

MARBURY v. MADISON (1803)

DIRECTIONS

Read the Case Background and Key Question. Then analyze Documents A-K. Finally, answer the Key Question in a well-organized essay that incorporates your interpretations of Documents A-K, as well as your own knowledge of history.

Case Background

The presidential election of 1800 was bitter and divisive. Thomas Jefferson, a Republican, defeated incumbent John Adams, a Federalist. The Federalist-controlled Congress passed a law, just days before Jefferson was to take office, allowing outgoing President John Adams to appoint forty-two new justices of the peace. These new justices became known as “midnight judges” because of the last-minute nature of their appointments.

By the time Jefferson took office, not all of the commissions formalizing the appointments had been delivered. President Jefferson ordered his Secretary of State, James Madison, not to deliver the commissions to Adams’s appointees. One of those commissions not delivered was for William Marbury. Marbury asked the Supreme Court to issue a “writ of mandamus” – a court order forcing Jefferson and Madison to deliver the commissions. The Judiciary Act, passed by Congress in 1789, had given the Supreme Court the power to issue these writs.

Sitting as Supreme Court Chief Justice was John Marshall, a Federalist, and the cousin of Thomas Jefferson. In his landmark opinion, Marshall asserted that Marbury had a right to his commission, but that the Supreme Court lacked the power under Article III of the Constitution to force the President to deliver it. In so ruling, the Supreme Court overturned the portion of the 1789 Judiciary Act granting the Supreme Court the power to issue writs of mandamus. The Supreme Court had found an act of Congress unconstitutional, and judicial review was first exercised.

KEY QUESTION

Argue whether or not the Supreme Court should have the power to overturn unconstitutional federal laws.

Documents you will examine:

- A Brutus, No. 15, 1788
- B *Federalist No. 78*, 1788
- C *Federalist No. 78*, 1788
- D *Federalist No. 78*, 1788
- E *Federalist No. 81*, 1788
- F Sections of Article III of the United States Constitution, 1789
- G The Supremacy Clause of the United States Constitution, 1789
- H Section 13, Judiciary Act of 1789
- I The Kentucky Resolution, Thomas Jefferson, 1798
- J Unanimous Majority Opinion, *Marbury v. Madison*, 1803
- K Thomas Jefferson to Spencer Roane, 1819

MARBURY v. MADISON

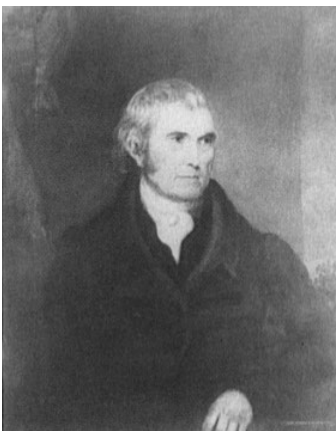
by Gordon Lloyd, Ph.D.

Much scholarship has been devoted to demonstrating that John Marshall in *Marbury* (1803), was an astute politician who pulled one over on Jeffersonian Republicans. Marshall engaged in the “delightful” activity of “calculated audacity,” namely, establishing the power of the Supreme Court by denying it had jurisdiction in the case. Also dominant is that Marshall “invented” judicial review in *Marbury* and thus established the judiciary as the sole interpreter of the Constitution. Accordingly, the dominant majority of scholars conclude that Marshall would invite future justices to reject the Framers as their guide to constitutional interpretation, and adopt, instead, the doctrine of a “living Constitution.” In short, Marshall invented the idea that we live under a Constitution, but the Constitution is what the Court says it is. In fact, it is no exaggeration to say that *Marbury* is the constitutional text and Marshall is the judicial framer in constitutional law texts.

There has been an influential minority of scholars, however, who portray this Marshallian foundation of creative living constitutional jurisprudence as mythological nonsense: If we let Marshall speak for himself, the minority say, then we will discover a Marshallian originalism grounded in the principles of the Constitution and the teachings of the Framers. *Marbury* is an attempt to establish Constitutional supremacy rather than judicial supremacy. According to this understanding, the Marshallian role for the judiciary is to 1) protect the rights of individuals against the abuse of governmental power and 2) control legislative, executive, and, yes, judicial excess. Rather than establishing the Court as the sole and supreme expositor of the Constitution, Marshall establishes the judiciary as the protector of the fundamental rule of individual law and institutional balance and responsibility.

Historians disagree as to what Marshall did and when and how he did it. We know that after the election of 1800, lame-duck President John Adams, with Senate approval, named several justices of the peace—known to us as “the midnight judges”—and that then Secretary of State, John Marshall, failed to deliver William Marbury’s commission before the new administration took office in March 1801. When the Jeffersonians came to power in Congress in 1801, they made several changes in the Judiciary Act, and

President Jefferson and Secretary of State Madison did not deliver Marbury’s commission. Also clear, is that the defeated Federalists wanted to embarrass Jefferson on constitutional grounds and enlisted Chief Justice Marshall in their effort. But these arguments, at best, suggest that Marshall did what he had to do in order to secure the Federalist Party cause. Which, of course, he actually failed to do! So that does not make him a very astute politician in the larger party-oriented sense. But that still leaves open the claim that Marshall was interested in the judiciary, and he pulled a fast one in order to establish judicial review. By the way, Marbury never did receive his commission. This partisan ideological interpretation, in effect, solves the complications of *Marbury* by denying that anything principled was at stake.



Chief Justice John Marshall

Was *Marbury*, then, about the establishment of “judicial review”? After all, the phrase judicial review does not appear in Article III of the Constitution and we all know that is what the Supreme Court does. The problem with this repeatedly advanced and unsubstantiated claim is this: the phrase “judicial review” does not appear in *Marbury*. But on a substantive level, the right of the Court to review acts of the legislature was agreed to at the Constitutional Convention and understood to extend to judicial cases only.

The President alone was given the power to exercise a conditional veto over bills before they became laws since it was understood that judges were already given the authority to subsequently review an act of Congress and determine whether or not it was constitutional.

During ratification, the Antifederalist Brutus argued that the “equity” language of Article III not only established judicial review; it was an invitation to the judiciary to establish judicial supremacy. Alexander Hamilton responded in *Federalist No. 78*. He explicitly defended judicial review and denied it would lead to judicial supremacy: the Constitution required the judiciary to declare unconstitutional an act of the legislature that violated “the manifest tenor” of the Constitution and, moreover, the judges would never substitute their will for their judgment. Marshall himself, in the Virginia Ratifying Convention, stated that if the federal legislature passed a law “not warranted by any of the powers enumerated,” it would be considered by the judges to be an infringement of the Constitution, which they are to guard. Even Jefferson, in his private correspondence with Madison, accepted judicial review of the legislature if exercised with judicial restraint.

If partisan politics and judicial review are not the driving forces undergirding *Marbury* what then is going on? We have two choices: either *Marbury* is about establishing judicial supremacy or it is about establishing the rule of law. In the analysis, we need to consider whether Marshall’s decision proves Brutus or Hamilton correct.

Marshall relies exclusively, in the first part of his opinion, on the specific language of the Constitution. He states that *Marbury* was properly nominated and confirmed in accordance with Article II, Section 2 of the Constitution. Thus, *Marbury* was constitutionally “an officer of the United States.” According to Article II, Section 3, continues Marshall, the President “shall Commission all the officers of the United States.” Thus, says Marshall, the Secretary of State, *shall* deliver the commission. Even though the commission was not delivered by the then Secretary of State—namely Marshall—neither the newly elected President, nor the newly appointed Secretary of State, had “the executive discretion” to withhold the commission. In this matter, concluded the Chief Justice, Jefferson and Madison had merely a “magisterial,” and not a “political” status.

In the second part of his opinion, Marshall also appeals to the specific language of the Constitution. Although a mandamus indeed should be issued to order the delivery of *Marbury*’s commission, the

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Supreme Court is constitutionally unable to issue that order. Article III, Section 2 of the Constitution, says “the Supreme Court shall have original jurisdiction in all cases affecting [1] ambassadors, [2] other public ministers and consuls, and [3] those in which a state shall be a party. *In all other cases, the Supreme Court shall have appellate jurisdiction.*” [Emphasis added.] To Marshall, the language of the Constitution imposes a *maximum* of three instances where the Supreme Court can exercise original jurisdiction. Since the authority to issue a mandamus is not specifically enumerated, the Supreme Court does not have the constitutional ability to issue one. That part of the Judiciary Act of 1789, which authorizes the Supreme Court “to issue writs of mandamus in cases warranted by principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States,” is unconstitutional.

Marshall’s message is clear: We live under a “written constitution,” and the language of that document places a written limitation not only on Congress, but also on the Executive and the Judiciary. Congress must conform to the language of the Constitution when passing laws, the Executive must conform when executing the law, and so too must the Judiciary. “The fundamental and paramount law of the nation,” limits the power of all three branches of the federal government to the language of the written constitution. In support, Marshall says his understanding of written constitutionalism conforms “to the solicitude of the convention,” and “all those who have formed written constitutions.”

Is the language of Article III as prohibitive as Marshall says it is and does it unambiguously support his interpretation? Article III bestows on Congress the authority to develop the structure of the courts and to install judicial procedures. Thus it was left to Congress to fill in the details. The First Congress did just that. It passed the Judiciary Act, one section of which dealt with the power of the Court to issue a writ of mandamus in certain specific situations. So the question becomes: What is the status of the First Congress in the creation of the originalist position?


Marshall observed in *Cohens v. Virginia* (1821) that the First Congress contained many members who had served in the Constitutional Convention, and we should take the First Congress seriously because they express the intent of the Constitutional Convention and the ratifying conventions. In *Marbury*, however, Marshall did not seek any assistance from the First Congress, the Constitutional Convention, *The Federalist* or ratifying conventions.

It is instructive that Madison, who as Representative Madison supported the mandamus provision in the 1789 Act, and who later failed to issue the commission in 1801, didn’t think that the Constitution he helped create, ratify, explain, and defend was being violated. Nor would *Marbury* even pass Hamilton’s *Federalist No. 78* “manifest tenor” test for judicial rejection of an Act of Congress: neither the First Congress nor the Jeffersonian Executive violated the “manifest tenor” of the Constitution when the Congress bestowed original jurisdiction to issue a mandamus and when the Executive refused to issue a commission to Marbury. The language of the Constitution does not make it manifestly clear that a newly elected President, and a newly appointed Secretary of State, should be compelled to deliver a judicial commission signed by a previous President and undelivered by a former Secretary of State. Doesn’t Article III state unambiguously that judicial appointments are matters to be dealt with by the Senate and the President? And it is troublesome that Marshall claims that it is the province of the judiciary, and not the Congress or the President, to make the distinction between what is judicial and what is political.

Toward the end of *Marbury*, Marshall announces, rather unexpectedly, “It is emphatically the province and duty of the judicial department to say what the law is.” This bold remark comes after the mandamus matter has been decided and the case put to rest. In the early part of the decision, Marshall called the Constitution, the “paramount law of the nation,” [emphasis added] which constrained every branch of government including the judiciary. Again, near the end, he says it is the duty of the judiciary “to say what the law is.” Marshall can’t possibly mean that the written constitution, the paramount law, is what the judiciary says it is. Or if he is not saying this, isn’t reasonable for future justices to claim this is what he is saying? Marshall concludes: “If two laws conflict with each other, the courts must decide on the operation of each,” because “this is of the very essence of judicial duty.”

Does Marshall introduce the idea of the rule of law in the first part of the decision, but conclude that the Supreme Court is the ultimate arbiter of the Constitution? In short, we may live under the language of the Constitution but the Court interprets the language of the Constitution. After all, to interpret the language of the Constitution, for Marshall, but not for Madison, is “emphatically the province and duty of the judicial department.” It is “too extravagant to be maintained,” he fumed, “that the intention of those who gave” the judicial power was that “the constitution should not be looked into.” How does he portray the “intention” of the Framers? What does looking into mean, and who does the looking?

Even one citation from the Founding debates would help, but Marshall offers none. Marshall says the Framers would support 1) the Supreme Court looking into the Constitution and 2) his decision in *Marbury*. We must take his word for it! But he also claims “the framers of the constitution contemplated that instrument [the Constitution], as a rule for the government of the courts, as well as of the legislature.” In short, according to the “influential minority” of scholars, no exclusive power to interpret the fundamental law is claimed for the Court in *Marbury*.

But when the First Congress looked into the Constitution, which it did when considering the Bill of Rights (and by the way this was a Congress overwhelming occupied by the Framers and ratifiers) the Congress saw nothing wrong in passing the mandamus provision of the Judiciary Act. Moreover, Marshall’s mentor, President George Washington, signed the bill into law. So we are left with the question: is the “dominant majority” or the “influential minority” correct concerning Marshall’s decision in *Marbury*? 

Dr. Gordon Lloyd is Professor of Public Policy at Pepperdine University. He earned his bachelor’s degree in economics and political science at McGill University. The co-author of three books on the American founding and two publications on political economy, he also has numerous articles and book reviews to his credit. His areas of research span the California constitution, common law, the New Deal, slavery and the Supreme Court, and the relationship between politics and economics. He has received many teaching, research, and leadership awards including admission to Phi Beta Kappa and an appointment as a Distinguished Visiting Scholar for the Oklahoma Scholarship Leadership Program.

To read essays by Dr. Lloyd on *Dred Scott v. Sanford, 1857*, and *United States v. Nixon, 1974*, visit <http://scdbq.billofrightsinstitute.org>.

DOCUMENT A

Brutus, No. 15, 1788

[The] supreme court under this constitution would be exalted above all other power in the government, and subject to no controul. ...I question whether the world ever saw, in any period of it, a court of justice invested with such immense powers, and yet placed in a situation so little responsible....

Judges under this constitution will controul the legislature, for the supreme court are authorised in the last resort, to determine what is the extent of the powers of the Congress; they are to give the constitution an explanation, and there is no power above them to set aside their judgment. The framers of this constitution appear to have followed that of the British, in rendering the judges independent, by granting them their offices during good behaviour, without following the constitution of England, in instituting a tribunal in which their errors may be corrected; and without adverting to this, that the judicial under this system have a power which is above the legislative, and which indeed transcends any power before given to a judicial by any free government under heaven....

If, therefore, the legislature pass any laws, inconsistent with the sense the judges put upon the constitution, they will declare it void; and therefore in this respect their power is superior to that of the legislature.

- **What is Brutus's argument against ratification of the Constitution and the proposed court system?**

DOCUMENT B

Federalist No. 78, 1788 [*emphasis Hamilton's*]

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 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.

- **Why does Hamilton call the judiciary the “least dangerous” branch of government?**

DOCUMENT C

Federalist No. 78, 1788

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.

- ▶ **Restate Hamilton's assertion in your own words.**

DOCUMENT D

Federalist No. 78, 1788

[T]he 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.

- ▶ **Who or what does Hamilton assert has the authority to judge the constitutionality of federal laws?**

DOCUMENT E

Federalist No. 81, 1788

[T]here is not a syllable in the plan under consideration which DIRECTLY empowers the national courts to construe the laws according to the spirit of the Constitution, or which gives them any greater latitude in this respect than may be claimed by the courts of every State. I admit, however, that the Constitution ought to be the standard of construction for the laws, and that wherever there is an evident opposition, the laws ought to give place to the Constitution.

- ▶ **What power does Hamilton deny the Constitution directly gives the national courts?**
- ▶ **What does Hamilton say should be the “standard of construction” for laws?**

DOCUMENT F

Sections of Article III of the United States Constitution, 1789

Section 1. 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....

Section 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority... both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

- ▶ **What is the Supreme Court's power?**

DOCUMENT G

The Supremacy Clause of the United States Constitution, 1789

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

- ▶ **Does this section of the Constitution support Hamilton's argument in Document B?**

DOCUMENT H

Section 13, Judiciary Act of 1789

The Supreme Court ... shall have power to issue ... writs of mandamus, in cases warranted by the principle and usages of law, to any courts appointed, or persons holding office, under the authority of the United States....

- ▶ **What powers does Section 13 give the Supreme Court?**

DOCUMENT I

The Kentucky Resolution, Thomas Jefferson, 1798

That the several states who formed that instrument [the Constitution], being sovereign and independent, have the unquestionable right to judge of its infraction; and that a nullification, by those sovereignties, of all unauthorized acts done under colour of that instrument, is the rightful remedy.

- ▶ **Who or what does Thomas Jefferson assert has the authority to judge the constitutionality of federal laws?**

DOCUMENT J

MAJORITY OPINION



Unanimous Majority Opinion, *Marbury v. Madison*, 1803

The authority ... given to the Supreme Court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the Constitution....

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....

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....

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty....

The judicial power of the United States is extended to all cases arising under the constitution. Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises? This is too extravagant to be maintained.

- ▶ **Why does this ruling argue that the Supreme Court has the power to interpret the Constitution?**
- ▶ **What does Marshall call the “very essence of judicial duty”?**

DOCUMENT K

Thomas Jefferson to Spencer Roane, 1819

For intending to establish three departments, coordinate and independent, that they might check and balance one another, [the Constitution] has given, according to this opinion [*Marbury v. Madison*], to one of them alone the right to prescribe rules for the government of the others, and to that one, too, which is unelected by and independent of the nation. ...The Constitution on this hypothesis is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please.

- **How does Jefferson's reaction to the decision in *Marbury v. Madison* compare to Hamilton's description of the judicial branch in Document A?**

DIRECTIONS

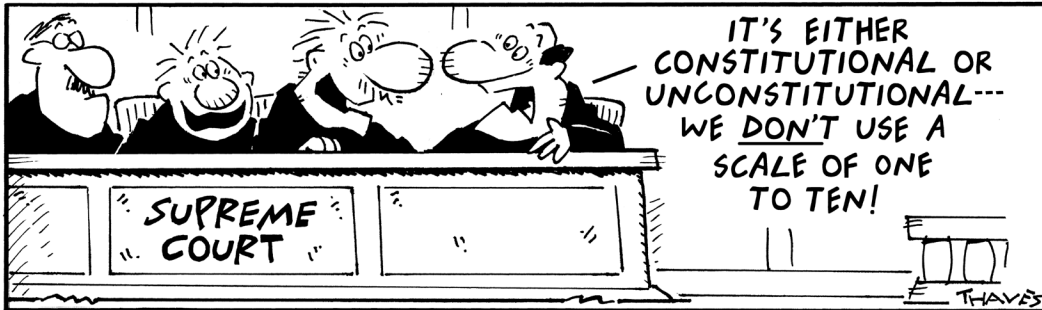
Answer the Key Question in a well-organized essay that incorporates your interpretations of Documents A-K, as well as your own knowledge of history.

KEY QUESTION

Argue whether or not the Supreme Court should have the power to overturn unconstitutional federal laws.

THE ISSUE ENDURES

Frank and Ernest



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- ▶ The *Marbury* decision was unanimous. Do split decisions (for example, 5-4 votes) indicate that a decision might be overturned in the future?



Identifying and Teaching against Misconceptions: Six Common Mistakes about the Supreme Court

By Diana E. Hess

This article originally appeared in Social Education, the official journal of the National Council for the Social Studies (NCSS). Reprinted here with permission of the author and NCSS.

My colleagues in science and math tell me that discussing students' preconceptions and misconceptions is a typical part of the discourse about teaching in their fields. By contrast, I rarely hear social studies teachers talk about this—

perhaps because so much of the content in social studies is or could be contested and we therefore shy away from labeling students' ideas as “pre” or “mis” conceptions.¹

As a general rule, in my social studies courses I tend to focus on topics and issues that are controversial or—as I often argue—are taught as “settled” and really need some unsettling.² But I do not think that everything that should be taught in social studies is controversial. In fact, much of what I think students should learn is not controversial—just hard. Consequently, I have come to believe that it is important for teachers to think deeply about the kinds of understandings that students come in with, identify their conceptions, and then organize teaching purposely to develop the “pre” and correct “the mis.”

An institution that is commonly taught about in middle and high schools is the U.S. Supreme Court. Many people—adults and young people alike—hold misconceptions about how it works. Interestingly, however, this lack of knowledge does not stop people from having a generally positive opinion of the Court—especially relative to the other two branches of the federal government.³ Every so often, polling is done that asks people to name Supreme Court justices as well as other groups (e.g., the Three Stooges and the Seven Dwarfs). The findings are always embarrassing and a bit bizarre. Notably, an astonishingly large percentage of people in the United States know all three of the stooges' names (74 percent to be exact), and about 80 percent can name two of Snow White's dwarfs.

By comparison, 63 percent of Americans cannot name two Supreme Court justices.⁴ Clearly, we should not over-generalize—it may be that some people who cannot name justices actually know a lot about the Supreme Court. Conversely, knowing the name of a justice does not indicate that a person understands anything substantive about the Court. Yet it is my sense that most people are not informed about what the Supreme Court does—in part because the media typically pays little attention to the Court, except when a Supreme Court position falls vacant and a new justice has to be nominated and approved.⁵

For many teachers, then, it is likely that while most of their students may have vague ideas and feelings about the Court, they are not coming into the classroom with robust content knowledge. However, this does not mean that they do not have any conceptions about the Court and what it does, or should do. In my experience teaching high school students in a variety of venues, and listening to hundreds of middle and high school teachers talk about their understandings about the Court—and what their students tend to know and not know—I have encountered six key misconceptions that many people hold about the Court (and the Constitution) that need to be corrected, or at least contested.

1. THE CONSTITUTION APPLIES TO EVERYONE AND EVERYTHING

When I was teaching high school government, history, and law courses, it was not unusual for students to believe that virtually every person and organization with which they interacted had to “follow” the Constitution. Because many students thought the Supreme Court only heard cases that dealt with the Constitution, this mistaken belief often worked to corrupt their understanding of what the Court did. It was not unusual for me to hear students say that their parents had violated their Fourth Amendment rights when they searched their bedrooms; complain that a private organization limited their free expression rights when it enforced strict behavior rules for activities; or argue that employers were violating their rights under the Constitution when they told them what to wear to work.

This mistaken belief about the Constitution’s reach is a sign that the core concept of “state action” had not been formed. That is, in virtually all circumstances, the Constitution only applies to actions taken by a federal, state, or local government actor. But my students believed that any person or organization that “governed” them by exerting authority in their lives was analogous to the “state” and therefore had to follow the Constitution. For example, one of my students believed that his employers were violating workers’ Fourth Amendment rights when they searched employee lockers.

This was a clear signal that he held a misconception about the reach of the Constitution. If he had understood the concept of state action, he would have realized that because his employer was a private entity, not the government, it was under no obligation to adhere to the procedures required by the Fourth Amendment. I realized that for a variety of reasons, my students seemed to have one large concept labeled “rights” under which they thought everything fit—as opposed to a more variegated understanding of the multiple sources of rules and rights. I have since come to believe that many people, not just young people, do not know what state action is. Thus, a fundamental misconception needs to be corrected by explicitly teaching students about the limits of the Constitution’s reach, and particularly about the difference between state and non-state actions. This is a perfect topic for a concept formation lesson where students are provided with examples of constitutional cases that clearly illustrate state action (as well as non-examples) and asked to identify who is being accused of violating the Constitution (e.g., a prison warden, a public school board, or a city council).

2. THE LIBERATION GENERALIZATION

Another belief that many people hold is that the Court’s primary and most frequently enacted function is to liberate people from the heavy hand of a discriminatory majority.

Supreme Court scholar Michael Klarman traces this misconception to the Court's landmark decision in *Brown v. Board of Education*. Klarman explains,

*The conventional assessment of the Court's countermajoritarian capacity has been distorted, I believe, by a single decision—Brown. Because that ruling rescued us from our racist past, the conventional storyline runs, the Court plainly can and does play the role of heroic defender of minority rights from majoritarian oppression.*⁶

The Supreme Court is not so much an error-correcting court as a uniformity-producing institution.

I learned about the relationship between *Brown* and the formation of the “liberation generalization” when a very skillful and experienced teacher told me how learning about the contemporary Supreme Court worked to diminish her interest in teaching a course in American government. She had attended a professional development program where she was taught that the primary function of the Supreme Court is to ensure uniformity in the federal judiciary. Consequently, most of the cases the Court chooses to decide revolve around legal issues for which there was disagreement among the lower federal courts. This information was profoundly disturbing to this teacher. She exclaimed, “I grew up at the time of *Brown*—we revered the Court.” Because she interpreted the ruling in *Brown* as a particularly potent representation of the Court liberating people from racist policies that the “majority” had enacted, she had come to believe that this was what the Court typically did. While there is a robust debate about whether the purpose of the Court should be to provide individuals with protection against the majority, there is less controversy among scholars about whether the Court sees that as its role, or has in fact, actually done that on a consistent basis. This is not to suggest that there are no examples of the Court performing this function, just that this particular role of the Court may be more the exception rather than the rule.

Most recently, the Court's controversial decision in the 2003 gay rights case *Lawrence v. Texas* has been interpreted by some as a particularly powerful example of the Court's majority acting to liberate or defend a group that was targeted by legislation (e.g., the “majority”). In this case, the Court ruled that a Texas state law that criminalized homosexual sodomy violated the due process clause of the 14th amendment. But it is important to note that many of the opponents of the Court's decision in the case have challenged the very right of the Court to overturn majority decisions—especially if they are about topics that are not explicitly mentioned in the Constitution. Teaching to correct Teaching to correct students' misconception that the Court's primary role is to liberate people is challenging, because this is clearly one function of the Court—and when that function is performed, the cases are often very important, so they garner landmark status. Yet it is a misrepresentation to teach that this is the focus of the Court most of the time.

3. THE BELIEF IN ERROR CORRECTION

Another common misconception that many lay people hold is that the role of the Court—as the “highest court”—is to correct errors when lower courts have made mistakes. But in most cases, the fact that a federal or state court below made a decision that seems to

be erroneous is not, by itself, a major reason why the Court takes a case. Most students would be surprised to know that if the error is actually a dispute over the “true” facts, then the errors are solely in the domain of the trial courts and will be not corrected or even addressed by the appellate courts. This is not to suggest that the Court does not overturn lower court decisions on issues of law (in fact, about 75 percent of the cases the Court decides do overturn a decision from below), but that is not its primary function. The Supreme Court is not so much an error-correcting court as a uniformity-producing institution. To understand the significance of this distinction, it is important to understand how cases get to the Court in the first place. Virtually all the cases decided by the United States Supreme Court have been granted a writ of *certiorari*. *Certiorari* is a Latin word that means “to be informed of.” Black’s Law Dictionary defines a writ of *certiorari* as:

“An order by the appellate court to bring the case before them when the court has discretion on whether or not to hear an appeal.” The Court does not have to grant requests for writs of *certiorari*, and most of the petitions requesting one are denied. For example, in most years the Court receives about 7,500 petitions for *certiorari*, but they typically take only 75-85 cases.

The vast majority of cases the Court agrees to decide each year involve a question about which there is disagreement among the lower federal Courts of Appeals (this is called a “circuit conflict”).⁷ Supreme Court litigator Tom Goldstein analyzed the Court’s docket in one recent term and found that 80 percent of cases involved a circuit conflict.⁸ As a general rule of thumb, the conflict must be significant enough to deserve attention. There are many instances in which the Court does not hear a case even when there is a circuit conflict. But if a strong argument can be made that a case focuses on an important question for which there is currently a conflict among circuits, and there is a need for a uniform answer across the nation (such as what a part of the federal tax code means), then it is more likely that the Court will decide to hear the case than they would a case for which there was not a circuit conflict.

4. THE GIDEON EFFECT

In addition to addressing misconceptions about the kind of cases the Court typically decides, it is important to teach accurate information about who is more likely to get a case heard by the Court. Among the cases the Court has selected to hear, very few are *in forma pauperis*, or cases filed by people who cannot afford the filing fee. In recent terms, an average of only one-tenth of one percent of paupers’ petitions were granted review (8 cases out of 6,386 in 2002-2003), compared to an average of 4 percent of paid cases (83 cases out of 1,869 in 2002-2003), during the same terms. This is extremely important information because it illustrates how relatively rare it is for the Court to take a case filed by a person in prison, a common misperception sometimes referred to as the “Gideon effect,” after *Gideon v.*

While many standard government textbooks mention that individuals and groups can file amicus briefs, few explain how deeply and broadly engaged many groups are in the work of the Court on a variety of levels.

Wainwright, in which the petitioner, Clarence Earl Gideon, famously appealed to the Court with his handwritten petition. This case is commonly taught—as it should be—but if not put in the context of its rarity, the effect of the case will be to reinforce a misconception about what kinds of cases the Court typically considers, and why.

5. A RULING IS A “RIGHT” ANSWER

In addition to misconceptions about what kinds of cases the Court takes, and for what reasons, it appears that many people believe that when the Court decides a case, its members are identifying the “right” answer to a challenging question. As Justice Robert Jackson famously wrote, however, “We are not final because we are infallible, but we are infallible only because we are final.” In an unusual statement, Jackson’s remark acknowledges that the Court makes mistakes. By definition, then, it seems logical that the Court’s rulings are supposed to be “right” answers. If they were not, how could the Court make mistakes? The Court often goes to great lengths to communicate this belief when it overturns its own precedents. In these decisions, the majority will often say that the Court got it wrong in the past, and this wrong must now be righted. But if that were really the case, then how do we explain the tendency of the Court to split on many hot-button cases, such as those that involve affirmative action, abortion, gay rights, or presidential-vote counting? Although most of the Court’s decisions are not split, in the cases involving matters that are especially divisive to the public, the Court often splits as well.

What makes the *Brown* decision so unusual is that it was the exception to this general rule—a divisive issue that the Court decided unanimously. When the Court wades into matters that deeply divide people in the United States, it is usually a solid bet that they involve questions for which there is lively dispute about what the correct answer should be. That is, there is a lively intellectual contest going on that involves scholars and the public about what is the right answer to a constitutional or legal question. Rather than being viewed as final arbiters in this intellectual debate, justices are better seen as participants in the debate—and what they rule is not “right,” just what a majority of the Court agree on at a particular time. Finality, not being right, is what the system is designed to produce. Today, we would not say that the Court’s decision in the *Dred Scott* case was “right,” but it was final from a legal standpoint, even though the social and political issue was an open wound. This does not mean that the Court’s decisions can be ignored, but its decisions can certainly be criticized— and indeed, this is an important productive part of public discourse in a democratic society. Teachers who adopt this latter view are more likely to ask students to evaluate whether they think the Court made the correct decision in a particular case, a pedagogical move that would go a long way toward correcting the misconception that what the Court rules is right simply because it emanated from the Court. In other words, Justice Jackson may have overstated his case (perhaps intentionally so) when he said the Court was infallible because it was final. A more accurate read of the Court’s role in the knowledge-production process (which is one way to characterize the sector that the Supreme Court is in) is to say that the Court is neither infallible nor final. Either of those options would be, by definition, antithetical to democratic notions of how the meaning of what is “right” comes to be constructed and reconstructed.

6. INTEREST GROUPS AND THE COURT: DISROBING THE BLIND JUSTICE METAPHOR

Another significant misconception that many people hold about the Court is that Court decisions are made without influence from the public—or specifically, from groups the public forms to influence policy, such as Planned Parenthood and Liberty Forum. This misconception is probably linked to the mistaken belief that the Court’s primary function is to serve in an anti-majoritarian role; if the Court is supposed to constantly “check” the majority, then it must not be susceptible to its views. However, even a cursory understanding of how interest groups influence the work of the Court indicates that the notion that the Court makes decisions without input from the public is false. The important influence that individuals and interest groups have on the Court’s thinking is not something that the Court hides; indeed, it openly admits and even references such influences. For example, it is fairly common knowledge that individuals and groups interested in the outcome of a case file *amicus* (or friend of the court) briefs, in which they are expected to provide important ideas and information they want the Court to consider when ruling on the case. The Court relies on these briefs, and it is clear that some of them are quite influential. Although an unusually large number of such briefs were filed in the two University of Michigan affirmative action cases (over 100), many of the justices asked questions that referred to one in particular—a brief supporting affirmative action filed by a group of former military academy superintendents and retired military officers. This brief was also referenced in the majority decision written by Justice Sandra Day O’Connor.

While many standard government textbooks mention that individuals and groups can file *amicus* briefs, few explain how deeply and broadly engaged many groups are in the work of the Court on a variety of levels. Interest groups routinely pay for or provide a party’s legal representation. In fact, they often “shop” for compelling cases that they think the Court will resolve in their favor. This has been a frequently used litigation tactic by groups of every persuasion. These same groups serve the reverse function—working to keep cases off the Court’s docket—by discouraging petitioners from going forward with an appeal (or in one recent example, encouraging a party to settle a case even after the Court had granted review).⁹

Not only are many interest groups deeply involved in the work of the Court, but some are involved in an inordinate number of the Court’s cases. In the term that just ended, the National Chamber Litigation Center, Inc. (the public policy law firm affiliated with the U.S. Chamber of Commerce) filed 18 briefs in support of certiorari, 15 briefs on the merits, for a total of more than 25 percent of the Court’s cases.

When one high school teacher learned this at a recent professional development institute about the Supreme Court, she exclaimed, “But isn’t that just like lobbying—and aren’t the courts supposed to be independent?” This exclamation sparked a very interesting conversation about what the role of interest groups in the Court should be.¹⁰ What became clear to the teachers attending the event was that interest groups are much more involved with the Court than those teachers had previously believed—and they now needed to figure out how to communicate that to students.

THE EFFECT OF CORRECTING MISCONCEPTIONS

Teaching to correct students' misconceptions about the Supreme Court may seem like a form of myth busting. Some people might think that this will diminish students' respect for important government institutions. In fact, it is possible that teaching to correct students' misconceptions may cause students to be less likely to revere the Court. However, we should not fear this result. I think we should be more nervous about teaching students to revere institutions. After all, awe is the enemy of inquiry. Conversely, it is more important that people know how institutions, such as the Supreme Court, really work if they are to truly understand what influence it has on U.S. society. Correcting many of the misconceptions I have described could serve an important role in disentangling the damaging connection that is often made between reverence and engaged citizenship. For example, someone who understands that the Court's primary and most frequently enacted function is to create uniformity in the federal court system may be less likely to view the Court as a political savior. This can be a good thing if we want to encourage people to let their views be known in the policy-making process. I am not suggesting that the Supreme Court, as an institution, does not deserve respect—I think it does, even though, like most people, I disagree with some of its decisions. But true respect is much more powerful when it comes from a strong knowledge base that can only be built if we recognize misconceptions and teach in a very explicit way to correct or at least expose them.

I doubt that all students hold the misconceptions I have discussed, or that my list of misconceptions is complete. However, I have frequently encountered them in my experience teaching about the Court. In the past, I did not consistently and purposely plan instruction to target students' misconceptions and work to change them. Now, I intend to work toward that goal, because eliminating misconceptions about critically important institutions in our society is a step to building deep knowledge about how such institutions actually work—surely a more important goal than simply fostering reverence.

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¹ Thanks to Jeff Passe for this explanation of why there is a difference in the discourse about misconceptions in the science, math, and social studies teaching communities.

² For example, I have written a number of articles about how *Brown v. Board of Education* is taught, in which I argue that we need to teach the controversies of *Brown* and its aftermath and that we rarely do. See Diana Hess, "Moving beyond Celebration: Challenging Curricular Orthodoxy in the Teaching of *Brown* and its Legacies," *Teachers College Record* 107, no. 3 (2005): 2046-2067.

³ See PollingReport.com, <http://www.pollingreport.com/institute.htm>, for recent opinion poll data about the views that people in the United States have about the Supreme Court, especially relative to their opinions about Congress and the presidency.

⁴ Zogby International, July 28, 2006, <http://www.zogby.com/wf-AOL%20National.pdf>.

⁵ Of course, there are times when the Court receives quite a bit of attention; two recent notable examples are *Bush v. Gore*, and the decision in 2005 on eminent domain (*Kelo v. City of New London*).

⁶ Michael J. Klarman, “How Brown Changed Race Relations: The Backlash Thesis,” *Journal of American History* 81, no. 1 (1994):81-118.

⁷ Go to **<http://www.uscourts.gov/courtlinks>** for a map showing the federal circuits.

⁸ Information received from Tom Goldstein via personal communications on September 5, 2006.

⁹ In 1997, the Court granted certiorari in an affirmative action case about whether race could be a factor in teacher lay-offs. Before the oral arguments, the school board agreed to a surprise out-of-court settlement that was funded by a consortium of civil rights groups who feared that the Court would rule against affirmative action.

¹⁰ This teacher was attending the Supreme Court Summer Institute sponsored by Street Law, Inc., and the Supreme Court Historical Society.

CLASSROOM APPLICATIONS

Scaffolding questions are provided as an option. Teachers of AP or honors classes may choose not to have students write answers to these.

Context/Background information for some documents is provided as an option to brief students on historical/legal context and significance.

DBQ Strategies:

- Write the Key Question on the board and give each student a copy of one document. Ask this question: Does this document help you to answer this question? If so, how? If not, what additional information might you need? Allow students 3-4 minutes to answer these questions. Then, have students pair up, sharing their documents and answering the same questions. Have each pair join another and repeat the process. Finally, bring the entire class together and answer the Key Question as a group.
- Write the Key Question on the board and spend one class period having students analyze documents and answer the scaffolding questions, followed by one class period writing their answers to the key question.
- Divide students into pairs or trios and assign one or more documents per group. Then ask groups to report on their documents to the class, being sure that they explain how their specific documents can help to answer the Key Question.
- Go over DBQs as a large group, using scaffolding questions and key questions as discussion prompts.
- Give students the documents from a case and have them craft a key question.
- Have students complete a Case Briefing Sheet (see p. 231) to reinforce key concepts.
- Have students determine for each document which side would be more likely to use it in oral argument of the case. (See graphic organizers, p. 232.)
- Conduct a Moot Court presentation (see p. 235 for directions).
- Lightning Round Moot Court: This strategy might be especially helpful to provide a quick review of a number of cases. Assign two students to each case—one to present the petitioner's position and one to present the respondent's. Each student has two minutes to present his/her position to the entire class, which then must vote on this question: Is the law in question a valid exercise of government power under the relevant constitutional principles?
- Have students conduct research to discover more details about the people involved in a case, and then report to the class.
- Develop an illustrated timeline to depict changes and trends in interpretation of a given constitutional principle.
- Develop political cartoons to highlight the important issues in a case.

ONLINE RESOURCES

Consult any of the following websites for additional resources to learn more about the Supreme Court and landmark cases.

<http://billofrightsinstitute.org/resources/educator-resources/landmark-cases/>
www.oyez.org
<http://www.streetlaw.org/en/landmark.aspx>
<http://www.supremecourt.gov/>
<http://www.law.cornell.edu/supct/cases/name.htm>
<http://www.scotusblog.com/>

CASE BRIEFING SHEET

Case Name and Year: _____

Facts of the Case: _____

What is the constitutional question that the Supreme Court must answer?
(This is a yes/no question and spells out the specific part of the Constitution at issue.)

What constitutional principles are indicated in the case? _____

Summary of one side's arguments:

Summary of the other side's arguments:

How would you decide the case and why? _____

How did the Supreme Court majority decide the case and why? _____

What were the main points raised in any dissenting opinions? _____

What other Supreme Court cases are related in important ways? _____

CONSTITUTIONAL ISSUE EVIDENCE FORM

How would you use the documents provided to answer the constitutional question?

Case Name and Year:

Constitutional Issue:

Yes (Source/Evidence)		No (Source/Evidence)	

DOCUMENTS SUMMARY

Use this form to develop an overview of the evidence available.

Document name & date	Author	Answer to scaffolding question	How each side might use this document to answer the Key Question –OR– What is the main idea of this document?

ATTORNEY DOCUMENT ANALYSIS

Use this form to show which attorney would probably use each document provided, and why.

Petitioner	Both sides	Respondent
Additional notes: How did majority/dissenting opinions align with each attorney's position?		

MOOT COURT PROCEDURES

Preparation

- Encourage students to use the background knowledge they have developed. Attorneys and Justices of the U.S. Supreme Court apply a great deal of background and historical knowledge.
- Caution students that “gotcha” questions within the classroom context are not productive. “Justices” should not ask questions that, based on their background and class activities, would not be fair game.
- Decide whether students will be allowed to use online resources via their smartphones during the exercise—there are good arguments both for using and for not using them.
- Recommendation—do not allow “Justices” to interrupt the attorneys in the first time or two that you run moot courts. They can ask their questions at the end of each attorney’s oral arguments.
- Encourage teamwork among “attorneys” in their presentations. Each team should have a lead attorney, but others will help fill in as needed.

Divide class into 3 groups: 9 Justices, advocates for the petitioner, and advocates for the respondent (A fourth group could be journalists.)

- Give time for planning: Justices decide what questions they want answered in oral arguments; advocates for each side plan their oral arguments.
- Allow equal time for presentation of each side, including interruptions from Justices (or not—your choice). In the U.S. Supreme Court, each side has 30 minutes, and the Justices interrupt continuously.
- Justices deliberate and announce decision. Deliberation is actually done in strict privacy in the U.S. Supreme Court conference, but you decide for your class.

At the beginning of each session of the Supreme Court, the Marshal of the Court (Court Crier) announces:

“Oyez! Oyez! Oyez! All persons having business before the Honorable, the Supreme Court of the United States, are admonished to draw near and give their attention, for the Court is now sitting. God save the United States and this Honorable Court!”

The Chief Justice will begin the oral argument phase by saying, “Petitioner, you may begin.”

The petitioner’s attorney says, “Mr. Chief Justice, and may it please the Court...”

Debrief: Discuss both the content of the case (Constitutional principle and its application) and the processes employed. Consider thinking and planning process, civil discourse process, and the application of these skills outside the classroom.

TIPS FOR THESIS STATEMENTS AND ESSAYS

Thesis Statement: The thesis statement condenses your arguments to a nutshell and appears in the opening paragraph, but it is not written until AFTER you have planned your overall response. (Planning process shown in table below.)

A good thesis statement—

- Fully addresses all parts of the prompt, while acknowledging the complexity of the issue.
- Clearly takes a side—makes a declarative statement that one thing was more important, more persuasive, etc. than another. Since the verb in the prompt is often something like “assess” or “evaluate,” the thesis statement should show which side the writer takes.
- Suggests a “table of contents” or road map for the essay—shows what elements enter into consideration.
- Begins an essay that is proven by abundant and persuasive facts and evidence.

In a DBQ essay, the student writes a well-organized response to target a specific prompt, analyzing pertinent documents in order to support his/her thesis. The steps described here will guide the process of handling the documents. (For Advanced Placement US History the response must include BOTH outside information AND information from the documents. On US History AP exams, one of the essays that must be written under timed conditions is the DBQ.)

DBQ Do and Don't

Steps	Do	Don't
1. Analyze the prompt and divide it into its components. A graphic organizer helps with this step.	Fully address the prompt. It is better to address all parts of the prompt, even if you must do some in a way that is less complete, than to spend all your time on just one of two parts or 3 of 4 parts.	Neglect part of the prompt because you spent too much time on the part you know more about.
2. Plan to prove your point. It is best to begin by planning the overall structure BEFORE even looking at the documents.	Organize your thoughts before writing the thesis statement. What are the logical points your essay needs to include?	Write a “laundry list” that simply summarizes each document.

Steps	Do	Don't
3. Check the documents to see how you can use them as tools.	Strive to use all the documents; but be sure you accurately understand their main ideas.	Take quotes or ideas out of context to use them in a manner other than the author intended.
4. Ask yourself when writing every paragraph: "How does this help to prove my thesis?"	Analyze to prove the position asserted in the thesis statement. Analysis is not the same thing as description or narrative. Merely making a series of true statements is not analysis. Key to analysis—is the essay answering the "So what?" question?	Use 1st- or 2 nd -person pronouns "I think the Supreme Court has the authority to use judicial review because..." "Have you ever wondered how the Supreme Court got the authority to overturn federal laws?"
5. Manage time wisely; writing long quotes will eat up thinking time.	Use relevant facts, evidence, proof. A well-chosen brief phrase in quotations and worked into your own sentence is powerful.	Use lengthy quotes. Pad the paper in an attempt to conceal a lack of analysis.
6. Give credit to sources.	Cite sources using the author's name and/or document title.	Write "According to Document B,..."
7. Think as you write!	Let logic and analysis drive the essay.	Let documents drive the essay.

RUBRIC FOR EVALUATING A DBQ ESSAY ON A 9-POINT SCALE

Adapted from AP US History guidelines

Score (Grade)	Thesis	Analysis (tends to be the most difficult component)	Entire Prompt	Documents	Outside Info (required for AP class)	Organization & Writing Skill	Errors
8-9 (95-100)	Contains a well-developed thesis which clearly addresses all aspects of the prompt and shows organizational roadmap	Effective analysis which shows & proves relationships; fully answers the "so what?" questions; more analytical than narrative.	Addresses all aspects of the prompt, though coverage may be slightly uneven	Effectively and appropriately uses all (or almost all) documents "The angels are starting to sing!"	Supports thesis with substantial and relevant outside information.	Clearly organized & well-written—evident on first reading, but we'll read it again just for pleasure. "Call the President; he needs to hear this essay!"	May contain minor errors. "Get this writer to proofread your next paper!"
5-6-7 (80-85-90)	Contains a thesis which addresses the prompt	Limited analysis; mostly descriptive; knowledge & comprehension level in use of facts	Slight or neglects some parts of the prompt	Uses some documents effectively	Supports thesis with some outside information	Acceptable organization; language errors do not interfere with comprehension and do not indicate misunderstanding of the topic	May contain errors that do not seriously detract from quality of the essay
2-3-4 (65-70-75)	Presents a limited, confused and/or poorly developed thesis	Simplistic explanations that do not indicate mastery of the content; may list facts without analysis	Deals with one aspect of the prompt in a general way or with additional parts in a superficial way	Quotes or briefly cites some documents, but does not use them as tools to support thesis	Contains little outside information	Demonstrates weak organizational and/or writing skills which interfere with comprehension	May contain major errors
0-1 (60 & below)	Contains no thesis or a thesis which does not address the prompt	Shows inadequate or inaccurate understanding of the prompt	Ignores part of the question	Contains little or no understanding of the documents or ignores them completely	Includes inappropriate, off-target, or no outside information	Is so poorly organized or written that it is difficult to understand	Contains numerous errors, both major and minor
–	Response is completely off-target. Examples: "I didn't have to pay for this exam and I'm not wasting my time on it"; "I know nothing about the prompt, but let me tell you about snow-boarding..."; "My former boyfriend is the world's biggest jerk and here's why..."						

KEY QUESTION SCORING GUIDELINES FOR ALL ESSAYS

The Good-Excellent Essay

- Asserts a strong, clear, and well-developed thesis in response to the key question.
- Supports the thesis with outstanding analysis of Founding documents, custom, legal precedent and contemporary views.
- Intelligently applies and/or critiques the Court's opinion(s).
- Effectively uses many documents and incorporates prior knowledge.
- Contains only minor errors; is clearly organized and exceptionally well-written.

The Average-Good Essay

- Asserts a thesis in response to the key question.
- Supports the thesis with some analysis of Founding documents, custom, legal precedent and/or contemporary views. Analysis of some aspects may be cursory or absent.
- Critiques and/or applies the Court's opinion(s), but may demonstrate less command of nuance than the Good-Excellent Essay.
- Effectively uses many documents and incorporates prior knowledge.
- Contains few significant errors; is acceptably organized and written.

The Below Average-Average Essay

- Asserts a limited thesis or does not fully address the key question.
- Analysis is largely incomplete, superficial, or incorrect; may merely paraphrase or quote documents.
- Contains simplistic or incorrect application/critique of the Court's opinion(s).
- Uses few documents and incorporates little prior knowledge.
- Contains some significant errors and is poorly organized and written.

The Poor-Below Average Essay

- Lacks a thesis.
- Exhibits inadequate understanding of the question and the documents.
- Offers no application/critique of the Court's opinion(s).
- Uses very few documents and incorporates no prior knowledge.
- Contains numerous significant errors and is poorly organized and written.



CONSTITUTIONAL PRINCIPLES AND THEIR DEFINITIONS

The words and ideas of America's Founders were reflections of certain widely accepted understandings about how people can govern themselves to best protect liberty. These understandings include the concepts listed here.

Due process: Government must interact with all citizens according to the duly-enacted laws, applying these rules equally among all citizens.

Equal protection: The laws apply equally to all people; government assures equal opportunity but not equal outcomes.

Federalism: A system of dual sovereignty in which the people delegate certain powers to the national government, while the states retain other powers; and the people, who authorize the states and national government, retain all freedoms not delegated to the governing bodies.

Inalienable rights: Rights with which all of us are born. Examples are the rights to life, liberty, property, and the pursuit of happiness.

Liberty: Except where authorized by citizens through the Constitution, government does not have the authority to limit freedom.

Limited government: Citizens are best able to pursue happiness when government is confined to those powers which protect their life, liberty, and property.

Popular sovereignty: The power of the government comes from the people.

Private property: The natural right of all individuals to create, obtain, and control their possessions, beliefs, faculties, and opinions, as well as the fruit of their labor.

Representative/republican government: Form of government in which the people are sovereign (ultimate source of power) and authorize representatives to make and carry out laws.

Separation of powers/Checks and balances: a system of distinct powers built into the Constitution, to prevent an accumulation of power in one branch

ANSWER KEY

UNIT ONE: The Federal Courts in History

Marbury v. Madison

Document A: The Supreme Court, and not the people or their representatives, would be sovereign. Further, he argues that since judges are not elected and “subject to no controul,” they will use their power to override the will of the people simply at the “sense of the judges.”

Document B: It has “neither force nor will.”

Document C: No law that contradicts the Constitution is valid.

Document D: The Courts

Document E: 1. The power to judge the constitutionality of laws. 2. The Constitution.

Document F: To rule in cases that involve the Constitution and all federal laws and treaties. Congress can determine the “exceptions” to judicial power/interpretation.

Document G: Yes.

Document H: To issue writs of mandamus.

Document I: The states.

Document J: 1. Because it is the “province and duty of the judicial department to say what the law is,” and the Constitution is the fundamental law. 2. To declare void laws that conflict with the Constitution.

Document K: Hamilton describes a weak judiciary whereas Jefferson identifies one that has grown very strong.

Dred Scott v. Sanford

Document A: To find a runaway slave. Thomas Jefferson.

Document B: To protect rights such as “life, liberty and the pursuit of happiness”

Document C: 1. Perpetuating slavery in the colonies. 2. Some will say that by using the word “men,” Jefferson equates slaves with free men, born with equal natural rights. Other students may say, however, that because Congress deleted the paragraph, it rejected this definition of “all men.”

Document D: Some students will say it refers to citizens; others will say voting citizens; others will say it refers to all people.

Document E: 1. Slaves 2. States have the power until 1808. Congress may have the power to regulate slavery thereafter.

Document F: Yes

Document G: 1. To regulate slavery 2. Individual states may have different views on slavery, while the Union may require a national policy. Not all states may be happy with a national policy on slavery.

Document H: Free states had to assist in the capture of runaway slaves.

Document I: 1. Through its provisions safeguarding the property rights slaveowners had in their property: slaves. 2. They were not part of the “political communities” that ratified the Constitution. Slaves were property, not persons.

Document J: 1. The fact that several states defined “free native-born inhabitants” as citizens with full voting rights. 2. The majority opinion in *Scott v. Sanford* focused on whether slaves were people or property; the dissenting opinion