

MCCULLOCH V. MARYLAND (1819)

DIRECTIONS

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

CONSTITUTIONAL PRINCIPLES

*Federalism
Limited government*

Case Background

The Necessary and Proper Clause gives Congress the power to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States.” It is not a free-standing grant of power, but rather was intended to give Congress the power to enact laws needed to “carry into execution” the various powers granted to the federal government by other parts of the Constitution.

The wording of the Clause suggests that a law authorized by it must meet two separate requirements: it must be “necessary” to the execution of some power granted to the federal government, and also “proper.” Since at least the 1790s, debate has raged over the meaning of these two terms. In the early republic, debate over the interpretation of the Clause focused on the constitutionality or lack thereof of the First Bank of the United States. When the Bank was first proposed in 1790, James Madison and Thomas Jefferson argued that its establishment was not authorized by the Necessary and Proper Clause because the word “necessary” should be interpreted to include only such measures as are truly essential to the implementation of other federal powers. By contrast, Secretary of the Treasury Alexander Hamilton defended the Bank, arguing that “necessary” should be interpreted to include any law that is “useful” or “convenient.” The issue of the constitutionality of the Bank did not reach the Supreme Court until 1819, when the justices decided the case of *McCulloch v. Maryland*.

While the Supreme Court has addressed the meaning of the word, “necessary” in a number of cases over time, it has focused far less attention to the meaning of “proper.” Controversy over both terms continues.

TEACHING TIPS: MCCULLOCH V. MARYLAND

LEARNING OBJECTIVES

- Students understand the major events and controversies related to interpretation of the Necessary and Proper Clause from the founding to the present day.
- Students understand and apply constitutional principles at issue in *McCulloch v. Maryland* to evaluate the Supreme Court's ruling in that case.

ACTIVITIES

1. To prepare students for his lesson, have them read the **Case Background** for *McCulloch v. Maryland* (1819).
2. Lead students through a careful whole-class study of **Documents F, G, and H**. These reports prepared by President Washington's cabinet members on the National Bank establish the primary lines of reasoning for differing methods of interpreting the Necessary and Proper Clause.
3. Assign appropriate documents for student analysis. **Documents A – I** address the historical background and Constitutional significance of the issues in *McCulloch v. Maryland*. **Documents J – M** prompt students to consider the continuing significance of these constitutional issues.
4. Use key question, "Does the Necessary and Proper clause grant a new power or does it serve to limit the ones that come before it? What does "Proper" mean?" for class discussion or writing assignment, focusing on the constitutional principles involved in the case.
5. Have students use **Graphing Federal Power** to show the change in the level of federal power over time, using the Supreme Court cases, *McCulloch v. Maryland* and *U.S. v. Comstock*. They may expand on this graph as they study the constitutional principle of federalism in the remaining lessons in this unit, *Gonzales v. Raich* and *South Dakota v. Dole*.
6. Have students collect and analyze current events articles related to the Necessary and Proper Clause.

See Appendix for additional Graphic Organizers.

BACKGROUND INFORMATION ON MCCULLOCH V. MARYLAND

Documents F, G, H: Cabinet Opinions regarding constitutionality of a national bank

By the time President George Washington named Alexander Hamilton Secretary of the Treasury, Hamilton had already begun to craft a plan to assure the economic success of the new nation. Central to his plan, which was modeled on the English financial system, was the incorporation of a national bank that would stimulate the economy and establish the credit of the United States. Other members of Washington's cabinet were skeptical. Washington asked each one to prepare a report explaining his answer to this question: Does the Constitution permit Congress to establish a national bank? Secretary of State Thomas Jefferson, (**Document F**) interpreted the Necessary and Proper Clause narrowly, deciding that the bank was unconstitutional because it was not specifically included in the enumerated powers of Congress. Based on his interpretation of the Necessary and Proper Clause, Attorney General Edmund Randolph (**Document G**) advised the President that the bank was unconstitutional. Hamilton built his defense of the bank on the implied powers of the Necessary and Proper Clause. Hamilton's argument (**Document H**) was most persuasive to Washington and he signed the Bank Bill. These approaches to understanding the powers of the national government set the foundation for analysis of the constitutional limits on national power continuing into the present day.

Document I: *McCulloch v. Maryland* (1819), Unanimous Opinion

In 1819 the United States had been a nation under the Constitution for barely a generation when an important case about federal power reached the Court. A National Bank had been established in 1791. When its initial twenty-year charter came up for renewal in 1811, Congress voted not to extend it. Then, following the nation's brush with bankruptcy in the War of 1812, Congress established the second National Bank of the United States in 1816. Those who supported a National Bank maintained that it was necessary to control the amount of unregulated paper money issued by state banks. However, most states opposed branches of the National Bank within their borders. They did not want the National Bank competing with their own banks, and objected to the establishment of a National Bank as an unconstitutional exercise of Congress's power.

The state of Maryland imposed a tax of \$15,000/year on the National Bank, which cashier James McCulloch of the Baltimore branch refused to pay. The case went to the Supreme Court. Maryland argued that as a sovereign state, it had the power to tax any business within its borders. McCulloch's attorneys argued that it was "necessary and proper" for Congress to establish a national bank in order to carry out its enumerated powers.

Chief Justice John Marshall wrote that the Necessary and Proper Clause provided for implied powers, including a power to establish the bank.

Document J: Jackson's Veto Message, July 10, 1832

By the 1830s, the National Bank had experienced several phases of good and bad management, and had weathered charges of corruption. The Bank was a volatile political issue, with many supporters in the East and many detractors in the West and South. The 1828 election of Andrew Jackson as President brought the Bank's most powerful enemy to the White House. He saw the Bank as a greedy monopoly dominated by a powerful elite and foreign interests. The Bank's second charter was set to expire in 1836, but in 1832 Senator Henry Clay proposed re-chartering

it early, explaining a number of benefits and winning approval of his bill in both Houses of Congress. However, Jackson's view of the Bank is summarized in a February 19, 1832 letter to John Coffee: "Unless the corrupting monster should be shraven with its ill-gotten power, my veto will meet it frankly and fearlessly." As promised, Jackson vetoed the bill. Congress could not muster the two-thirds majority needed to overturn the veto, so the bank's charter expired in 1836 and was never renewed.

Document L: *U.S. v. Comstock* (2010), Majority Opinion (7-2)

President George W. Bush signed the Adam Walsh Child Protection and Safety Act into law in 2006. The law required that sex offenders register their whereabouts periodically, created a national sex offender registry, and Section 4248 of the law provided for continued incarceration of certain offenders even after they had completed their criminal sentences. A federal judge had authority to civilly commit individuals who were in the federal prison system if it were proven that they continued to be sexually dangerous.

Just before Graydon Comstock was to have completed his 37-month sentence for receiving child pornography, U.S. Attorney General Alberto Gonzales certified that he remained a sexually dangerous person, which meant that he would not be released. Lower courts had ruled that Section 4248 of the law was unconstitutional, on the basis that it exceeded the constitutional power of Congress. Justice Breyer delivered the opinion of the Supreme Court, determining that the powers implied in the Necessary and Proper Clause built on themselves and granted Congress the power to enact such a law.

MCCULLOCH V. MARYLAND

CONSTITUTIONAL PRINCIPLES

Federalism
Limited government

KEY QUESTION

To what extent does the Necessary and Proper Clause grant a new power to Congress? What does “Proper” mean?

- A United States Constitution, Article 1, Section 8, Clause 18 (1787)
- B An Old Whig (1787)
- C *Brutus* #1 (1787)
- D *Federalist* #33 by Alexander Hamilton (1788)
- E *Federalist* #39 by James Madison (1788)
- F Thomas Jefferson, Opinion on the Constitutionality of the Bill for Establishing a National Bank (1791)
- G Memorandum #1: Edmund Randolph to George Washington (1791)
- H Alexander Hamilton’s Opinion on the National Bank (1791)
- I *McCulloch v. Maryland* (1819), Unanimous Opinion
- J Jackson’s Veto Message, July 10, 1832
- K King Andrew the First cartoon (1833)
- L *U.S. v. Comstock* (2010), Majority Opinion
- M *U.S. v. Comstock* (2010), Dissenting Opinion

FEDERALISM AND THE CONSTITUTION

by Ilya Somin, Associate Professor of Law, George Mason University School of Law

The scope of federal government power under the Constitution has been a major point of controversy since the beginning of the Republic. As early as the 1790s, the Founding Fathers engaged in a vehement debate among themselves over whether Congress had the authority to establish a national bank. This was the start of a longstanding argument between those who argue that freedom and prosperity are best promoted by political decentralization and those who believe that a powerful central government is needed to ensure progress and prevent state governments from undermining the national interest.

The debate over the scope of federal power is often described as a conflict between national authority and “states’ rights.” But it may be more appropriately considered a conflict over the extent of congressional authority under the Constitution, regardless of whether the states benefit from restrictions on federal power or not. As the Supreme Court has pointed out in a recent unanimous decision, limits on federal authority are intended to protect “the freedom of the individual” as well as the authority of state governments. Moreover, state governments often support extensions of federal power, especially federal spending programs that transfer resources to the states themselves.

The most common view of the Commerce Clause during the Founding era was that the Clause gave Congress the authority to regulate interstate movement and trade in goods and services.

Today’s federal government derives the lion’s share of its authority from three clauses of the Constitution: the Commerce Clause, the Necessary and Proper Clause, and the Spending Clause. The interpretation of each has been much debated.

The Commerce Clause

The Commerce Clause gives Congress the power to regulate “Commerce ... among the several states,” as well as with foreign nations and Indian tribes. While there was some disagreement over its interpretation during the Founding era, the most common view at that time was that the Clause gave Congress the authority to regulate

interstate movement and trade in goods and services. In the famous 1824 case of *Gibbons v. Ogden*, the Supreme Court interpreted the Clause broadly enough to allow Congress to regulate interstate steamboat routes. Chief Justice John Marshall’s opinion noted that the Clause gives Congress “plenary” power to regulate any “commerce which concerns more states than one.” But he also emphasized that federal power under the Clause does not extend to many types of economic legislation. The latter include “[i]nspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State.” Although these sorts of laws “may have

a remote and considerable influence on commerce,” they are not themselves regulations of interstate trade, and therefore did not come within the scope of the Commerce Clause.

In the nineteenth and early twentieth centuries, the Supreme Court continued to enforce a relatively narrow interpretation of the Commerce Clause. It denied Congress the power to regulate activities such as agriculture and manufacturing, which had an impact on interstate trade, but were not themselves interstate commerce.

Critics of the Court increasingly argued that the Commerce Clause should be interpreted more broadly, in order to permit federal regulation of various economic activities that they believed to be essential in a modern, integrated economy. The crisis of the Great Depression reinforced these criticisms. Many believed that the Depression had arisen because of insufficient federal regulation of the economy.

In the early 1930s, Congress began to enact a wide range of new economic regulations that tested the limits of the Court’s Commerce Clause jurisprudence. Defenders of the new laws claimed that they were needed to deal with the economic crisis, and that allegedly antiquated legal categories should not stand in their way. As President Franklin D. Roosevelt famously put it, modern economic legislation should not be constrained by a “horse-and-buggy definition of interstate commerce.”

At first, the Supreme Court struck down many of the new laws. In its unanimous decision in *Schechter Poultry Corp. v. United States* (1935), the Court invalidated the National Industrial Recovery Act. The NIRA – probably the most sweeping economic regulation in American history – had established cartel-like wage and price controls over almost the entire nonagricultural economy of the United States. It was based on the theory – since rejected by most modern economists – that the Depression was caused by “overproduction” that had driven prices too low, and that prosperity would return if the federal government could increase producer income by raising prices to a higher level. The Court’s rejection of the NIRA and several other prominent New Deal laws led to a major political confrontation between the president and Congress on one hand and the judiciary on the other.

By 1937, however, the Supreme Court largely abandoned its opposition to most New Deal measures and began to interpret the Commerce Clause more broadly. Scholars differ on the extent to which this “switch in time” was caused by political pressure on the Court brought to bear by President Roosevelt’s plan to “pack” the Court by appointing new justices willing to uphold his policies.



Waiting for relief checks. Calipatria, California. Image courtesy Library of Congress Prints and Photographs Division (LC-USF34-016123-C).

In 1942, a Court by then largely composed of Roosevelt appointees, decided *Wickard v. Filburn*, a sweeping ruling that set the seal on the New Deal transformation of Commerce Clause doctrine. In *Wickard*, the Court concluded that Congress could use the Commerce Clause to restrict the amount of wheat that farmers can grow, even in a case where the wheat in question never crossed state lines and was never sold in any market. According to the Court, Congress could restrict such wheat production because doing so had an impact on interstate commerce in wheat. A farmer forbidden to grow his or her own wheat is more likely to purchase additional wheat in interstate commerce. By artificially restricting the production of wheat, Congress hoped to increase its price, and thereby raise the sagging profits of farmers around the country.

The Depression-era cases illuminate the real-world stakes of constitutional federalism issues. Defenders of the challenged New Deal laws argued that they were essential to alleviating an economic crisis that left millions in poverty and unemployed. Opponents argued that much of the new legislation actually made the crisis worse. For example, NIRA raised prices and may have increased unemployment, while the wheat law at issue in *Wickard* raised the price of food at a time when many workers were already having trouble making ends meet. To this day, specialists continue to debate whether the New Deal-era increases in federal power created more benefit than harm.

After *Wickard*, many observers believed that there were no longer any meaningful limits on Congress' powers under the Commerce Clause. Over fifty years passed before the next Supreme Court decision striking down a federal law because it exceeded congressional authority under the Clause. In *United States v. Lopez* (1995), the Court struck down a federal law banning gun possession near a school zone. It reasoned that this law was not authorized by the Commerce Clause because it did not regulate any kind of "economic activity." In *United States v. Morrison* (2000), the Court used the same reasoning to invalidate a law allowing victims of gender-motivated violence to sue their attackers in federal court.

Those who hoped that *Lopez* would lead to strong judicial enforcement of limits on federal power were dealt a major setback by the Court's 2005 decision in *Gonzales v. Raich*. In that case, the Court ruled that the Commerce Clause allowed Congress to forbid the growth and possession of medical marijuana even if the marijuana in question was not produced by a commercial enterprise, had never crossed state lines, and had not been sold in any market even within a single state. The majority reasoned that marijuana possession and production can be regulated because it is an "economic activity," which it defined as any activity involving the "the production, distribution, and consumption of commodities." Few if any activities fall outside this broad definition.

However, *Raich* arguably still left open the possibility that Congress' authority might not extend far enough to cover regulations that were not targeted at any activity at all, but instead forced individual citizens to engage in activities that they would otherwise have avoided. This was the main issue at stake in the individual health insurance mandate decided by the Court in June 2012. That important case, *NFIB v. Sebelius*, is addressed in a separate essay in this volume **Federalism and the Health Care Case** (p. 57).

The Necessary and Proper Clause

The Necessary and Proper Clause gives Congress the power to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States.” It is not a free-standing grant of power, but rather was intended to give Congress the power to enact laws needed to “carry into execution” the various powers granted to the federal government by other parts of the Constitution.

The wording of the Clause suggests that a law authorized by it must meet two separate requirements: it must be “necessary” to the execution of some power granted to the federal government, and also “proper.” Since at least the 1790s, debate has raged over the meaning of these two terms. In the early republic, debate over the interpretation of the Clause focused on the constitutionality or lack thereof of the First Bank of the United States. When the Bank was first proposed in 1790, James Madison and Thomas Jefferson argued that its establishment was not authorized by the Necessary and Proper Clause because the word “necessary” should be interpreted to include only such measures as are truly essential to the implementation of other federal powers. By contrast, Secretary of the Treasury Alexander Hamilton defended the Bank, arguing that “necessary” should be interpreted to include any law that is “useful” or “convenient.” The issue of the constitutionality of the Bank did not reach the Supreme Court until 1819, when the justices decided the case of *McCulloch v. Maryland*. In a famous opinion by Chief Justice Marshall, the Court unanimously upheld the constitutionality of the Bank and endorsed Hamilton’s interpretation of “necessary.” At the same time, however, Marshall noted that his reasoning was not a blank check for assertions of federal power. The Clause, he wrote, authorized only such laws as promote “legitimate” ends that are “within the scope of the constitution,” and use “means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution.”

McCulloch’s broad definition of “necessary” did not win universal acceptance. Critics of federal power such as President Andrew Jackson did not accept Marshall’s reasoning. In an 1832 message accompanying his veto of a bill reauthorizing the Bank, Jackson made clear his disagreements with *McCulloch*.

Despite this continuing controversy, the Court has repeatedly endorsed Marshall and Hamilton’s broad definition of “necessary,” most recently in *United States v. Comstock* (2010) where it emphasized that any measure qualifies as “necessary” under the Clause if it is “rationally related” to the implementation of some other federal power.

The Court has been far less clear in its interpretation of the word “proper.” Hamilton, Madison, and other Founders all agreed that propriety imposed restrictions separate from those of necessity. A measure that is “necessary” might still be declared unconstitutional on the grounds that it is not “proper.” The Court has also ruled in several cases that these are two distinct requirements. But it has never provided anything approaching a complete definition of “proper.” In the recent *Comstock* case, the Court was again unclear in its interpretation of “proper,” even as it reiterated its endorsement of a broad definition of “necessary.”

There is considerable disagreement over the issue among academic commentators. Among the more widely accepted interpretations of the term is the idea that a “proper” law at the very least cannot be justified by a rationale that would give Congress virtually unlimited authority. As Madison put it in a 1791 speech, “[w]hatever meaning this clause may have, none can be admitted that would give an unlimited discretion to Congress.” The interpretation of “proper” played a key role in the 2012 health insurance mandate case, *NFIB v. Sebelius*.

James Madison argued that the power to spend for the general welfare only gave Congress the authority to spend money for the purpose of implementing Congress’ other enumerated powers.

The Spending Clause

The Spending Clause gives Congress the power to impose taxes to “pay the Debts and provide for the common Defence and general Welfare of the United States.”¹ The Clause seems to give Congress the authority to raise and spend tax revenue for three distinct purposes: providing for the common defense, paying the debts of the federal government, and promoting the “general welfare.” The meaning of this last phrase – often called the “General Welfare Clause” – has been the cause of repeated controversy. James Madison argued that the power to spend for the general welfare only gave Congress the authority to spend money for the purpose of implementing Congress’ other enumerated powers. By contrast, Alexander Hamilton claimed that the General Welfare Clause created a separate and distinct power to spend money for general purposes. However, he did not contend that Congress could spend money for any purpose it liked. Rather, it could only do so for purposes that are “general, not local.” During the nineteenth and early twentieth centuries, the Supreme Court never clearly resolved the dispute over the meaning of “general welfare.” Outside the courts, however, presidents such as James Madison, James Buchanan, and Grover Cleveland vetoed federal spending bills that allocated money for local construction projects on the grounds that such expenditures were not for the “general welfare,” but instead merely benefited local interests.

During the 1930s, Congress enacted a wide range of new spending programs transferring money to the states for the purpose of trying to combat the effects of the Great Depression. In a series of cases addressing constitutional challenges to these programs, the Court first endorsed Hamilton’s broad interpretation of “general welfare” in preference to Madison’s narrow one, and then went even further than Hamilton envisioned – concluding that the “general welfare” includes almost any purpose so defined by Congress. This effectively jettisoned Hamilton’s distinction between spending for “general” and “local” projects. As a result, Congress has been able to allocate funds for a variety of local “porkbarrel” projects, such as the notorious “Bridge to Nowhere,” an extremely expensive federally financed bridge that served only a handful of people in an isolated part of Alaska.

¹ The Clause is often also referred to as the Tax Clause or the Taxing and Spending Clause.

Although the post-1930s Supreme Court has been unwilling to impose restrictions on the purposes for which Congress spends money, it has enforced some conditions on federal grants to state governments. Such grants have grown enormously since the 1930s, currently encompassing over 25% of all state government spending. Nearly all federal grants to state governments come with conditions that state officials must meet if they are to qualify for the money.

In *South Dakota v. Dole* (1987), the Supreme Court upheld a federal law denying 5% of federal highway funds to states that refused to enact a law raising their drinking age to 21 (a measure the federal government claimed was related to promoting highway safety). The Court ruled that Spending Clause measures must meet four requirements in order to be constitutional. They must 1) promote the “general welfare,” 2) be “related” to a federal interest, 3) be clear and unambiguous, and 4) not violate any other part of the Constitution. The first requirement means little in practice because the Court defers to Congress in deciding what promotes the “general welfare”; the second has always been applied very deferentially; and the fourth is largely redundant – a spending bill that violated some unrelated part of the Constitution would be invalidated even without it. However, the Supreme Court has strongly enforced the requirement that conditions attached to federal grants to state governments must be clear, and has sometimes refused to enforce conditions that are excessively vague.

Dole also noted that a spending condition may be unconstitutional if it is so onerous as to be “coercive.” Unfortunately, the Court did not explain what it meant by this phrase, and did not do so in later decisions until 2012. So far, lower courts have struck down very few spending conditions on this basis.

The issue of coercion is important to the future of American federalism because states are increasingly dependent on the federal government for much of their funding. This enables Congress to use federal grants as leverage to force dissenting states to conform to the views of the national majority.

The Court began to clarify the meaning of “coercion” in its decision addressing the constitutionality of spending conditions attached to the Affordable Care Act of 2010. The Court struck down a provision of the Act that would have stripped states of all their Medicaid funds (which fund health care for the poor) unless they agree to greatly expand program eligibility to millions of additional people, including those with incomes up to 33% above the poverty line. Since Medicaid was established in 1965, most states have become heavily dependent on Medicaid funding.

In its closely-divided decision in *NFIB v. Sebelius*, the Court invalidated claims that the Affordable Care Act’s individual mandate provision is constitutional under the Commerce Clause, and the Necessary and Proper Clause, but upheld the requirement that people buy health care insurance under the Tax Clause. Continued controversy surrounding the Court’s decision in this case reflects the fact that constitutional federalism remains a divisive issue for both the Supreme Court and American society as a whole.

DOCUMENT A

United States Constitution, Article 1, Section 8, Clause 18 (1787)

The Congress shall have Power ...To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

- 1. Underline the most important words and phrases in this passage and put them in your own words**

DOCUMENT B

An Old Whig (1787)

My object is to consider that undefined, unbounded and immense power which is comprised in the following clause: "And, to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this constitution in the government of the United States; or in any department or offices [officer] thereof." Under such a clause as this can any thing be said to be reserved and kept back from Congress? ...[B]esides the powers already mentioned, other powers may be assumed hereafter as contained by implication in this constitution. The Congress shall judge of what is necessary and proper in all these cases and in all other cases – in short in all cases whatsoever.

Where then is the restraint? How are Congress bound down to the powers expressly given? What is reserved or can be reserved?

- 1. State in your own words the main concerns of the author of this passage.**

DOCUMENT C

Brutus #1 (1787)

[T]he legislature of the United States are vested with the great and uncontrollable powers, of laying and collecting taxes, duties, imposts, and excises. ...And are by this clause invested with the power of making all laws, *proper and necessary*, for carrying all these into execution; and they may so exercise this power as entirely to annihilate all the state governments, and reduce this country to one single government.

[I]t is a truth confirmed by the unerring experience of ages, that every man, and every body of men, invested with power, are ever disposed to increase it, and to acquire a superiority over every thing that stands in their way. This disposition, which is implanted in human nature, will operate in the federal legislature to lessen and ultimately to subvert the state authority, and having such advantages, will most certainly succeed, if the federal government succeeds at all.

- 1. According to Brutus, what governments are in danger?**
- 2. What observation does Brutus make about human nature?**
- 3. What does Brutus say will necessarily happen if the federal government is to succeed at all? Why?**

DOCUMENT D

Federalist #33 by Alexander Hamilton (1788)

These two clauses [the “necessary and proper clause” and the “supremacy clause”] have been the sources of much virulent invective and petulant declamation against the proposed constitution, they have been held up to the people, in all the exaggerated colours of misrepresentation, as the pernicious engines by which their local governments were to be destroyed and their liberties exterminated — as the hideous monster whose devouring jaws would spare neither sex nor age, nor high nor low, nor sacred nor profane; and yet strange as it may appear, after all this clamour, to those who may not have happened to contemplate them in the same light, it may be affirmed with perfect confidence, that the constitutional operation of the intended government would be precisely the same, if these clauses were entirely obliterated, as if they were repeated in every article....

If the Federal Government should overpass the just bounds of its authority, and make a tyrannical use of its powers; the people whose creature it is must appeal to the standard they have formed, and take such measures to redress the injury done to the Constitution, as the exigency may suggest and prudence justify. The propriety of a law in a constitutional light, must always be determined by the nature of the powers upon which it is founded

- 1. According to Hamilton, why are these two clauses not cause for concern?**
- 2. What must the people do if the government becomes tyrannical?**

DOCUMENT E

Federalist #39 by James Madison (1788)

But if the government be national with regard to the operation of its powers, it changes its aspect again when we contemplate it in relation to the *extent* of its powers. The idea of a national government involves in it, not only an authority over the individual citizens, but an indefinite supremacy over all persons and things, so far as they are objects of lawful government. ...In this relation, then, the proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects. It is true that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide, is to be established under the general government. But this does not change the principle of the case. The decision is to be impartially made, according to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure this impartiality....

- 1. According to Madison , the government established by the Constitution has “an indefinite supremacy over all persons and things” as long as what?**
- 2. What does Madison say is the role of the tribunal (the Supreme Court) in deciding questions between the federal and state governments?**

DOCUMENT F

Thomas Jefferson, Opinion on the Constitutionality of the Bill for Establishing a National Bank (1791)

I consider the foundation of the Constitution as laid on this ground that “all powers not delegated to the U.S. by the Constitution, not prohibited by it to the states, are reserved to the states or to the people” [Tenth Amendment]. To take a single step beyond the boundaries thus specially drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition.

The incorporation of a bank, and other powers assumed by this bill have not, in my opinion, been delegated to the U.S. by the Constitution. They are not among the powers specially enumerated...

They are not to do anything they please to provide for the general welfare. ...[G]iving a distinct and independent power to do any act they please which may be good for the Union, would render all the preceding and subsequent enumerations of power completely useless. It would reduce the whole instrument to a single phrase that of instituting a Congress with power to do whatever would be for the good of the United States; and, as they would be the sole judges of the good or evil, it would be also a power to do whatever evil they please and this can never be permitted.

- 1. Name at least two main reasons that Jefferson gave for *not* interpreting the powers of Congress broadly.**

DOCUMENT G

Memorandum #1: Edmund Randolph to George Washington (1791)

February 12, 1791

The Attorney General of the United States in obedience to the order of the President of the United States, has had under consideration the bill, entitled “An Act to incorporate the Subscribers to the Bank of the United States,” and reports on it, in point of constitutionality, as follows...

The general qualities of the federal government, independent of the Constitution and the specified powers, being thus insufficient to uphold the incorporation of a bank, we come to the last enquiry, which has been already anticipated, whether it [a National Bank] be sanctified by the power to make all laws which shall be necessary and proper for carrying into execution the powers vested by the Constitution. To be necessary is to be incidental, or in other words may be denominated the natural means of executing a power.

The phrase, “and proper,” if it has any meaning, does not enlarge the powers of Congress, but rather restricts them. For no power is to be assumed under the general clause but such as is not only necessary but proper, or perhaps expedient also. ...However, let it be propounded as an eternal question to those who build new powers on this clause, whether the latitude of construction which they arrogate will not terminate in an unlimited power in Congress?

In every aspect therefore under which the attorney general can view the act, so far as it incorporates the Bank, he is bound to declare his opinion to be against its constitutionality.

- 1. According to Randolph’s reasoning, how should the word, “necessary” be defined?**
- 2. In your own words, explain Randolph’s view that “The phrase, ‘and proper,’ if it has any meaning, does not enlarge the powers of Congress, but rather restricts them.”**

DOCUMENT H

Alexander Hamilton's Opinion on the National Bank (1791)

It is not denied that there are implied well as express powers, and that the former are as effectually delegated as the latter....

Then it follows, that as a power of erecting a corporation may as well be implied as any other thing, it may as well be employed as an instrument or mean of carrying into execution any of the specified powers, as any other instrument or mean whatever. The only question must be in this, as in every other case, whether the mean to be employed or in this instance, the corporation to be erected, has a natural relation to any of the acknowledged objects or lawful ends of the government. Thus a corporation may not be erected by Congress for superintending the police of the city of Philadelphia, because they are not authorized to regulate the police of that city. But one may be erected in relation to the collection of taxes, or to the trade with foreign countries, or to the trade between the States, or with the Indian tribes; because it is the province of the federal government to regulate those objects, and because it is incident to a general sovereign or legislative power to regulate a thing, to employ all the means which relate to its regulation to the best and greatest advantage....

To establish such a right, it remains to show the relation of such an institution to one or more of the specified powers of the government. Accordingly it is affirmed, that it has a relation more or less direct to the power of collecting taxes; to that of borrowing money; to that of regulating trade between the states; and to those of raising, supporting & maintaining fleets & armies....

The constitutionality of all this would not admit of a question, and yet it would amount to the institution of a bank, with a view to the more convenient collection of taxes. ... To deny the power of the government to add these ingredients to the plan, would be to refine away all government.

1. Below are paraphrases of steps that Hamilton followed in order to reason that creation of the first national bank was a constitutional exercise of the power of Congress. Number them in the correct order to follow Hamilton's reasoning.

- ___ Implied powers "are as effectually delegated as" the expressed powers.
- ___ Certain expressed powers are related to establishment of a national bank.
- ___ Implied powers are inherent in the definition of government: "To deny the power of the government to add these ingredients to the plan, would be to refine away all government."
- ___ We must determine whether there is a natural relation between the national bank and one or more of the lawful purposes of government.

***McCulloch v. Maryland (1819)***

Although, among the enumerated powers of Government, we do not find the word “bank” or “incorporation,” we find the great powers, to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation are entrusted to its Government. ... [I]t may with great reason be contended that a Government entrusted with such ample powers, on the due execution of which the happiness and prosperity of the Nation so vitally depends, must also be entrusted with ample means for their execution. ...

Does [the word, “necessary”] always import an absolute physical necessity...? We think it does not. ...[W]e find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end is generally understood as employing any means calculated to produce the end, and not as being confined to those single means without which the end would be entirely unattainable....

[It is clear] that any means adapted to the end, any means which tended directly to the execution of the Constitutional powers of the Government, were in themselves Constitutional. ...

We think so for the following reasons:

1st. The clause is placed among the powers of Congress, not among the limitations on those powers.

2d. Its terms purport to enlarge, not to diminish, the powers vested in the Government. It purports to be an additional power, not a restriction on those already granted. ...

Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are Constitutional....

That the power to tax involves the power to destroy [is a proposition] not to be denied...

The Court has [determined] that the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared.

We are unanimously of opinion that the law passed by the Legislature of Maryland, imposing a tax on the Bank of the United States is unconstitutional and void.

- 1. How did Chief Justice John Marshall interpret the following clauses of the Constitution in the unanimous opinion in *McCulloch v. Maryland*: Commerce Clause, the Necessary and Proper Clause, and the Supremacy Clause?**
- 2. Did the opinion in this case align more with the reasoning of Hamilton, Jefferson, or Randolph?**

DOCUMENT J

Jackson's Veto Message, July 10, 1832

To the Senate.

...It is maintained by the advocates of the bank that its constitutionality in all its features ought to be considered as settled by precedent and by the decision of the Supreme Court. To this conclusion I can not assent. ...

The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. ... The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve. ...

I understand them to have decided that inasmuch as a bank is an appropriate means for carrying into effect the enumerated powers of the General Government, therefore the law incorporating it is in accordance with that provision of the Constitution which declares that Congress shall have power "to make all laws which shall be necessary and proper for carrying those powers into execution." Having satisfied themselves that the word "necessary" in the Constitution means "needful," "requisite," "essential," "conducive to," and that "a bank" is a convenient, a useful, and essential instrument in the prosecution of the Government's "fiscal operations," they conclude that to "use one must be within the discretion of Congress " ...

...Under the decision of the Supreme Court, therefore, it is the exclusive province of Congress and the President to decide whether the particular features of this act are *necessary* and *proper* in order to enable the bank to perform conveniently and efficiently the public duties assigned to it as a fiscal agent, and therefore constitutional, or *unnecessary* and *improper*, and therefore unconstitutional.

... [M]any of the powers and privileges conferred on it can not be supposed necessary for the purpose for which it is proposed to be created, and are not, therefore, means necessary to attain the end in view, and consequently not justified by the Constitution....

It is to be regretted that the rich and powerful too often bend the acts of government to their selfish purposes. There are no necessary evils in government. Its evils exist only in its abuses. If it would confine itself to equal protection, and, as Heaven does its rains, shower its favors alike on the high and the low, the rich and the poor, it would be an unqualified blessing. In the act before me there seems to be a wide and unnecessary departure from these just principles. ...

Most of the difficulties our Government now encounters and most of the dangers which impend over our Union have sprung from an abandonment of the legitimate objects of Government by our national legislation, and the adoption of such principles as are embodied in this act. ...

1. What are the main objections that President Jackson raised against the National Bank?

DOCUMENT K

King Andrew the First cartoon, 1833



1. Why was Jackson attacked as a tyrant in this cartoon?
2. Was Jackson trying to expand or limit the role of the national government?

DOCUMENT L

U.S. v. Comstock (2010), Majority Opinion

The Necessary and Proper Clause grants Congress broad authority to enact federal legislation. Nearly 200 years ago, ...Chief Justice Marshall emphasized that the word “necessary” does not mean “absolutely necessary.” ...

Congress has the implied power to criminalize any conduct that might interfere with the exercise of an enumerated power... we must reject [the] argument that the Necessary and Proper Clause permits no more than a single step between an enumerated power and an Act of Congress....

To be sure, as we have previously acknowledged, the Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses; first, because the Framers would not have conceived that *any* government would conduct such activities; and second, because the Framers would not have believed that the *Federal* Government, rather than the States, would assume such responsibilities. Yet the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government’s role.

The Framers demonstrated considerable foresight in drafting a Constitution capable of such resilience through time. As Chief Justice Marshall observed nearly 200 years ago, the Necessary and Proper Clause is part of “a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.”

- 1. How does this ruling interpret the Necessary and Proper Clause?**
- 2. Who or what should be the one to do the “adapting” of the Constitution Chief Justice Marshall referred to 200 years ago?**

DOCUMENT M

U.S. v. Comstock (2010), Dissenting Opinion

The Constitution plainly sets forth the “few and defined” powers that Congress may exercise. Article I “vest[s]” in Congress “[a]ll legislative Powers herein granted,” §1, and carefully enumerates those powers in §8. The final clause of §8, the Necessary and Proper Clause, authorizes Congress “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” Art. I, §8, cl. 18. As the Clause’s placement at the end of §8 indicates, the “foregoing Powers” are those granted to Congress in the preceding clauses of that section. The “other Powers” to which the Clause refers are those “vested” in Congress and the other branches by other specific provisions of the Constitution.

...Congress lacks authority to legislate if the objective is anything other than “carrying into Execution” one or more of the Federal Government’s enumerated powers.

This limitation was of utmost importance to the Framers....Referring to the “powers declared in the Constitution,” Alexander Hamilton noted that “it is expressly to execute these powers that the sweeping clause ... authorizes the national legislature to pass all *necessary* and *proper* laws.” James Madison echoed this view, stating that “the sweeping clause ... only extend[s] to the enumerated powers.” Statements by delegates to the state ratification conventions indicate that this understanding was widely held by the founding generation....

I respectfully dissent

1. On what basis does the dissenting opinion disagree with the majority’s interpretation of the Necessary and Proper clause?

DIRECTIONS

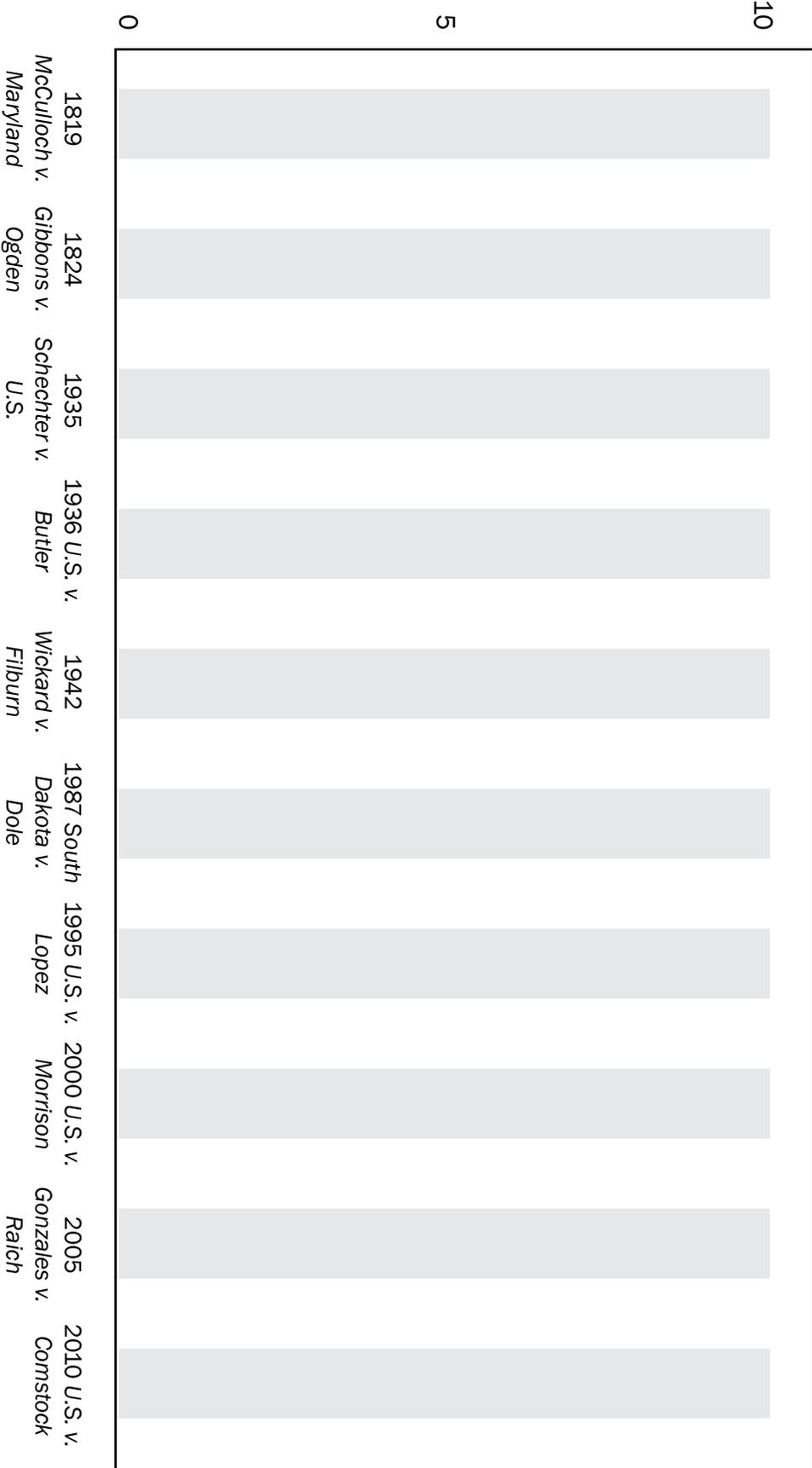
Read the Case Background and Key Question. Then analyze the Documents provided. Finally, answer the Key Question in a well-organized essay that incorporates your interpretations of the Documents as well as your own knowledge of history

KEY QUESTION

To what extent does the Necessary and Proper Clause grant a new power to Congress? What does “Proper” mean?

GRAPHING FEDERAL POWERS

For each case listed on the table below, assign a score on a scale of 1 - 10, showing to what extent federal power changed.





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.

Diana E. Hess is an associate professor of Curriculum and Instruction at the University of Wisconsin-Madison. She is grateful for the helpful feedback on earlier drafts of this article provided by Lee Arbetman, Keith Barton, Jeff Brown, Bebs Chorak, and Simone Schweber.

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://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
<p>Additional notes: How did majority/dissenting opinions align with each attorney's position?</p>		

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	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 1 – FEDERALISM AND THE CONSTITUTION

MCCULLOCH V. MARYLAND (1819)

Document A: United States Constitution, Article 1, Section 8, Clause 18 (1787)

1. Students may suggest that the most important words and phrases are as follows:

all Laws, necessary and proper, foregoing Powers, and all other Powers vested by this Constitution

Document B: An Old Whig (1787)

1. Congress may use the “necessary and proper” clause to expand its power indefinitely. The Constitution’s limitations on the powers of the national government would be irrelevant.

Document C: Brutus #1 (1787)

1. State governments are in danger.
2. People who have power have always been interested in increasing that power.
3. According to Brutus, the federal government, because of all the advantages it has (including the necessary and proper clause), will increase in power and eventually make the state government irrelevant. This will happen, according to Brutus, because the desire to increase power is part of human nature.

Document D: Federalist #33 by Alexander Hamilton (1788)

1. They add no new power to the federal government than that which is already contained in other parts of the Constitution.
2. The people must insist that their government return to the principles of the Constitution.

Document E: Federalist #39 by James Madison (1788)

1. The central government’s jurisdiction extends only to certain enumerated powers and leaves all other powers with the states.
2. In disputes between the two levels, the Supreme Court would make the decision impartially, “according to the rules of the Constitution.”

Document F: Thomas Jefferson, Opinion on the Constitutionality of the Bill for Establishing a National Bank (1791)

Answers may include: He refers to the Tenth Amendment, which provides that any power not delegated to the U.S. by the Constitution belongs to the states or to the people.

He notes that incorporation of a bank is not included in the enumerated powers of Congress.

He explains that interpreting the General Welfare clause broadly would nullify the enumeration of Congress’ powers, and would give Congress the power to do whatever good—or whatever evil—they choose.

ANSWER KEY

Document G: Memorandum #1: Edmund Randolph to George Washington (1791)

1. Necessary—the natural means of executing a power
2. Accept reasoned responses. Students may suggest that a government action could be “necessary,” or the natural means of executing a power, but not be the “proper” (right, correct, best) way to carry out the task. Just because a policy may be a good idea does not mean it is constitutional.

Document H: Alexander Hamilton’s Opinion on the National Bank (1791)

Statements should be arranged in this order:

1. Implied powers “are as effectually delegated as” the expressed powers.
2. We must determine whether there is a natural relation between the national bank and one or more of the lawful purposes of government.
3. Certain expressed powers are related to establishment of a national bank.
4. Implied powers are inherent in the definition of government: “To deny the power of the government to add these ingredients to the plan, would be to refine away all government.”

Document I: *McCulloch v. Maryland* (1819), Unanimous Opinion

1. He explained that creation of a national bank was an appropriate and legitimate means to carry out some of the expressed powers of Congress, including the Commerce Clause. He maintained that the Necessary and Proper Clause enlarges the expressed powers. The Supremacy Clause provides that the national government is supreme over the state governments. For this reason, the states have no power to tax a function of the national government.
2. Hamilton; However—Hamilton noted that the Necessary and Proper Clause was not a blank check for Congress to do whatever it wished.

Document J: Jackson’s Veto Message, July 10, 1832

Answers should include: The Supreme Court is not the only branch of government with the responsibility to determine constitutionality of a law.

The bank gives too many benefits to those who are already rich and powerful, fail to equally protect the poor and working classes.

The bank invades on the powers of the states.

The bank bill demonstrates that the government has abandoned the legitimate goals of government.

Document K: King Andrew the First cartoon (1833)

1. For vetoing the Bank Bill
2. Jackson was trying to limit government’s role. Note the irony—Jackson was attacked as a tyrant for limiting the power/role of the federal government. On the other hand, by vetoing a bill that had been passed by the duly-selected representatives of the states and the people, he was attacked for arguably substituting his will for theirs. It might be argued that, as President, Jackson was just as much a representative of the people as Congress was.

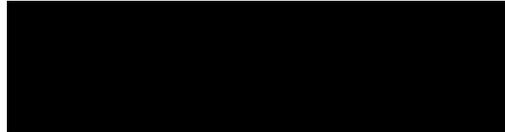
Document L: *U.S. v. Comstock* (2010), Majority Opinion

1. It grants broad authority to Congress to take actions related to enumerated powers. The Constitution was written to allow for the expansion of the federal government’s role.
2. Some students will say that Courts are in the position of adapting the Constitution through judicial opinions that shape how the Constitution is interpreted. Others will say that the adaptation of the Constitution should come by the people through the means it provides for its own adaptation—i.e. the constitutional amendment process.

ANSWER KEY

Document M: *U.S. v. Comstock* (2010), Dissenting Opinion

1. In this opinion written by Justice Thomas, the dissenters quote the Founders to support their argument that the Necessary and Proper Clause grants Congress the power to legislate on only those areas enumerated in the Constitution.



Teaching Tips

1. Suggested responses: marriage and divorce laws, speed limits, education, alcohol/drug regulation, establish local governments, define state crimes, driver's licenses.

Document A: United States Constitution, Article I, Section 8, Clause 1 (1787)

1. Congress may spend to pay for the nation's debts, defense and general welfare.
2. Answers will vary, but students may define "general welfare" as anything that contributes to the common good, peace, health, safety or morals of the American people.

Document B: *Brutus* #6 (1787)

1. Brutus argued that it is a vague concept, and that what qualifies as the "general welfare" is a matter of opinion, having no true definition or limits. He worried that the federal government would end up becoming the judge of the scope of its own powers.
2. Brutus argued that the General Welfare Clause cannot be interpreted as a limitation on the powers of Congress. He wrote that since Congress will be the only real judge of it, they will always make the claim that what they do is in the "general welfare," using it to expand their powers.

3. People may be honest, or they may have bad motives, for arguing that any particular thing supports the "general welfare."

Document C: *Federalist* #41 by James Madison (1788)

1. Madison argued that the specific enumeration of powers that immediately follows the General Welfare (Spending) Clause serves to explain and define the meaning of "general welfare." He wrote that it is absurd to think that "general welfare" has limitless meaning, as Brutus suggested.
2. No. Madison argued that the General Welfare (Spending) Clause is merely a general statement that is limited by the particular powers given to Congress; they may only tax and spend on the realm of powers given to them elsewhere in the Constitution. Those powers listed in the Constitution serve as the definition of what Congress can do in the name of the "general welfare."
3. Depending on the examples that students find, they may support or refute Madison's reasoning. Students' conversation would illustrate the difficulty of interpreting the concept of general welfare.

Document D: *Federalist* #45 by James Madison (1788)

1. The Founders envisioned a system of government in which the national government exercised authority in a few specific areas; all other areas, save a very few items, such as those listed in Article I, Section 10, were to be left to the states.
2. By consulting the Constitution.
3. America's system of federalism, crafted by the Constitution, was designed to give appropriate powers to a central government over all the states, and at the same time to guard against the accumulation of power in a single, national (or central) government at the expense of state/local authority.