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

By Diana E. Hess

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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.

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. 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. 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. 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.
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.  

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 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.

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*).


Go to [http://www.uscourts.gov/courtlinks](http://www.uscourts.gov/courtlinks) for a map showing the federal circuits.

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

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.

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

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

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

DBQ Strategies:

• Write the Key Question on the board and give each student a copy of one document. Ask this question: Does this document help you to answer this question? If so, how? If not, what additional information might you need? Allow students 3-4 minutes to answer these questions. Then, have students pair up, sharing their documents and answering the same questions. Have each pair join another and repeat the process. Finally, bring the entire class together and answer the Key Question as a group.

• Write the Key Question on the board and spend one class period having students analyze documents and answer the scaffolding questions, followed by one class period writing their answers to the key question.

• Divide students into pairs or trios and assign one or more documents per group. Then ask groups to report on their documents to the class, being sure that they explain how their specific documents can help to answer the Key Question.

• Go over DBQs as a large group, using scaffolding questions and key questions as discussion prompts.

• Give students the documents from a case and have them craft a key question.

• Have students complete a Case Briefing Sheet (see p. 231) to reinforce key concepts.

• Have students determine for each document which side would be more likely to use it in oral argument of the case. (See graphic organizers, p. 232.)

• Conduct a Moot Court presentation (see p. 235 for directions).

• Lightning Round Moot Court: This strategy might be especially helpful to provide a quick review of a number of cases. Assign two students to each case-one to present the petitioner’s position and one to present the respondent’s. Each student has two minutes to present his/her position to the entire class, which then must vote on this question: Is the law in question a valid exercise of government power under the relevant constitutional principles?

• Have students conduct research to discover more details about the people involved in a case, and then report to the class.

• Develop an illustrated timeline to depict changes and trends in interpretation of a given constitutional principle.

• Develop political cartoons to highlight the important issues in a case.
ONLINE RESOURCES

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

http://billofrightsinstitute.org/resources/educator-resources/landmark-cases/
www.oyez.org
http://www.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:
________________________________________________________________________________
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How would you decide the case and why? ___________________________________________
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How did the Supreme Court majority decide the case and why? ________________________
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What were the main points raised in any dissenting opinions? _________________________
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What other Supreme Court cases are related in important ways? ______________________
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### Constitutional Issue Evidence Form

**Case Name and Year:**  

Constitutional Issue:  

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# DOCUMENTS SUMMARY

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

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<tr>
<th>Document name &amp; date</th>
<th>Author</th>
<th>Answer to scaffolding question</th>
<th>How each side might use this document to answer the Key Question —OR— What is the main idea of this document?</th>
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<td>Additional notes:</td>
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- How did majority/dissenting opinions align with each attorney's position?
MOOT COURT PROCEDURES

Preparation

- Encourage students to use the background knowledge they have developed. Attorneys and Justices of the U.S. Supreme Court apply a great deal of background and historical knowledge.

- Caution students that “gotcha” questions within the classroom context are not productive. “Justices” should not ask questions that, based on their background and class activities, would not be fair game.

- Decide whether students will be allowed to use online resources via their smartphones during the exercise—there are good arguments both for using and for not using them.

- Recommendation—do not allow “Justices” to interrupt the attorneys in the first time or two that you run moot courts. They can ask their questions at the end of each attorney’s oral arguments.

- Encourage teamwork among “attorneys” in their presentations. Each team should have a lead attorney, but others will help fill in as needed.

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

- Give time for planning: Justices decide what questions they want answered in oral arguments; advocates for each side plan their oral arguments.

- Allow equal time for presentation of each side, including interruptions from Justices (or not—your choice). In the U.S. Supreme Court, each side has 30 minutes, and the Justices interrupt continuously.

- Justices deliberate and announce decision. Deliberation is actually done in strict privacy in the U.S. Supreme Court conference, but you decide for your class.

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

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

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

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

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

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

A good thesis statement—

• Fully addresses all parts of the prompt, while acknowledging the complexity of the issue.

• Clearly takes a side—makes a declarative statement that one thing was more important, more persuasive, etc. than another. Since the verb in the prompt is often something like “assess” or “evaluate,” the thesis statement should show which side the writer takes.

• Suggests a “table of contents” or road map for the essay—shows what elements enter into consideration.

• Begins an essay that is proven by abundant and persuasive facts and evidence.

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

DBQ Do and Don’t

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<th>Steps</th>
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<th>Don’t</th>
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<tr>
<td>1. Analyze the prompt and divide it into its components. A graphic organizer helps with this step.</td>
<td>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.</td>
<td>Neglect part of the prompt because you spent too much time on the part you know more about.</td>
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<tr>
<td>2. Plan to prove your point. It is best to begin by planning the overall structure BEFORE even looking at the documents.</td>
<td>Organize your thoughts before writing the thesis statement. What are the logical points your essay needs to include?</td>
<td>Write a “laundry list” that simply summarizes each document.</td>
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<tr>
<td>Steps</td>
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<td>3. Check the documents to see how you can use them as tools.</td>
<td>Strive to use all the documents; but be sure you accurately understand their main ideas.</td>
<td>Take quotes or ideas out of context to use them in a manner other than the author intended.</td>
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<tr>
<td>4. Ask yourself when writing every paragraph: “How does this help to prove my thesis?”</td>
<td>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?</td>
<td>Use 1st-or 2nd-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?”</td>
</tr>
<tr>
<td>5. Manage time wisely; writing long quotes will eat up thinking time.</td>
<td>Use relevant facts, evidence, proof. A well-chosen brief phrase in quotations and worked into your own sentence is powerful.</td>
<td>Use lengthy quotes. Pad the paper in an attempt to conceal a lack of analysis.</td>
</tr>
<tr>
<td>6. Give credit to sources.</td>
<td>Cite sources using the author’s name and/or document title.</td>
<td>Write “According to Document B,...”</td>
</tr>
<tr>
<td>7. Think as you write!</td>
<td>Let logic and analysis drive the essay.</td>
<td>Let documents drive the essay.</td>
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<tr>
<td>Score (Grade)</td>
<td>Thesis</td>
<td>Analysis (tends to be the most difficult component)</td>
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<tr>
<td>8-9 (95-100)</td>
<td>Contains a well-developed thesis which clearly addresses all aspects of the prompt and shows organizational roadmap.</td>
<td>Effective analysis that shows &amp; proves relationships; fully answers the &quot;so what?&quot; questions; more analytical than narrative.</td>
</tr>
<tr>
<td>5-6-7 (80-85-90)</td>
<td>Contains a thesis which addresses the prompt</td>
<td>Limited analysis; simplistic explanations that do not indicate mastery of the content; may list facts without analysis.</td>
</tr>
<tr>
<td>2-3-4 (65-70-75)</td>
<td>Presents a limited, confused and/or poorly developed thesis</td>
<td>Simplistic explanations that do not indicate mastery of the content; may list facts without analysis.</td>
</tr>
<tr>
<td>0-1 (60 &amp; below)</td>
<td>Contains no thesis or a thesis which does not address the prompt</td>
<td>Shows inadequate or inaccurate understanding of the prompt</td>
</tr>
</tbody>
</table>

The rubric is adapted from AP US History guidelines.

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

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.
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]hatsoever 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*.

**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.
SOUTH DAKOTA V. DOLE (1987)

Case Background

Since the Founding, debate has persisted about the Constitution’s precise division of powers in maintaining America’s system of federalism. Some Anti-Federalists were concerned that the Constitution’s more general clauses might be used by a future Congress to expand federal power into areas that were properly the domain of the states. One of these was the General Welfare (Spending) Clause in Article 1, Section 8, Clause 1: “The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.”

The New Deal marked a turning point as the Congress began to use the Spending Clause on a far grander scale in its response to the Great Depression. In 1933, Congress attempted to manage the nation’s agricultural market by levying a tax on the processors of farm products. The money taken from these processors was to be used to pay federal subsidies to individual farmers who agreed not to farm some of their land. While the Supreme Court struck down this New Deal program in \textit{U.S. v. Butler} as unconstitutional saying that regulation of agriculture was beyond the scope of federal authority, it nevertheless adopted a very broad interpretation of the General Welfare Clause, leaving the door open for future Congresses to use the spending power as a way to influence state action.

In 1984 Congress walked through that door with the passage of the national Minimum Legal Drinking Age Act (MLDA 1984). Congress had provided funding to the states for interstate highways since 1916. But in 1984, the MLDA placed a new condition on the receipt of those funds. Under the MLDA, any state that refused to raise its drinking age to 21 would see its funds decreased by 5%.

Does Congress have the power to make rules about drinking age? The Constitution is silent on this power, and so many would say that it remains with the states under our system of federalism. However, by attaching the drinking-age condition, Congress sought to influence state decision-making via its spending power. Congress asserted that drinking ages affected highway safety, and highway safety was part of the ‘general welfare.’ In \textit{South Dakota v. Dole} (1988), the Court was asked to address whether Congress could attach conditions to money given to states if those conditions were in an area where the federal government has no enumerated power to act.
TEACHING TIPS: SOUTH DAKOTA V. DOLE (1987)

LEARNING OBJECTIVES

- Students understand the major events related to the national Minimum Legal Drinking Age Act (MLDA 1984).
- Students understand and apply constitutional principles at issue in South Dakota v. Dole, to evaluate the Supreme Court’s ruling in that case.

ACTIVITIES

1. Set the stage for analysis of South Dakota v. Dole. Consulting Article 1, Sections 8-10 of the Constitution – the enumeration of powers given to the national government, and limitations to both national and state powers – have students brainstorm a list of the range of powers that the 10th Amendment would seem to “reserve” to the states.

2. Assign appropriate documents for student analysis.

3. Use key question for class discussion or writing assignment, focusing on the constitutional principles involved in the case.

   **Key Question:** Evaluate the extent to which each of these is consistent with the principle of federalism:

   - The Court’s interpretation of the General Welfare (Spending) Clause
   - The attachment of conditions to federal funds given to states

4. Discuss Question 2 of Document H: South Dakota v. Dole, Dissenting Opinion, regarding the differences between a condition and a regulation. How is this distinction related to the principle of federalism?

5. Refer to student responses to Question 2 in Document A, the Taxing and Spending Clause of the U.S. Constitution—a definition of “general welfare”.

   - How did the Supreme Court majority define “general welfare” in South Dakota v. Dole?
   - How did the dissenting opinion define “general welfare”?
   - Compare/contrast students’ definitions with those of the Court.

See Appendix for additional Graphic Organizers.
BACKGROUND INFORMATION ON SOUTH DAKOTA V. DOLE

Documents A–E: United States Constitution and Federalist/Anti-Federalist Papers

The Philadelphia Convention was called, in large part, to deal with the commercial challenges posed by thirteen sovereign states charging each other tariffs, refusing to recognize each others’ currencies, and questioning each others’ systems of weights and measures. The Constitution that emerged on September 17, 1787 created a strong central government (today often called the “federal government”) with limited powers. In the state-by-state ratification conventions that followed, debates immediately centered on just how powerful that central government would be, and what powers were reserved to the states. Anti-Federalists such as Brutus (Document B) argued that the central government created by the Constitution would be powerful enough to endanger the liberties of the people and the authority of the states. Federalists (Documents C and D) maintained that, since the government consisted of enumerated powers, employing a complex system of checks and balances, and always under the control of the people themselves, there should be no concern about individual liberty or the authority of the states. One result of debate during the ratification process was that James Madison agreed to head the task of writing a Bill of Rights to be added to the Constitution. The Tenth Amendment (Document E) clarified the division of power between central government and states.

Document F: United States v. Butler (1936), Majority Opinion (6-3)

During the long financial collapse that began in 1929, many people maintained that the central government needed more power in order to manage the economy and restore the nation to economic health. The 1933 Agricultural Adjustment Act included a provision by which money collected from agricultural processors would be redistributed to farmers who agreed to leave some of their land unplanted. The goal was to reduce production, drive prices up, and increase the amount of money that farmers could receive for their products. The majority opinion, written by Justice Owen Roberts, ruled that the processing tax/redistribution aspect of the law was unconstitutional because it overstepped the powers delegated to the federal government and indirectly forced compliance.

Document G: South Dakota v. Dole (1987), Majority Opinion (7-2)

The national Minimum Legal Drinking Age Act (MLDA ) of 1984 was an effort to deal with the problem of drinking and driving by young people. Varying drinking ages among the states sometimes resulted in drivers crossing state lines to buy alcohol. MLDA provided for the Secretary of Transportation to withhold 5% of the federal highway funding from any state that did not maintain a minimum drinking age of 21. The majority opinion, written by Chief Justice Rehnquist, held that the withholding of 5% of a state’s federal highway funding was not coercive, and the law was a constitutional use of the federal government’s taxing and spending power. States could still choose to forfeit some of their federal highway funds and set a lower drinking age.


Justice O’Connor argued in dissent that Congress was using its taxing and spending power to regulate a decision that belonged to the states — the legal drinking age. Her view was that there was simply not enough connection between regulation of drinking age and construction of highways to justify this law.
KEY QUESTION

Evaluate the extent to which each of these is consistent with the principle of federalism:

- The Court’s interpretation of the General Welfare (Spending) Clause
- The attachment of conditions to federal funds given to states

A United States Constitution, Article I, Section 8, Clause 1 (1787)
B Brutus #6 (1787)
C Federalist #41 by James Madison (1788)
D Federalist #45 by James Madison (1788)
E The Tenth Amendment (1791)
F United States v. Butler (1936), Majority Opinion
G South Dakota v. Dole (1987), Majority Opinion
H South Dakota v. Dole (1987), Dissenting Opinion
I Table: State Minimum Legal Drinking Age—National Highway Traffic Safety Administration (1991)
**DOCUMENT A**

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

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States;

1. For what purposes can Congress spend the tax money it collects?
2. Craft a definition of “general welfare.”

**DOCUMENT B**

*Brutus* #6 (1787)

I would ask ... Are these terms [common defense and general welfare] definite, and will they be understood in the same manner, and to apply to the same cases by every one? No one will pretend they will. It will then be matter of opinion, what tends to the general welfare; and the Congress will be the only judges in the matter.

To provide for the general welfare, is an abstract proposition, which mankind differ in the explanation of ... the most opposite measures may be pursued by different parties, and both may profess, that they have in view the general welfare; and both sides may be honest in their professions, or both may have sinister views.

It is absurd to say, that the power of Congress is limited by these general expressions, to ‘provide for the common defense and general welfare’...The government would always say, their measures were designed and calculated to promote the public good; and there being no judge between them and the people, the rulers themselves must, and would always, judge for themselves.

1. What was Brutus’ primary concern about the meaning of the General Welfare (Spending) Clause of the Constitution?
2. Does the General Welfare (Spending) Clause serve to limit the powers of Congress, or expand them, according to Brutus?
3. Put this passage in your own words: the most opposite measures may be pursued by different parties, and both may profess, that they have in view the general welfare; and both sides may be honest in their professions, or both may have sinister views.
Federalist #41 by James Madison (1788)

It has been urged and echoed, that the power to ... ‘provide for the common defense and general welfare of the United States,’ amounts to an unlimited commission to exercise every power which may be alleged necessary for the common defense or general welfare. Had no other enumeration or definition of the powers of the Congress been found in the Constitution, than the general expressions just cited, the authors of the objection might have had some color [proof] for it...

But what color can the objection have, when a specification of the objects alluded to by these general terms immediately follows, and is not even separated by a longer pause than a semicolon?... For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general power?

Nothing is more natural nor common than first to use a general phrase, and then to explain and qualify it by a recital of particulars. But the idea of an enumeration of particulars which neither explain nor qualify the general meaning, and can have no other effect that to confound and mislead, is an absurdity...

1. How did Madison refute Brutus’ concern that the General Welfare (Spending) Clause grants Congress unlimited power to interpret its meaning?

2. Did Madison view - as Brutus seemingly did - the General Welfare (Spending) Clause as an enumerated power in and of itself, allowing Congress to spend in any way it wishes? What does Brutus say will necessarily happen if the federal government is to succeed at all? Why?

3. Find an example (in current events or other sources) of the style of writing that Madison described here: the use of a general phrase which is then explained and qualified by listing details. Do you agree with Madison’s assertion that separating the details from the general statement leads to “an absurdity”?
**DOCUMENT D**

*Federalist #45 by James Madison (1788)*

The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

1. How does this quotation illustrate our Founders’ vision of the principle of federalism?

2. Following this principle, how do you know what areas of power properly belong with the national government? With the state governments?

3. Against what danger was the system of federalism crafted?

**DOCUMENT E**

*The Tenth Amendment (1791)*

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

1. Rephrase the 10th Amendment, in your own words

2. Does the 10th Amendment adequately address Brutus’ concerns that Congress will interpret the General Welfare (Spending) Clause broadly, to spend and act in areas that are not delegated to it by the Constitution?
United States v. Butler (1936), Majority Opinion

The [General Welfare] clause confers a power separate and distinct from those later enumerated, is not restricted in meaning by the grant of them, and Congress consequently has subsequent power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States ... the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution. But [the spending power is] subject to limitations.

[However] ... the Act [the Agricultural Adjustment Act] invades the reserved rights of the states. It is a statutory plan to regulate and control agricultural production – a matter beyond the powers delegated to the federal government. The tax, the appropriation of funds raised, and the direction for their disbursements are but parts of the plan. They are but means to an unconstitutional end.

The Government asserts that [the Act] is constitutionally sound because the end is accomplished by voluntary cooperation. The regulation is not, in fact, voluntary. ...The amount offered [or withheld] is intended to be sufficient to exert pressure on him to agree to the proposed regulation. The power to confer or withhold unlimited benefits is the power to coerce or destroy. ...At best, it is a scheme for purchasing with federal funds submission to federal regulation of a subject reserved to the states.

Congress has no power to enforce its commands on the farmer to the ends sought by the Agricultural Adjustment Act. It must follow that it may not indirectly accomplish those ends by taxing and spending to purchase compliance.

1. Which interpretation of the General Welfare (Spending) Clause – Brutus’ or Madison’s – does the Supreme Court appear to be adopting in the first paragraph? Explain.

2. Despite adopting a broad interpretation of the General Welfare (Spending) Clause, the Court does spell out a restriction on the way Congress can spend money in areas it does not have the direct power to act. Explain the restriction.

3. Define coercion. How do you know when conditions have become coercive?
South Dakota v. Dole (1987)

The Constitution empowers Congress to ‘lay and collect Taxes … and provide for the common Defense and general Welfare of the United States.’ Incident to this power, Congress may attach conditions on the receipt of federal funds. ...The breadth of this power was made clear in United States v. Butler, ...Thus, objectives not thought to be within Article I’s [enumerated powers] may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.

The spending power is not unlimited, but is instead limited by several general restrictions ...[1] the exercise of the spending power must be in pursuit of ‘the general welfare’ ...[2] if Congress desires to condition the States’ receipt of federal funds, it ‘must do so unambiguously, enabling States to exercise their choice knowingly, ...[3] conditions [must be related] to the federal interest in particular national projects or programs’...[4, given that] other constitutional provisions [do not] provide an independent bar to the conditional grant of federal funds.

Congress found that the differing drinking ages in the States created particular incentives for young persons to combine their desire to drink with their ability to drive, and that this interstate problem required a national solution. The means it chose to address this dangerous situation [withholding 5% of highway funds available to States that refused to raise their drinking age to 21] were reasonably calculated to advance the general welfare. The conditions upon which States receive the funds, moreover, could not be more clearly stated by Congress. By enacting [the National Minimum Legal Drinking Age Act, 1984], Congress conditioned the receipt of federal funds in a way reasonably calculated to address this particular impediment to a purpose for which the funds are expended [a safe interstate highway system].

Our decisions have recognized that, in some circumstances, the financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion.’ Here, however, Congress has directed only that a State desiring to establish a minimum drinking age lower than 21 lose a relatively small percentage [5%] of certain federal highway funds.
Here, Congress has offered relatively mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose. But the enactment of such laws remains the prerogative of the States not merely in theory, but in fact. Even if Congress might lack the power to impose a national minimum drinking age directly, we conclude that encouragement to state action [through the attachment of conditions to federal funds] is a valid use of the spending power.

1. In what way(s) does the Court use the Butler decision to justify the federal government influencing state decisions through the use of its spending power?

2. What restrictions does the Court place on Congress that guide or limit how it may use the spending power?

3. Referring back to your answers to Document D, Federalist #45, and Document E, Amendment 10, is the establishment of a minimum drinking age a power of the national government or the state governments? Or, could it be both? Explain.

4. What does the Court argue with regard to whether federal conditions were “coercive” in directing state decision-making in this area? Do you agree?
South Dakota v. Dole, 1987, Dissenting Opinion

...[T]he Court’s application of the requirement that the condition imposed be reasonably related to the purpose for which the funds are expended is cursory and unconvincing. In my view, establishment of a minimum drinking age of 21 is not sufficiently related to interstate highway construction to justify so conditioning funds for that purpose.

When Congress appropriates money to build a highway, it is entitled to insist that the highway be a safe one. But it is not entitled to insist as a condition of the use of highway funds that the State impose or change regulations in other areas of the State’s social and economic life because of attenuated [weak] or tangential relationship to highway use or safety. Indeed, if the rule were otherwise, the Congress could effectively regulate almost any area of a State’s social, political, or economic life on the theory that use of the interstate transportation system is somehow enhanced.

Rather than a condition determining how federal highway money shall be expended, it is a regulation determining who shall be able to drink liquor. As such, it is not justified by the spending power.

The immense size and power of the Government of the United States ought not obscure its fundamental character. It remains a Government of enumerated powers. Because [the National Minimum Legal Drinking Age Act, 1984] cannot be justified as an exercise of any power delegated to the Congress, it is not authorized by the Constitution.

1. On what basis does the Dissenting Opinion disagree with the Court’s ruling in South Dakota v. Dole?

2. The Dissenting Opinion makes a distinction between a ‘condition’ and a ‘regulation.’ Define each in your own words. In your opinion, does such a distinction matter to the principle of federalism? Why or why not?
## DOCUMENT I

### State Minimum Legal Drinking Age 21 History - National Highway Traffic Safety Administration, 1991


<table>
<thead>
<tr>
<th>State</th>
<th>Date when Minimum Drinking Age was set at 21</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dec. 5, 1933: Repeal of prohibition by 21st Amendment. Most states set their legal drinking age at 21.</td>
<td></td>
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<tr>
<td>Oregon</td>
<td>1933</td>
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<tr>
<td>California</td>
<td>1933</td>
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<td>Washington</td>
<td>1934</td>
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<td>New Mexico</td>
<td>1934</td>
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<tr>
<td>Indiana</td>
<td>1934</td>
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<tr>
<td>Utah</td>
<td>1935</td>
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<td>Nevada</td>
<td>1935</td>
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<td>Pennsylvania</td>
<td>1935</td>
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<tr>
<td>Arkansas</td>
<td>1935</td>
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<tr>
<td>North Dakota</td>
<td>1936</td>
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<tr>
<td>Kentucky</td>
<td>1938</td>
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<tr>
<td>Missouri</td>
<td>1945</td>
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<tr>
<td>Michigan</td>
<td>1978</td>
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<tr>
<td>Illinois</td>
<td>1980</td>
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<tr>
<td>Maryland</td>
<td>1982</td>
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<tr>
<td>New Jersey</td>
<td>1983</td>
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<tr>
<td>Delaware</td>
<td>Jan. 1, 1984</td>
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<tr>
<td>Rhode Island</td>
<td>July 1, 1984</td>
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<td>July 17, 1984: President Reagan signed MLDA</td>
<td></td>
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<tr>
<td>Tennessee</td>
<td>Aug. 1, 1984</td>
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<tr>
<td>Alaska</td>
<td>Nov. 1, 1984</td>
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<tr>
<td>Nebraska</td>
<td>Jan. 1, 1985</td>
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<tr>
<td>Arizona</td>
<td>Jan. 1, 1985</td>
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<tr>
<td>New Hampshire</td>
<td>June 1, 1985</td>
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<tr>
<td>Massachusetts</td>
<td>June 1, 1985</td>
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<tr>
<td>Virginia</td>
<td>July 1, 1985</td>
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<td>Maine</td>
<td>July 1, 1985</td>
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<td>Kansas</td>
<td>July 1, 1985</td>
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<tr>
<td>Florida</td>
<td>July 1, 1985</td>
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<tr>
<td>Connecticut</td>
<td>Sep. 1, 1985</td>
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<tr>
<td>Alabama</td>
<td>Oct. 1, 1985</td>
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<tr>
<td>Oklahoma</td>
<td>Nov. 1, 1985</td>
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<tr>
<td>New York</td>
<td>Dec. 1, 1985</td>
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<tr>
<td>West Virginia</td>
<td>July 1, 1986</td>
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<td>Vermont</td>
<td>July 1, 1986</td>
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<tr>
<td>Wisconsin</td>
<td>Sep. 1, 1986</td>
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<td>Texas</td>
<td>Sep. 1, 1986</td>
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<td>North Carolina</td>
<td>Sep. 1, 1986</td>
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<td>Minnesota</td>
<td>Sep. 1, 1986</td>
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<tr>
<td>Iowa</td>
<td>Sep. 1, 1986</td>
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<td>South Carolina</td>
<td>Sep. 14, 1986</td>
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<td>Georgia</td>
<td>Sep. 30, 1986</td>
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<tr>
<td>Mississippi</td>
<td>Oct. 1, 1986</td>
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<td>Hawaii</td>
<td>Oct. 1, 1986</td>
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<tr>
<td>Louisiana</td>
<td>Mar. 15, 1987</td>
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<td>Montana</td>
<td>Apr. 1, 1987</td>
</tr>
<tr>
<td>Idaho</td>
<td>Apr. 10, 1987</td>
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<tr>
<td>June 23, 1987: Supreme Court announced its ruling in <em>South Dakota v. Dole.</em></td>
<td></td>
</tr>
<tr>
<td>Colorado</td>
<td>Jul. 1, 1987</td>
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<tr>
<td>Ohio</td>
<td>Jul. 31, 1987</td>
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<tr>
<td>South Dakota</td>
<td>Apr. 1, 1988</td>
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<tr>
<td>Wyoming</td>
<td>July 1, 1988</td>
</tr>
</tbody>
</table>
1. What does the data contained in the chart tell you about the diversity of drinking age laws throughout the states prior to the enactment on July 17, 1984 of the National Minimum Legal Drinking Age Act of 1984 (MLDA 1984)? In what ways does this chart illustrate the principle of federalism at work?

2. How many states changed their drinking age to 21 in response to the passage of the MLDA 1984 (i.e. within 3 years of its passage)? How many states did not change their drinking age until the Supreme Court announced its decision in *South Dakota v. Dole* to uphold the MLDA 1984 on June 23, 1987 (i.e. within 1 year of the decision)? What other forces might have influenced states to raise their legal drinking age?

3. In Document G, Majority Opinion, Question 4 you were asked whether you agreed with the Court that the MLDA 1984’s provision to cut 5% of each state’s federal highway funding – if they did not raise their drinking age - was not coercive. Given your interpretation of the data above, have you changed your opinion? Why or why not?

**KEY QUESTION**

Evaluate the extent to which each of these is consistent with the principle of federalism:

- The Court’s interpretation of the General Welfare (Spending) Clause
- The attachment of conditions to federal funds given to states
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.

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.

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.

SOUTH DAKOTA V. DOLE (1987)

Teaching Tips

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 E: The Tenth Amendment (1791)

1. Any power that is either not given to the national government or denied to the states by the Constitution is a power that only states or the people may exercise.

2. Accept reasoned responses. Some students may say that the 10th Amendment seems to provide a bright and clear line with regard to the areas in which Congress may or may not act. The 10th Amendment would seem to adequately address Brutus’ concern. Others may note that the lack of the word “expressly” before “delegated” opens the door to arguments about what powers are delegated. The Articles of Confederation had begun, “Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.” With this context, Brutus may have seen the 10th Amendment as relatively weak.

Document F: United States v. Butler (1936), Majority Opinion

1. Despite declaring the Agricultural Adjustment Act unconstitutional, the Supreme Court does indeed adopt Brutus’ view of the General Welfare (Spending) Clause. In the first paragraph above, the Supreme Court indicates the clause is an enumerated power in and of itself, and is neither qualified nor limited by the enumerated powers that follow it in Article 1, Section 8, as Madison argued it was. The Court does note that it is not, however, an unlimited grant of power (being limited by the notion of “general welfare” itself), but on balance does adopt Brutus’ broad interpretation of it. The Court also notes that Congress cannot use the tax and spending power to regulate matters that are otherwise outside the scope of its authority.

2. Congress may not place conditions on the receipt of federal benefits in a way that is coercive. If Congress attempts to act in an area of direct state authority, it may not do so in a way that has the practical effect of forcing compliance indirectly through the disbursement – or denial – of benefits. Congress may not pursue “unconstitutional ends” through the use of coercive conditions.

3. Accept reasoned responses. Students may say that coercion is the point at which someone is no longer free to act, or genuinely make one’s own decisions. Conditions, demands, pressure or the general environment have created a situation in which the ultimate decision is under someone else’s control.


1. The Court cites Butler’s broad interpretation of the General Welfare (Spending) Clause. The Majority Opinion in Butler ruled that the General Welfare Clause exists independently of the other enumerated powers of Congress, and is neither informed nor limited by them. In South Dakota v. Dole, the Court expands on this interpretation by stating that Congress may achieve objectives that are not within their scope of powers via the Spending Clause by the attachment of conditions to federal funds.

2. The Court placed four restrictions on the attachment of conditions of federal funds. 1) spending must be in pursuit of the “general welfare;” 2) conditions must be clearly stated by Congress, and states must be allowed to make decisions with full knowledge of the conditions they are agreeing to; 3) conditions must be related to national goals and programs; and 4) the conditions do not violate a Constitutional provision.

3. Some will say via the 10th Amendment, the power to institute a minimum drinking age is a state power, as it is not an enumerated power of Congress in Article 1, Section 8. However, it could be both. States might be free to regulate this, so long as they are
not preempted by a federal law.

4. The Court argues that the loss of 5% of federal funds is not coercive, but rather serves as a “mild encouragement” to nudge state action. The Court continues on to say that states are ultimately left free to decide for themselves, despite the potential loss of a relatively small amount of money. Answers will vary as to whether students agree with the Court in this regard.


1. The Dissenting Opinion argues that the condition placed by the Congress on federal highway funds isn’t reasonably related to highway construction, and rather than being a condition is an attempt by Congress to chip away at state authority in a way the Constitution doesn’t allow.

2. Accept reasoned responses.


1. Prior to the passage of the MLDA 1984, only 18 states had made the legal drinking age 21; the remaining 32 states had lower minimum drinking ages. As the power to create a minimum drinking age is a reserved power under the 10th Amendment, federalism flourished in this area, creating a patchwork of drinking ages that differed state-to-state.

2. Twenty-eight states changed their drinking age to 21 within 3 years of the passage of MLDA 1984, presumably as a direct response to its passage. Four states, including South Dakota, changed their drinking age to 21 within 1 year of South Dakota v. Dole, presumably as a direct response to its ruling. Other forces pushing in this direction included an aggressive lobbying and public relations campaign by Mothers Against Drunk Driving. Answers will vary, but many students will now likely interpret the federal government’s action to be coercive, as 28 of 32 states complied within 4 years of the passage of MLDA 1984.

Document A: United States Constitution, Article I, Section 8, Clause 3 (1787)

1. This section gives Congress the power to oversee trade between the states, as well as with foreign countries and the Indian tribes.

2. The Founders were convinced that federal regulation of interstate commerce – in other words, for the national government to make uniform (or “regular”) rules among them) was necessary to ensure that interstate commerce could take place, and that the new nation had a firm financial foundation.

Document B: United States Constitution, Article VI, Section 2 (1787)

1. The Constitution is the supreme law of the land, and no law made by Congress or by the states may contradict it.

Document C: *Gibbons v. Ogden* (1824), Majority Opinion

1. Moving goods on interstate roads, trains, planes, or ships; producing or buying a good or service in one state and selling it in another; interstate banking; etc.

2. The ability of the federal government to make rules for interstate commerce supersedes the power of the states to regulate such commerce. Because of the Supremacy Clause, any state law in conflict with the Constitution is invalid.