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Judges, Presidents, and the People: Who Should Interpret the Constitution?

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Overview & Rationale

"We the People, in order to form a more perfect union... do ordain and establish this Constitution," begins the Preamble to the United States Constitution.

If the People *ordain* and *establish* the Constitution, then who is responsible for *interpreting* this "living" document? [1] Should those who interpret the Constitution also represent the People? Should they be independent from the People? Should the People interpret the Constitution? Should the President, who takes an Oath to "preserve, protect, and defend" the Constitution, also interpret it? Whose interpretation matters?

In modern America, the role of interpreting the Constitution ultimately belongs to the nine Justices of the Supreme Court of the United States. [2] Instead of asking how the Supreme Court interprets the Constitution, why don't we ask *why* they have this right and *whether or not* they should? [3]

I admit to feeling a certain sense of heresy in suggesting that someone besides the Supreme Court should interpret the Constitution. I was educated in the South Carolina public school system and taught to respect the checks and balances of the United States Government from an early age. I was taught that the Constitution is a marvelous, "living" document that evolves over time, through amendments, to ensure continuity of "Blessings of Liberty to Ourselves and to our Posterity." [4] Indeed, that "the People" *ordain* the Constitution always suggested to me a sort of religious reverence for that four-page document. Unfortunately, the "sovereign voice of the People [through amendment] has been heard in the land only sixteen times in two hundred years." [5]

In my own lifetime, the Constitution has only been amended once. For my students, it hasn't been amended at all: I wonder, how "alive" is the Constitution to them?

Indeed, for most students, this epic document is a short stop in our road trip through United States History: We read it. We talk about it. We answer some scenarios on the Bill of Rights. At the end of a week or two, we take a state-required test before it settles in the dust with all of the other obscurely-written stories from Old, Dead, White Guys with Weird Hair.

Still, we find ourselves talking about it from time to time: When a criminal is arrested, he (or she) may invoke his right to remain silent or his right to a trial by jury under the 5th amendment. A gun activist without a license may invoke his/her right to bear arms under the 2nd amendment. A gossiping columnist may publish false information on a celebrity and seek protection from prosecution for slander under the 1st amendment. It is possible that a President may even offer an interpretation of his right to declare war as Commander in Chief. Jay Z interpreted his right to protection from "unreasonable" search and seizure in the song "99 problems."

Debates over *who* interprets the Constitution and *how* the Constitution should be interpreted are at the heart of my curriculum and provide students with a dynamic and evolving portrayal of both the Judicial and Executive Branches of government. In this unit, students will examine the function of judicial review as one of the Supreme Court's "checks" against the executive branch of government and, more specifically, how the executive branch has reacted to this tool. Using primary documents, we will examine in detail how Andrew Jackson, Abraham Lincoln, and Franklin Roosevelt have reacted to the concept of judicial review. While these are not the only Presidents who have questioned the role of the Supreme Court, I hope to offer a framework and starting point by which other discussions and criticisms can be examined.

As a teacher of primarily Hispanic students with recent immigration histories, I believe it is important that my students recognize they can and aught to play an active role in interpreting the Constitution. Indeed, many of my students feel largely disenfranchised from the American political system. Many students say they have been treated "differently" by officials, including teachers and even the police.

On a broader level, how can a Congress that is 85% white represent the interests of a high school that is 93% Hispanic? [6] As you might imagine, it is difficult for me to explain that the U.S. Government is truly representative of "the People." It's not as if any Mexican's assisted in drafting the Constitution: Why should my students assume that it protects their interests? Another question arose for me in the 2012 school year: "Why, Mr. Holder, aren't any Mexicans running for President?"

In the spirit of helping students become informed, conscientious citizens of our country, I believe it is important for students to access and engage in these debates first-hand, and I hope that my curriculum will provide a process and framework for helping students engage in the issue of judicial authority.

Students will read Supreme Court opinions and decisions in order to develop their critical reading skills and will pay special attention to the text structure of complex arguments. Students will also examine political cartoons, Presidential speeches, letters, and political commentary, past and present. Students will develop their abilities to locate, cite, and logically use evidence. They will compare and contrast the views of competing parties and will evaluate multiple sources by origin, type, and author's purpose. Ultimately, students will write their own opinions from the perspective of a Supreme Court Justice and as a President.

Constitutional Powers

As a highly procedural document, the Constitution is verb-dense and assigns a variety of specific actions, roles, and responsibilities to the Legislative, Executive, and Judicial branches of government. That there is a system of checks-and-balances between the three branches is well-known and well-discussed. [7] My unit will

focus specifically upon the Supreme Court's ability to "check" the power of the presidency through judicial review as well as Executive reactions, past and present, to this power. Before we can begin a discussion of how the Judicial branch structures the power of the Executive, it is crucial to develop a working definition and understanding of both Executive and Judicial power in particular regard to their power, either explicit or implicit, of Constitutional interpretation.

Executive Powers

Articles II and III of the Constitution detail the roles of the Executive and Judicial branches of government. Based on Article II of the Constitution, Clinton Rossiter summarized the President's five key roles: Commander in Chief, Chief Executive, Chief Diplomat, Chief of State, and Chief Legislator. [8] Of these roles, that of Chief Legislator is perhaps the most perplexing since it can only be inferred from the President's other roles and responsibilities.

Clinton Rossiter argued that the President *alone* is capable "in a political, constitutional, and practical position" to provide external leadership to the Legislative branch of government. [9] As the President is required to "take Care that the Laws be faithfully executed," he must necessarily have some operative understanding and interpretation of what the laws mean under the Constitution. [10]

Moreover, in the age of a two-party system, whereby the Legislative branch may sometimes be at odds, it may seem appropriate that the President be capable of "directing" Congress and the Senate in areas of disagreement. Barack Obama seemed to share this understanding a President's role prior to his election: "I think that there's a tradition of us working together [in Congress] to make sure that we are dealing with the threats that are out there and that we are building a consensus here in the United States.That's the kind of approach I intend to take when I'm president of the United States." [11]

The President, then, appears to play a key role in building consensus, especially when partisan politics may slow the legislative process. It seems, then, that the President plays a key role in both shaping and executing the laws under the Constitution.

Should the President, then, also have final or equal authority in interpreting the Constitution as the other branches?

Judicial Powers: Interpreting the Third Branch

Article III of the Constitution specifies that "judicial Power of the United States shall be vested in one supreme Court" and that it may create inferior courts as necessary." [12] The jurisdiction, or legal authority, of the Supreme Court extends "to all Cases, in Law and Equity, arising under this Constitution." [13] Article III, however, is silent in regard to what happens for issues that *do not* arise under the Constitution. Moreover, it provides no directions or recommendations for *how* the court should make its decisions or by what process it should select, hear, review, and decide cases.

Though modern scholars still debate the meaning of Article III, it was perhaps most hotly debated by the founders themselves. Debates centered largely upon who had the *duty* of interpretation and whether or not there were "checks" upon interpretation.

The Power of Interpretation

In recording notes from the Constitutional Convention, James Madison noted Elbridge Gerry's concern on June 4 th , 1787 that the Judiciary had a "power of deciding on their own Constitutionality" and inquired as to whether there should be some "check" against this. [14] No "check," however, was explicitly formulated.

For this very "lack" of a check against judicial review, Alexander Hamilton noted that the Supreme Court is the center of authority in the national government through its "duty… to declare all acts contrary to the manifest tenor of the Constitution void." [15] He did, however, also note that it lacked certain key powers in that it has no influence over "the sword or the purse." [16] While it did not have the sword or purse, the judicial had the "say."

It would appear, then, that the Supreme Court reserves a right to review any case involving an issue under the Constitution. On the issue of how to interpret the Constitution, however, there were no directions. Did the drafters envision this document as relatively straightforward? Did they, or could they, foresee the plethora of Constitutional interpretations that would later arise?

The Federalists, Framers, and Judicial Review

That the Judicial should check the Legislative branch in Constitutional interpretation was very clear: "If the general legislature should at any time overleap their limits, the judicial department is a constitutional check," said Oliver Ellsworth in 1788. [17] Similarly, James Wilson explained that the Legislature "may be restrained, and kept within its prescribed bounds, by the interposition of the judicial department." [18] The word "interposition" almost suggests a sort of judicial activism- Beyond merely hearing cases that arise, Ellsworth seems to recommend the court find and intervene in instances where Legislation exceeded its Constitutional bounds! The interpretations from Hamilton and Ellsworth both hint at an implicit anticipation of judicial review.

The Executive's role in reviewing the Constitution, however, was less clear.

James Wilson argued that *both* the Legislative and Executive have a key duty to interpret the Constitution. As one of the attendees of the Constitutional Convention, he wrote in December of 1787 that "*the judges,*—when they consider its principles, and find it to be incompatible with the superior power of the Constitution,—it is their duty to pronounce it *void.*" [19] Wilson, however, did not suggest that the Judicial have ultimate power of interpretation. Instead, he hinted at a shared responsibility to interpret the Constitution: "In the same manner, the President of the United States could shield himself, and refuse to carry into effect an act that *violates* the Constitution." [20] Both executive and judicial, in Wilson's view, have an equal role interpreting the Constitutionality of an action.

Interestingly, while the Executive and Judicial share an equal role in Constitutional interpretation, he believed the Legislative branch played a clearly inferior role in this regard: "The legislature may be restrained, and kept within its prescribed bounds, by the interposition of the judicial department." [21]

Finally, there was also a view that *each* branch should interpret the Constitution for itself. In this view, branches had an equal responsibility to support Constitutional laws and to void those which were not. Jefferson noted this as follows: "Each of the three departments has equally the right to decide for itself what is its duty under the constitution, without regard to what the others may have decided for themselves under a similar question." [22] A foundational assumption of this view would seem to be that the Constitution is relatively straightforward and that there would not likely be conflicts of interpretation. The Judicial, then, would serve primarily to confirm or validate through its opinions what the other branches had decided for themselves.

The Anti-Federalists and Judicial Review: Is "Interpretation" the ultimate check?

As a primary source, the Anti-Federalist papers no. 11, 12, and 15 by "Brutus" offer a unique and evolving understanding of the judicial branch as the Founders may have perceived it.

In the Anti-Federalist papers, number 11, Brutus claims that no prior papers have seriously considered the question of the court's role. In his analysis, Article 3, section ii implied that the court could "determine all questions that may arise upon the meaning of the constitution in law." [23] This understanding encompasses the general meaning of judicial review and yet Brutus wrote this in 1788, years before this phrase entered the legal vernacular with our modern connotation. Perhaps more interestingly, he argued that "they are empowered, to explain the constitution according to the reasoning spirit of it, without being confined to the words or letter." [24] The *spirit,* he argued, would be determined through the judges' interpretation of the Constitution's preamble. The idea that judicial opinions may not be *confined to the words*, suggests Judges may have quite broad interpretive powers, powers that could not easily be predicted if we only study the exact wording of the constitution.

Nearly one month later, Brutus revisited this issue in the Federalist 12, suggesting, "it is easy to see, that in their adjudications they may establish certain principles.... [which] will enlarge the sphere of their power beyond all bounds." [25] Fears that the Executive branch and the President might be too powerful were common, yet this marked one of the first instances where the Judicial branch came under this sort of suspicion. While the Federalist 11 was not an outright indictment of the Supreme Court, the 12 th appears to be! It is almost as if, after ruminating for a week or two, Brutus suddenly realized how expansive the court's rule could become.

In number fifteen, in March of 1788, Brutus offered perhaps the most articulate and thorough critique against judicial supremacy. Brutus argued:

> The Supreme Court then have a right, independent of the legislature, to give a construction to the constitution and every part of it, and there is no power provided in this system to correct their construction or do it away. [26]

This is one of the first arguments, in anticipation of a formal definition of "judicial review," that the judicial branch may have a "superior" check. Essentially, if the Constitution describes the powers of each branch, the branch with authority to interpret these powers will have the greatest power! It may interpret the Constitution, without check, to benefit the growth of its own powers! While Brutus does not explicitly reference the Executive's role, he does say there is no power in "this system" to check the court's role.

It is worth considering whether any of these arguments of the Court's supremacy hold weight and whether they return as the Executive branch establishes its role.

Marbury v. Madison: The Explicit Rise of Judicial Review

The Political Context of Marbury v. Madison

James Madison wrote that all new laws are "obscure and equivocal" until their meaning is determined by "a series of particular discussions and adjudications." [27]*Marbury v. Madison* in 1803 became one such discussion, promising to clarify the Court's role under the Constitution. While there were four Chief Justices and 12 cases heard between 1790 and Marbury in 1803, no prior cases played such a crucial role in dictating the role of the Court.

Indeed, the role and proper jurisdiction of the Court were under close watch by Thomas Jefferson and his administration, as well as the American people. Having taken the office and role of Chief Justice only 13 days before Thomas Jefferson, John Marshall was thought to represent the interest of Federalist and not Jefferson's Republican party. Bruce Ackerman summarizes their relationship on a more personal level: "Jefferson detested him, despite—because of?—the fact that they were cousins." [28] The Court had immediate reason to worry that its Justices would be impeached since Justice Samuel Chase became the first- and only- Justice to be impeached in 1803.

In this context, and amid even greater fears that there may be a NEW Constitution, it was important that Chief Justice Marshall find some way to clarify the court's role without stepping- at least too hard-on Jefferson's toes.

The Case

In *Marbury v. Madison*, the Court considered the question of whether or not the Supreme Court should force, through a "writ of mandamus," a current Secretary of State, Madison, to honor and deliver a commission from a former Secretary of State (coincidentally, this former Secretary was Marshall!). Ruling in favor of Marbury would have dramatically upset both Thomas Jefferson and James Madison and ignited severe criticism toward the court from Republicans. According to Jeffery Rosen, these Republicans wanted judges "entirely subservient to popular will." [29] Any decision that conflicted with the "will" of the elected branches, then, could be seen as a violation of their primary duties. It may even have led to more impeachments if Jefferson and the Legislative determined that Supreme Court judges were acting in a manner out of line with the Constitution! After all, a single "anti-Constitutional" remark from Samuel Chase, had appeared to spark his impeachment hearings. [30]

Ultimately, however, the court argued that issuing a writ of mandamus exceeded the scope of their powers under the Constitution and was "not warranted by the Constitution." [31] The Syllabus and Opinion of the Court elaborated at length upon the limits and process of the Presidents power of Appointment, where this power begins and ends, and how commissions are to be delivered. Beyond these procedural issues, however, the syllabus notes, in somewhat an abrupt and incongruous, manner, that "it is emphatically the duty of the Judicial Department to say what the law is." [32]

This interpretation of the Judicial Department's role served, in a practical sense, to establish judicial authority and supremacy of interpreting the Constitution! Legal scholars and future justices have made innumerable references to this quote and cited it as the birth of "judicial review." Indeed, this quote has been used to delineate and reaffirm the court's role in some of the most famous cases in American History, including *Dred Scott v. Sandford*, *Cooper V. Aaron* (desegregation of schools in Little Rock), and *United States v. Nixon*. Ultimately, this case "provides the foundation for American constitutional law by establishing the authority for

judicial review of EXECUTIVE and LEGISLATIVE acts." [33]

The story of judicial interpretation would seem to end with Marbury v. Madison, and for many scholars, it has. The Supreme Court has final and ultimate authority in interpreting the Constitution. Period. How much clearer could Justice Marshall have been?

Jackson- Presidential Reactions

Executive reactions seem to suggest that the question of judicial interpretation did not end with *Marbury v. Madison*. Presidents Andrew Jackson, Abraham Lincoln, and Franklin Roosevelt would question the practice of judicial review by: a) arguing that their oath to support the Constitution implied a right of interpretation, b) questioning the court's ability, as a non-elected body, to objectively represent the interests of the People, and c) arguing that judicial review was a "check" that somehow trumped all others in the system of balances.

President Jackson was among the first Presidents after Jefferson to seriously question the Court's right to judicial interpretation.

In one of the strongest claims against judicial authority, Jackson noted the following:

> If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the coordinate authorities of this Government. The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve. [34]

This is not a simple rebuke of the court's authority of interpretation: The sheer length, repetition, and specificity with which Jackson refutes judicial review demonstrates his frustration with the court's emergent role. Jackson argues that each branch of Government and public officer has a duty to interpret the Constitution "as he understands it." Jackson, then, implicitly links the Oath of public office to the act of interpretation! Equally striking, he suggests that the "opinion" of the judges has no more authority than the "opinion" of the Executive or Legislative branches. Using the word "opinion" seems to undermine the objectivity with which Supreme Court decisions were, in theory, supposed to display.

Secondly, Jackson also states that Constitutional decisions are only binding and authoritative when "the acquiescence of the people and the States can be considered as well settled." [35] If the Court's ruling, then, does not represent the will of the people, Jackson believes it is not authoritative! As a non-elected branch, this argument has particularly powerful implications: If the court isn't elected by the People, then how can we

ensure that it represents their interests?

In perhaps the most interesting twist of Jackson's statement, he actually uses the Court's ruling to support his argument. He notes that by "taking into view the whole opinion of the court and the reasoning by which they have come to that conclusion, I understand them to have decided that... the law is in accordance with the Constitution." [36] By using *his interpretation* of the court's ruling, Jackson actually legitimizes, on some level, the court's authority on this matter. Moreover, this reveals that the court's interpretations may not always be straightforward themselves. Thus, if by words he rebukes judicial supremacy, then by action he appears to endorse it. At the very least, while he was always deferent to the Supreme Court, Jackson did defer to the Constitution. He even mentioned the word *Constitution*, or a version of it (i.e. *Constitutionality*), over twenty times in his bank veto speech.

Jackson's arguments against Judicial review and authority articulated a set of frustration that future Presidents would echo and elaborate upon.

Lincoln

In *Dred Scott*, Justice Taney argued that African Americans were not entitled to rights under the Constitution. To arrive at this conclusion, he asked and answered a simple question: Did the framers, at the time of the Constitution, view blacks as part of the people? For various reasons, he argued they didn't. Several legal historians believe he argued in this way in order to entirely side-step the issue of race: Taney thought that this sort of decision might remove the politically-charged topic from legal *and* political discussions of the day. [37]

For Lincoln, the Court's decision in *Dred Scott* was unconstitutional. That Lincoln *could* contest and differ on this ruling is quite remarkable in itself: While the court may have the final say over what the Constitution means, the President could object to how they interpreted it! In essence, the President could seize some power if he interpreted the court's interpretation. Lincoln justified the Presidential "right" to interpretation by referencing Jackson, noting that, "the court had no right to lay down a rule to govern a co-ordinate branch of the government, the members of which had sworn to support the Constitution—that each member had sworn to support that Constitution as he understood it." [38] First, by emphasizing the judiciary should be coordinate; Lincoln implies that judicial review somehow raises the Judicial above the Executive. While there may be checks and balances (as the Executive appoints judges), judicial review is somehow a more unfair, or more "ultimate," check that any others. Jackson would likely have agreed!

Second, Lincoln's primary argument rests on his claim that members of the Executive take an "Oath" to support the constitution *as he understood it*. Once again, the Oath the executive takes does not mention "understanding," and yet Lincoln suggests that it is an implication, bound into the Oath. How, after all, can one support a Constitution that he does not understand? The Oath, then, presents a tension in the roles of the Executive and Judiciary: How can the Executive "execute" the law when the Supreme Court denies their interpretation of it? Doesn't waiting for the Supreme Court somehow hinder the efficiency and timeliness of Executive actions?

Lastly, that the Republican Lincoln would reference the Democratic Jackson suggests how unifying and vexing the Court's role appeared to have become for all Presidents.

Stephen Douglas appeared to have no such qualms with the Court's authority and used Lincoln's quote as a point of contention, reminding him, "the right and province of expounding the Constitution… is vested in the judiciary established by the Constitution." [39] This statement itself is quite an interpretation as Article 3 did not use the word "expound" or any similar verbiage. Stephens was likely aware of this detail, but avoided it for the sake of rhetoric. Still, by interpreting the court's right to "expound," Stephens quote reveals how entrenched and fundamental this "right" had become by the middle of the 19-th century.

Franklin Roosevelt

In 1937, Franklin Roosevelt made his first Fireside Chat to the American people during his second term as President. In this chat, he argued that for the Nation to avoid "hopeless chaos," and that "national laws are needed…. to complete our program of Protection in time." [40] For Roosevelt, the power of Congress to pass these laws and his ability to execute them was dramatically, and dangerously, limited by the Supreme Court. By referencing the importance of time, he does not argue about the Court's right to interpret the law, but emphasizes instead that this process limits his ability to execute it.

More generally, Roosevelt exclaims: "The Courts… have cast doubts on the ability of the elected Congress to protect us against catastrophe by meeting squarely our modern social and economic conditions." By making special reference to the "elected Congress," Roosevelt contrasts the Court's position as a *non-elected* body. How, he seems to suggest, can the Court protect the People's if it does not represent them? Moreover, if they were "old" and had been appointed in many years past, how could they address "modern" problems?

In perhaps the most direct and remarkable criticism of the court, Roosevelt continued to say that in *Marbury v. Madison* in 1803, "the Court claimed the power to declare [Congressional laws] unconstitutional and did so declare it." [41] It is remarkable that Roosevelt, in his fireside address to the modern concerns of the country, would reference a case more than one-hundred years old. Still, Roosevelt considers this as the birth of judicial review and suggests that it is an "invented" power of the Court. He even refers at one point to judicial review as "judicial say-so."

In another colorful example, Roosevelt also characterized the Court as a "third house of Congress" and a "super-legislature." Judicial review, he argued, was their veto over legislation.

Ultimately, Roosevelt calls for "an action to save the Constitution from the Court and the Court from itself." The specific action is a recommendation to "infuse new blood into all our courts." [42] Roosevelt, then, does not argue that the right of judicial review should change. He argues for a change in the composition of the courts… not in their role.

It would appear that the question of whether the court should interpret the Constitution has nearly been erased from our collective memory. While Roosevelt believed the Court's monopoly on judging the constitutionality of laws was "created," he was no longer arguing along the lines of Jackson and Lincoln that it should not exist. His interpretation of the Constitution and the Court, then, was neither final nor authoritative.

Conclusion and Final Thoughts

In sum, Lincoln, Jackson, and Roosevelt argued against judicial supremacy on multiple, and often similar, grounds. First, they saw the Judicial review as a process which conflicted with their oath to execute the law and preserve the Constitution. To preserve the Constitution, they had to operate on their understanding of it. Moreover, judicial review could be a slow- if not entirely backwards- process that limited their ability to efficiently and expediently execute the laws.

Second, these Presidents saw judicial dominance as a sort of "Superior" check in the system of balances. Judicial review could overturn legislation proposed, approved, and ratified by the elected Legislative and Executive branches of government. This ability inspired Roosevelt's famous quote that "two of the horses [of government] are pulling in unison today; the third is not." Jackson and Lincoln argued that the process of interpreting the Constitution should be shared equally among all branches. No one branch should have the final and authoritative power to say what the Constitution means. Interestingly, arguments in this vein seem to rehash the Anti-Federalist concerns primary concerns of Brutus in 1788.

Third, these Presidents argued that the Court did not necessarily represent the People. Roosevelt argued that the *power* to interpret came from the People who "voted a mandate" for Congress and the President to "protect" them. In a similar vein, Jackson had stated that the power of the Court's decisions only extended insofar as "the acquiescence of the people and the States can be considered as well settled." If the Court's decision did not reflect the will of the People, it had no real authority.

Ultimately, however, the question of whether the Court should have authoritative right to interpret the Constitution had all but disappeared by Frank Roosevelt's second term in office. Criticisms of the Court focused instead upon *how* the Court interpreted the Constitution.

Have Madison's fears come true? Like Dr. Frankenstein, did the Framers create an incidental monster, one that can "check its own Constitutionality?" Is it true, as Brutus wrote in 1787, that there is "no power provided in this system to correct their construction" of the Constitution?"

I'm not sure. Who is to say? Perhaps we should let our students, the People, decide.

Objectives

My primary objective for this unit is to bring the Constitution back to life for our students! I want students to realize that the Constitution was created by people for people. Moreover, I want to help students develop the tools they need to critically examine and interpret the Constitution for themselves.

Specifically, these "tools" include my students' abilities to read and compare complex texts, to analyze text structure, and to creatively consider how different systems and structures interact with one another. Understanding the interaction of checks and balances, for instance, requires a shift in the way students think. Instead of simply memorizing a specific fact, students need to analyze scenarios from multiple, competing perspectives. In developing their own interpretations, I also seek to have students cite and qualify specific

sources to demonstrate how different ideas have influenced their thinking.

Teaching Strategies

My unit revolves around the theme of interpretation: Who should interpret the Constitution and upon what grounds? When teaching this unit, then, it is important to continually define, redefine, and discuss what interpretation means and how it affects the historian's role. I recommend, as a starting point, having the class develop a working definition of this concept. Is "interpretation" simply "making sense" of something or is it transforming and recasting an old concept, structure, and/or thought in some modern way? Is interpretation an objective practice or is it necessarily biased by our own experiences? Why? What influences our interpretations?

In any history class, analyzing primary sources requires an act of interpretation, and therefore, it is important for every class to formulate some working definition of what this means.

To create a definition of "interpretation," I recommend utilizing high-order thinking questions to help students consider the implications and meaning of interpretation as a process by which we understand our world. Beyond "yes or no" questions, ask students to justify, predict, translate, analyze, and build. You may consider creating and posting a class definition of interpretation. Alternatively, you could create a poster with word "associations."

Also, you can use discussions of interpretation as an opportunity to emphasize the importance of citing examples from text. When engaged in the act of interpretation, it is essential to include direct references to that object which is being interpreted, be it a book or a painting.

Additionally, when presenting the Constitution, have students consider the historical context, the purpose, and the audience of this document. Have students complete the same exercise when examining alternative primary sources such as Presidential speeches and letters. How, for instance, might a private letter from Lincoln on slavery have differed from a public speech?

Lastly, I recommend that teachers use visual organizers such as highlighters and charts to help students recognize patterns and structures in historical sources. The constitution, for instance, is divided into articles and sections. Ensure that students learn the importance and function of such organizational devices. In complex texts and arguments, such as the Federalist and Anti-Federalist papers, teach students to analyze text structures that are not so explicit. For instance, teach students to recognize key transition words and to note when an author is moving between different ideas.

Teacher Activities

1. What does the Constitution look like?

As a primary source, one of the most remarkable things about the Constitution is that we still have it! Indeed, the Constitution is a four-page document that resides in the Library of Congress in Washington DC. When you imagine all of the paper you get in the mail, all of the paper teachers receive at Professional Developments, and all of the worksheets/handouts we give students, it is remarkable that these four pages still exist! Will any of our worksheets exist two-hundred years from now?

To help students engage with the Constitution on a visual level and to more fully appreciate its uniqueness as a primary source, consider posting a printout of the Constitution on the board. Do not, however, let students know that it is the Constitution! Next to it, display another 4-page document. This could be the Student Code of Conduct, a magazine, or newspaper. As an opener, have students answer the questions: "Which document is more important and why?" Perhaps students will say the document with color is most important! They may also reference the style of the font.

As a whole group, begin to share out and record similarities and differences, possibly in a Venn-Diagram. Ultimately have students consider why and what factors may have affected the layout of the Constitution. Are there wide margins? Who was the audience? Would they have wanted it to be visually engaging, or more "plain?" Why? Essentially, have students debate and consider what the purpose of the Constitution was and how the visual layout of the Constitution either does or does not support that purpose! This exercise can provide the instructor with formative feedback regarding how much background the student has with the Constitution!

2. What "powers" does the Constitution grant?

Because the Constitution offers quite descriptive statements of what each branch aught to do, consider providing small student groups with paper copies of the Constitution. Assign each group the job of either reviewing Article 1, 2, or 3 of the constitution. Proceed to have them highlight all verbs in their section of the constitution. Have students choose the 5-to-10 "most important" power verbs they notice and then create a poster of these verbs that includes a visual illustration or representation of what these actions may look like. What, for instance, does it look like for the President to "veto" a bill? What does it look like for Congress to *provide* and *maintain* the Navy?

Groups can present their posters. You can end this activity by having students answer critical reflection questions regarding possible conflicts between the branches. Are any of the verbs, for instance, the same? How do we, or might we, resolve conflicts between branches?

3. Are you a Federalist or Anti-Federalist?

Have students carefully read the Federalist, number 80, and the Anti-Federalist, number 11. Have students map and outline the general structure of each paper. You may, for instance, have students write a one-to-two sentence summary for each paragraph and then illustrate with an organizer how these paragraphs relate. You may consider having a brief class discussion after each article whereby the class considers *how* each author argues his point. The author of the Federalist, number 80, for instance, uses an almost scientific approach to defend the judicial branch: He begins by describing certain principles of "sound" government and proceeds to

"test" whether each section of Article 3 coincides with these principles. You may ask students to record and define five unknown words from each article as well.

Next, have students assume the role of either a Federalist or Anti-Federalist. Using only the Constitution and the two papers, have students write a two-to-three page article that could be published in the school newspaper. Have them include at least three of the unknown words they researched. In their papers, students may adopt an argumentative style exhibited in either the Federalist or Anti-Federalist paper.

Reading List for Students

The Founders' Constitution. This online resources has multiple primary sources for students. While some are difficult to read quickly, most are short and provide commentary on political, theoretical, and legal issues surrounding the development of the Constitution. Primary sources can be found that correspond to virtually all articles and sections of the constitution. By simply clicking on an article/section, students can view documents, chronologically sorted, that related to the given section.

Brutus, numbers 11, 12,13, & 15 are great Anti-Federalist papers which specifically contemplate the role of the judicial branch, and which present several original arguments against judicial supremacy.

Federalist papers 80-82 offer an opposing view that supports the constitutional construction of the judiciary. These offer a superb opportunity for analyzing text structure and argumentative style.

Appendix: Standards

My unit addresses all four categories of reading standards for literacy in the Social Sciences. Specifically, these categories are Key Ideas and Details, Craft and Structure, Integration of Knowledge and Ideas, and Range of Reading and Level of Text Complexity. First, as students summarize difficult court cases, they will learn to identify key ideas and details. By engaging with difficult texts such as the federalist papers, students will demonstrate a broad range of reading. Analyzing court cases and the structure of historical sources will assist students in making sense of craft and structure. Lastly, comparison activities and broad, critical analysis questions will assist students in integrating knowledge and ideas. Throughout, students will cite specific evidence and analyze how structure and word choice affect authors' purposes. Students will ultimately utilize effective techniques in their own writing. If, for instance, they appreciate Alexander Hamilton's "scientific" writing format in Federalist number 80, they may apply it in their own paper!

Specific Standards Include:

RH.9-10.1 Cite specific textual evidence to support analysis of primary and secondary sources, attending to such features as the date and origin of the information.

RH.9-10.2 Determine the central ideas or information of a primary or secondary source; provide an accurate summary of how key events or ideas develop over the course of the text.

RH.9-10.4 Determine the meaning of words and phrases as they are used in a text, including vocabulary describing political, social, or economic aspects of history/social science.

RH.9-10.5 Analyze how a text uses structure to emphasize key points or advance an explanation or analysis

RH.9-10.6 Compare the point of view of two or more authors for how they treat the same or similar topics, including which details they include and emphasize in their respective accounts.

RH.9-10.8 Assess the extent to which the reasoning and evidence in a text support the author's claims.

RH.9-10.9 Compare and contrast treatments of the same topic in several primary and secondary sources.

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