: 39

17. The Constitution explicitly recognizes the **_____,** an ancient common law device that persons can use to challenge the legality of arrest or imprisonment.
    a. demurrer to an indictment
    b. pretrial motion to dismiss the indictment
    c. writ of habeas corpus
    d. None of the above is true.

ANS: C REF: 40

18. In _____, the Court granted standing to a taxpayer to challenge federal spending that would benefit parochial schools in possible violation of the Establishment of Religion Clause of the First Amendment.
a. *Flast v. Cohen* (1968)
b. *United States v. Richardson* (1974)
c. *Valley Forge College v. Americans United for Separation of Church and State, Inc.* (1982)
d. None of the above is true.

ANS: A REF: 41

19. In *United States v. Richardson*, Chief Justice _____ argued that although Richardson, as a federal taxpayer, had "a genuine interest in the use of funds," he had not alleged that he was "in danger of suffering any particular concrete injury."
a. Earl Warren
b. Warren Burger
c. William Rehnquist
d. John Roberts

ANS: B REF: 41

20. In _____ (1973), the Supreme Court granted standing to a student group to challenge a regulation of the Interstate Commerce Commission (ICC).
a. *Summers v. Earth Island Institute*
b. *United States v. Students Challenging Regulatory Procedures* (SCRAP)
c. *Valley Forge College v. Americans United for Separation of Church and State, Inc.*
d. *Sierra Club v. Morton*

ANS: B REF: 42

21. In _____ (1978), the Court permitted residents of a community near the site of a proposed nuclear power plant to challenge the constitutionality of the federal Price-Anderson Act, which facilitates construction of nuclear plants by limiting liability for accidents.
a. *Sierra Club v. Morton*
b. *United States v. Students Challenging Regulatory Procedures* (SCRAP)
c. *Duke Power v. Carolina Environmental Study Group*
d. *Summers v. Earth Island Institute*

ANS: C REF: 42

22. The Supreme Court's preterm conference is devoted primarily to
a. the consideration of petitions for rehearing of cases from the previous term.
b. administrative and procedural matters.
c. consideration of petitions for certiorari.
d. motions to proceed *in forma pauperis.*

ANS: C REF: 47

23. The Supreme Court grants approximately _____ petitions for certiorari out of the 10,000 that are filed each term.
    a. 100
    b. 200
    c. 300
    d. 400

    ANS: A REF: 47

24. The maximum number of opinions that may be issued in a Supreme Court decision is _____.
    a. one
    b. two
    c. nine
    d. ten

    ANS: D REF: 49

25. The Supreme Court's practice of issuing an "opinion of the Court" was initiated by Chief Justice _____.
    a. William Howard Taft
    b. John Jay
    c. Earl Warren
    d. John Marshall

    ANS: D REF: 49

26. In American constitutional law, _____ denotes the power of a court of law to review a policy of government (usually a legislative act) and to invalidate that policy if it is found to be contrary to constitutional principles.
    a. judicial review
    b. judicial restraint
    c. judicial activism
    d. judicial notice

    ANS: A REF: 51

27. The power of the Supreme Court to invalidate unconstitutional acts of Congress was first implied in
    a. *Hylton v. United States* (1796).
    b. *Marbury v. Madison* (1803).
    c. *Eakin v. Raub* (1825).
    d. *Dred Scott v. Sandford* (1857).

    ANS: A REF: 52

28. The _____ has provided the Supreme Court substantial control over its own agenda.
    a. writ of mandamus
    b. bill of attainder
    c. writ of habeas corpus
    d. power of judicial review

    ANS: D REF: 52

29. James Madison is the defendant in *Marbury v. Madison* because of his position as _____.
    a. Governor of Maryland
    b. Security of Defense
    c. Secretary of State
    d. Supreme Court Justice

    ANS: C REF: 52

30. The Supreme Court first invalidated a state law in
    a. *Marbury v. Madison* (1803).
    b. *Eakin v. Raub* (1825).
    c. *Barron v. Baltimore* (1833).
    d. *Fletcher v. Peck* (1810).

    ANS: D REF: 55

31. *In Dred Scott v. Sandford* (1857), the Supreme Court invalidated the _____ of 1820.
    a. Judiciary Act
    b. Alien and Sedition Acts
    c. Missouri Compromise
    d. Neutrality Act

    ANS: C REF: 56

32. In *Pollock v. Farmer's Loan and Trust Company* (1895), the Court invalidated a federal law that
    a. imposed a two percent tax on incomes of more than $4,000 a year.
    b. banned slavery in certain federal territories.
    c. prohibited industrial monopolies affecting interstate commerce.
    d. None of the above is true.

    ANS: A REF: 57

33. The _____, which outlawed slavery, nullified the Supreme Court's decision in *Dred Scott.*
    a. Twelfth Amendment
    b. Thirteenth Amendment
    c. Fourteenth Amendment
    d. Fifteenth Amendment

    ANS: B REF: 57

34. The _____ overruled the Supreme Court's decision in *Pollock v. Farmer's Loan and Trust Company* (1895) where the Court invalidated a federal law that imposed a tax on incomes over $4,000 per year.
    a. Fourteenth Amendment
    b. Fifteenth Amendment
    c. Sixteenth Amendment
    d. Seventeenth Amendment

    ANS: C REF: 57, 58

35. Under the Chief Justice John Roberts, the Supreme Court has continued to move, with notable exceptions, in a _____ direction.
    a. liberal
    b. conservative
    c. neutral
    d. None of the above is true.

    ANS: B REF: 62

36. In 2008, the Supreme Court recognized for the first time, that the Second Amendment granted an individual, as distinguished from a "collective" right to bear arms in
    a. *Marbury v. Madison.*
    b. *Ex parte McCardle.*
    c. *District of Columbia v. Heller.*
    d. None of the above is true.

    ANS: C REF: 62

37. In 2009, President Obama nominated his first U.S. Supreme Court nominee, _____, who was overwhelmingly confirmed by the Senate.
    a. David Souter
    b. Sandra Day O'Connor
    c. Sonia Sotomayor
    d. Ruth Bader Ginsburg

    ANS: C REF: 62

38. Proponents of gun rights argue that the _____ protects their right to keep and bear arms.
    a. First Amendment
    b. Second Amendment
    c. Fourth Amendment
    d. Ninth Amendment

    ANS: B REF: 63

39. Which of the following Supreme Court decisions provides a good example of judicial restraint?
a. *Dred Scott v. Sandford* (1857)
b. *Lochner v. New York* (1905)
c. *Pollock v. Farmer's Loan and Trust Co.* (1895)
d. None of the above is true.

ANS: D REF: 64

40. Supreme Court justices inclined toward _____ are more likely to take an expansive view of the Court's jurisdiction and powers than are judges who embrace judicial restraint.
a. activism
b. *stare decisis*
c. conservatism
d. natural law

ANS: A REF: 65

41. Justice _____ articulated the *Ashwander* rules, which seek to protect judicial power not only by deflecting constitutional questions but by making narrow rulings when constitutional issues are considered.
a. Louis Brandeis
b. Hugo Black
c. Oliver Wendell Holmes, Jr.
d. None of the above is true.

ANS: A REF: 68

42. Article _____ of the Constitution recognizes the judiciary as a separate branch of government.
a. I
b. II
c. III
d. IV

ANS: C REF: 70

43. Article III of the Constitution provides that the Supreme Court "...shall have _____ jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the _____ shall make."
a. original; Congress
b. appellate; Congress
c. original; Court
d. appellate; Court

ANS: B REF: 70

44. In the wake of the Civil War, Congress effectively prevented the Supreme Court from ruling on the constitutionality of
    a. the Reconstruction Acts.
    b. the Missouri Compromise.
    c. the Sherman Anti-Trust Act.
    d. the Habeas Corpus Act of 1867.

    ANS: A REF: 70

45. In *Ex parte McCardle* (1869), the Supreme Court acquiesced in a congressional curtailment of its
    a. power of judicial review.
    b. original jurisdiction.
    c. appellate jurisdiction.
    d. None of the above is true.

    ANS: C REF: 71

46. The Court's ruling in *McCardle* reminds us of Congress' power over Supreme Court _____.
    a. appointments
    b. impeachments
    c. jurisdiction
    d. salary

    ANS: C REF: 72

47. To be removed from office on impeachment, a federal judge must be convicted by a _____ vote of the U.S. Senate.
    a. simple majority
    b. two-thirds
    c. three-fourths
    d. unanimous

    ANS: B REF: 76

48. Article III of the Constitution leaves the organization of the lower federal courts to the _____.
    a. Congress
    b. Supreme Court
    c. Cabinet
    d. state legislatures

    ANS: A REF: 77

## ESSAY QUESTIONS

1. Explain the origin of judicial review and evaluate the various justifications that have been proposed for it.

2. Citing particular Supreme Court decisions, both historic and modern, explain the difference between judicial activism and judicial restraint.

3. Recount the facts, issue and decision in the infamous *Dred Scott* case. How did the Court's decision impact events of the day and the Court itself?
4. Discuss the various aspects of federal court jurisdiction. In particular, discuss the various levels of the federal court system and whether each level possesses original and/or appellate jurisdiction.
5. Describe the political questions doctrine that the Supreme Court historically exercised in avoiding certain types of cases. Provide examples of issues that the Court has at various times declared to be "political questions."
6. *Marbury v Madison* is often characterized as the most important case in Supreme Court history. Discuss several of the reasons why this is so and describe what legal scholars are focused on when they say that John Marshall's opinion lost the battle in order to win the war.