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Chief Justice John Marshall asserts that judicial review is a legitimate and indispensable power of the courts in the U.S. constitutional system. Pennsylvania Supreme Court Justice John B. Gibson argues, in response to Marshall, that the U.S. Constitution itself provides no textual basis for the power of judicial review.

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Chief Justice Earl Warren asserts that the interpretation of the Constitution set forth in a particular decision is the supreme law of the land and it is binding on the states. Former U.S. Attorney General Edwin Meese III argues that a decision by the Supreme Court does not establish a supreme law of the land that is binding on all persons and parts of the government.

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NO: Fred M. Vinson, Dissenting, in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1942) 52

Justice Hugo L. Black, writing for the Supreme Court in *Youngstown Sheet & Tube Co. v. Sawyer*, held that President Truman’s order seizing

the nation's steel mills during the Korean War infringed upon the lawmaking powers of Congress and was not justified by his role as Commander in Chief of the armed forces. Justice Fred M. Vinson's dissenting opinion in *Youngstown Sheet & Tube Co. v. Sawyer* asserted that President Truman's seizure of the steel mills was proper because it was a temporary measure justified by the emergency nature of the situation as an effort to preserve the status quo, until the Congress could take action.

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Justice Anthony M. Kennedy, in *Boumediene v. Bush* (2008), asserted that the constitutional right to a writ of habeas corpus applies to all accused terrorists, including those designated as enemy combatants. Justice Antonin E. Scalia, dissenting, asserted that the Constitution does not ensure habeas corpus for aliens held by the United States in areas over which our government is not sovereign.

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NO: **Thomas Jefferson**, "Opinion on the Constitutionality of the Bill for Establishing a National Bank," in Julian P. Boyd (ed.), *The Papers of Thomas Jefferson*, 31 vols. vol. 19, 1950, pp. 275–282 109

Chief Justice John Marshall, writing for the Supreme Court in 1819, asserted that congressional powers may be implied in the Constitution, if they are "necessary and proper" for carrying out an express power, such as establishing a national bank in order to raise revenue; in addition, a state may not tax such an entity because "the power to tax is the power to destroy." Thomas Jefferson, widely recognized as one of the most influential U.S. "founding fathers," asserts that the powers of Congress should be limited and not include the authority to establish a national bank. The authority to incorporate a bank is not included in the Constitution as an enumerated power of Congress.

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Justice Robert H. Jackson, writing for the Supreme Court in 1942, in the aftermath of the New Deal, asserted that the “power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.” Moreover, “no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress.” Chief Justice William H. Rehnquist, writing for the Supreme Court in 2000, asserted that congressional power to pass laws under the Constitution’s Interstate Commerce Clause is limited to cases that demonstrate a direct link to “instrumentalities, channels, or goods involved in interstate commerce.” Thus, the passage of laws designed to regulate the possession of guns in school zones should be left to the discretion of the states.

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YES: Hugo L. Black, from *Adamson v. California*, 322 U.S. 46 (1947) 145

NO: Benjamin N. Cardozo, from *Palko v. Connecticut*, 302 U.S. 319 (1937) 151

Justice Hugo L. Black, in a dissenting opinion in *Adamson v. California* (1947), asserted that the Supreme Court’s “selective incorporation” approach to the constitutional protections in the Bill of Rights “degrades” those safeguards. Moreover, the Fifth, Sixth, and Eighth Amendments were specifically designed to confine the exercise of power by judges, particularly in criminal cases. Justice Benjamin N. Cardozo, writing for the Supreme Court in *Palko v. Connecticut* (1937), asserted that only those Bill of Rights protections that are “implicit in a concept of ordered liberty” are binding on state proceedings through the Due Process Clause of the Fourteenth Amendment.

Issue 8. Should the States be Permitted to Abolish the Exclusionary Rule of Evidence in Criminal Cases? 159

YES: Akhil Reed Amar, from “Against Exclusion (Except to Protect Truth or Prevent Privacy Violations),” *Harvard Journal of Law and Public Policy* (Winter 1997) 161

NO: Yale Kamisar, from “In Defense of the Search and Seizure Exclusionary Rule,” *Harvard Journal of Law and Public Policy* (Winter 2003) 169

Yale law professor Akhil Reed Amar argues that if reliable evidence is excluded from trials, wrongful acquittals and erroneous convictions will result. Moreover, he believes that the exclusionary rule of evidence hurts innocent defendants while helping the guilty ones. University of Michigan law professor Yale Kamisar contends that the exclusionary rule is the sole effective remedy to secure compliance with the Constitution by the police and that admitting evidence obtained illegally requires courts to condone lawless activities of law enforcement officers.

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NO: Hugo L. Black, from *Griswold v. Connecticut*, 381 U.S. 479 (1965) 202

Justice William O. Douglas asserted that the Constitution has rights that emanate from certain Amendments that form a “penumbra,” which provides a right to privacy protected from governmental interference. Justice Hugo L. Black, in contrast, asserted that a constitutional right to privacy is not found in any explicit provision in the Bill of Rights. Therefore, he would vote to uphold the Connecticut law prohibiting contraceptives.

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NO: William H. Rehnquist, from *Roe v. Wade*, 410 U.S. 113 (1973) 231

Justice Harry A. Blackmun, writing for the U.S. Supreme Court in *Roe v. Wade* (1973), asserted that the constitutional right to privacy, established in *Griswold v. Connecticut* (1965), is sufficiently broad to protect a woman’s right to terminate her pregnancy. Justice William H. Rehnquist, dissenting in *Roe v. Wade* (1973), asserted that although privacy may be a form of liberty protected by the Fourteenth Amendment, such an interest is protected only against state actions without due process of law. Moreover, the right to an abortion is not “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”

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YES: Anthony M. Kennedy, from Majority Opinion, *Lawrence v. Texas*, 539 U.S. 558 (2003) 242

NO: Antonin E. Scalia, from Dissenting Opinion, *Lawrence v. Texas*, 539 U.S. 558 (2003) 253

Justice Anthony M. Kennedy, writing for the U.S. Supreme Court in *Lawrence v. Texas* (2003), held that a Texas law making it a crime for two persons of the same sex to engage in intimate sexual conduct violates the Fourteenth Amendment’s Due Process Clause. Justice Antonin E. Scalia, dissenting in *Lawrence v. Texas* (2003), asserted that the Texas law does not infringe a “fundamental right.” Moreover, it bears a rational relationship to what the Constitution considers a legitimate state interest and does not deny the equal protection of the laws.

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NO: **John Paul Stevens**, from Dissenting Opinion, *District of Columbia v. Heller*, 554 U.S. __ (2008). 286

Justice Antonin E. Scalia, writing for the U.S. Supreme Court in *District of Columbia v. Heller* (2008), held that a District of Columbia law making it a crime to carry an unregistered handgun and prohibiting the registration of handguns, but that authorizes the police chief to issue one-year licenses and requires residents to keep lawfully owned handgun unloaded and disassembled or bound by a trigger lock or similar device, violates the Second Amendment. Justice John Paul Stevens, dissenting in *District of Columbia v. Heller* (2008), argued that neither the text of the Second Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms. Moreover, there is no indication that the framers intended to enshrine the common-law right of self-defense in the Constitution.

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NO: **Clarence Thomas**, from Majority Opinion, *Kansas v. Hendricks*, 521 U.S. 346 (1997) 309

Associate Justice Stephen Breyer asserts that if a state's law attempts to inflict additional punishment on an offender after he has served a prison sentence, it will violate the U.S. Constitution. Justice Clarence Thomas, in contrast, contends that post-imprisonment civil confinement laws do not violate the Constitution.

Issue 14. Is the Death Penalty an Unconstitutional Punishment for Juvenile Offenders? 321

YES: **Anthony M. Kennedy**, from Majority Opinion, *Roper v. Simmons*, U.S. Supreme Court (2005) 323

NO: **Antonin E. Scalia**, from Dissenting Opinion, *Roper v. Simmons*, U.S. Supreme Court (2005) 331

Associate Justice Anthony M. Kennedy, writing for the Court, asserts that the death penalty is an unacceptable punishment for juveniles who commit murder because it constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. Associate Justice Antonin E. Scalia, dissenting in the same case, argues that there is no clear social consensus that would favor abolishing the death penalty in these cases and that in doing so the Court's majority is usurping the powers of state legislatures.

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NO: **Henry B. Brown**, from Majority Opinion, *Plessy v. Ferguson*, 163 U.S. 537 (1896) 359

Chief Justice Earl Warren, writing for the U.S. Supreme Court in *Brown v. Board of Education of Topeka*, held that state laws that segregate white and black children solely on the basis of race deny to African American children their Fourteenth Amendment right to the equal protection of law. Warren also expressly rejected the “separate but equal” doctrine developed in *Plessy v. Ferguson* (1896). In contrast, Justice Henry B. Brown, writing for the Court in *Plessy v. Ferguson*, held that Louisiana’s law providing for “separate but equal” accommodations for persons of different races on passenger trains does not violate the Thirteenth or Fourteenth Amendment to the U.S. Constitution.

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NO: **William H. Rehnquist**, from Dissenting Opinion, *Grutter v. Bollinger*, 539 U.S. 306 (2003) 392

Associate Justice Sandra D. O’Connor, writing for the U.S. Supreme Court in *Grutter v. Bollinger* (2003), held that a state law school’s narrowly tailored use of race in admissions decision to further a compelling state interest in obtaining the educational benefits that flow from a diverse student body is not prohibited by the Equal Protection Clause of the Fourteenth Amendment or federal statutes. Chief Justice William H. Rehnquist, dissenting in *Grutter v. Bollinger* (2003), asserted that when it comes to the use of race, the connection between a state’s interest and the means used to attain them must be precise. In this case, it is not; therefore, the use of race as an admissions criterion violates the Equal Protection Clause.

Issue 17. Does the Fourteenth Amendment Require the States to Use a “One Person, One Vote” Standard for Apportioning Legislative Districts? 401

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NO: **John M. Harlan**, from Dissenting Opinion, *Reynolds v. Sims*, 377 U.S. 533 (1963) 417

Chief Justice Earl H. Warren, writing for the U.S. Supreme Court in *Reynolds v. Sims* (1963), held that both houses of a state’s legislature must be apportioned on an equal population basis. The Equal Protection Clause requires an honest and good-faith effort by the states to do so.

Justice John M. Harlan, in contrast, believes that *Reynolds v. Sims*, which involved congressional districting by the states, has the effect of placing basic aspects of state political systems under “the pervasive overlordship of the federal judiciary.”

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Issue 18. Does a State Law That Requires Public School Teachers to Teach “Creation Science” Whenever They Teach the Theory of Evolution Violate the First Amendment? 430

YES: **William J. Brennan**, from Majority Opinion, *Edwards v. Aguillard*, 482 U.S. 578 (1987) 434

NO: **Antonin E. Scalia**, from Dissenting Opinion, *Edwards v. Aguillard*, 482 U.S. 578 (1987) 443

Justice William J. Brennan, writing for the U.S. Supreme Court in *Edwards v. Aguillard* (1987), held that the Louisiana law that required public school teachers to teach “creation science” whenever they taught the theory of evolution was a violation of the First Amendment’s Establishment Clause because the law lacked a clear secular purpose. Justice Antonin E. Scalia, dissenting in *Edwards v. Aguillard* (1987), asserted that the Louisiana law had a valid secular purpose—protecting academic freedom and that the statute should therefore be upheld.

Issue 19. Should Burning an American Flag Be a Form of Expression Protected by the First Amendment? 464

YES: **William J. Brennan**, from Majority Opinion, *Texas v. Johnson*, 491 U.S. 397 (1989) 468

NO: **William H. Rehnquist**, from Dissenting Opinion, *Texas v. Johnson*, 491 U.S. 397 (1989) 481

Justice William J. Brennan, writing for the U.S. Supreme Court in *Texas v. Johnson* (1989), held that the defendant’s act of burning an American flag at the Republican National Convention was expressive conduct, protected by the First Amendment. Moreover, the state of Texas could not lawfully prohibit flag desecration as a means of preserving the flag as a symbol of national unity. Furthermore, the statute was not sufficiently narrow to prohibit only those acts that were likely to result in a serious disturbance. Chief Justice William H. Rehnquist, dissenting in *Texas v. Johnson* (1989), asserted that because the American flag occupies a unique position as the symbol of our nation, the state of Texas is justified in prohibiting flag burning in a case such as this.

Issue 20. Does the First Amendment Permit the Government to Censure the Media? 495

YES: **Pierce Butler**, from Dissenting Opinion, *Near v. Minnesota*, 283 U.S. 697 (1931) 499

NO: **Charles E. Hughes**, from Majority Opinion, *Near v. Minnesota*, 283 U.S. 697 (1931) 506

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Justice Pierce Butler, dissenting in *Near v. Minnesota* (1931), asserted that the Court's decision to prevent states from stopping the publication of malicious, scandalous, and defamatory periodicals gives to freedom of the press a meaning and a scope not previously recognized, and construes "liberty" in the Due Process Clause of the Fourteenth Amendment to restrict the states in a way that is unprecedented. Chief Justice Charles E. Hughes, writing for the Court in *Near v. Minnesota* (1931), held that the Minnesota law, which allowed the newspaper to be shut down, was the essence of censorship and a violation of the First Amendment.

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