

# ROE v. WADE (1973)

## DIRECTIONS

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

### Case Background

According to common law tradition carried over in the United States from England, abortion before “quickening” (or when the fetus’s movements could be felt) was not a crime. In 1821, Connecticut adopted a portion of Lord Ellenborough’s Act (1803) and passed the first law banning abortion after quickening. Twenty years later, eight states had such laws. At the time of the adoption of the Fourteenth Amendment in 1868, 20 states (out of 37) restricted abortion. Generally, abortions after quickening were felonies while those procedures performed before quickening were treated as misdemeanors. Gradually, the legal distinction between pre- and post-quickening abortions began to disappear. By the 1950s, almost every state banned all abortions except when necessary to save the woman’s life.

In the late 1960s, however, some states began to relax their laws restricting abortion. This trend coincided with the feminist movement, and the liberalization of laws governing sexuality and privacy. The trend was also mirrored in legal challenges to laws regulating intimate relations. The Supreme Court struck down laws banning the use of birth control by married couples (*Griswold v. Connecticut*, 1965), and single people (*Eisenstadt v. Baird*, 1972).

Beginning with Colorado in 1967, thirteen states opened access to abortion. Several states restricted the procedure somewhat, while 31 states allowed abortion only to save the life of the mother. Texas was one of those states. A Texas woman, using the pseudonym Jane Roe, challenged the Texas law and her case eventually went to the Supreme Court. Roe claimed that the law robbed her of her right to privacy and her liberty as protected by the Due Process Clause of the Fourteenth Amendment.

## KEY QUESTION

Evaluate the Court's constitutional reasoning in *Roe v. Wade*.

### Documents you will examine:

- A Lord Ellenborough's Act, 1803
- B Article 1191 of Texas Penal Code, first adopted in 1857
- C The Fourteenth Amendment, 1868
- D *Griswold v. Connecticut*, 1965
- E Large Abortion Billboard Alongside Road, 1971
- F Pro-Life Demonstrators, 1971
- G Abortion Petition in *Ms* Magazine Debut Issue, 1972
- H Majority Opinion, *Eisenstadt v. Baird*, 1972
- I Majority Opinion (7-2), *Roe v. Wade*, 1973
- J Dissenting Opinion (William Rehnquist), *Roe v. Wade*, 1973
- K Dissenting Opinion (Byron White), *Roe v. Wade*, 1973

# PERSONAL LIBERTY

by Dennis Goldford, Ph.D.

In American constitutional law the phrase “right to privacy” refers not to questions of information and secrecy, but rather to the idea that government has no authority to interfere with the right of individuals to make their own decisions about intimately personal, fundamental matters like marriage, sexual activity, and child rearing. Though controversial, the right to privacy developed because of, and must be understood in terms of, two important questions in our constitutional system: first, *how* are individual rights protected against government, and, second, *what* individual rights are protected against government?

Prior to the adoption of the Fourteenth Amendment in 1868, the rights of Americans were protected (beyond a few provisions of Article I, Section 10, of the Constitution and the mechanisms of separation of powers and federalism) in three principal ways. First, individuals were protected against certain actions of the federal government by the Bill of Rights. Second, individuals were protected against certain actions of their own state governments by a bill of rights or other such provisions in the constitution of their state. Third, individuals traveling to a state other than their own were protected against certain actions of that state government by certain provisions of Article IV of the Constitution. The key point is that, at that time, individuals had no federal protection against actions of their own state governments, because the Supreme Court held in *Barron v. City of Baltimore* (1833) that the Bill of Rights applied to federal actions only—not to state actions. As the Court stated in *Twining v. New Jersey* (1908), “the first ten Amendments of the Federal Constitution are restrictive only of national action.”

Due to doubts about the constitutionality of the Civil Rights Act of 1866, which provided for federal protection for the newly freed slaves against the southern state governments, the Fourteenth Amendment was ratified in 1868 and stated, in part: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the

laws.” The Supreme Court held in the *Slaughter-House Cases* that the Privileges or Immunities Clause of the Fourteenth Amendment did not now make the protections of the Bill of Rights applicable against state governments in defense of fundamental individual rights. Nevertheless, many justices believed that the Fourteenth Amendment does in fact establish a basket of fundamental rights grounded in the U.S. Constitution to be protected against state infringement. Increasingly, the Supreme Court came to argue that the idea of liberty

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**Prior to the adoption of the Fourteenth Amendment, individuals had no federal protection against actions of their own state governments.**

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mentioned in the Due Process Clause of the Fourteenth Amendment provides the textual basis for this basket of protected fundamental rights.

If the Due Process Clause answers the question of *how* fundamental individual rights are protected by the Constitution against state governments, the other question became more problematic: *what* fundamental individual rights are protected by the Constitution against state governments? In other words, how do we know what rights are contained in that federally guaranteed basket? One answer, suggested in the late nineteenth century and supported most prominently by Justice Hugo Black in the twentieth, is that any and all rights protected against federal infringement by the Bill of Rights are protected against state infringement by the Due Process Clause of the Fourteenth Amendment. However, the Supreme Court as a whole has never accepted this argument. Rejecting it for the Court in *Palko v. Connecticut* (1937), Justice Benjamin Cardozo wrote: “Whatever would be a violation of the original bill of rights (Amendments one to eight) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule.” The question remains, therefore: how do we determine what fundamental individual rights are protected by the Constitution against state governments?

Justice Cardozo went on to suggest two criteria for making that determination: a right is contained in that federally guaranteed basket of rights protected against state infringement if it is “implicit in the concept of ordered liberty” or is, citing another case, a “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental” (*Palko*). This allowed for substantial overlap between the Bill of Rights and the Due Process Clause, for the Court came to see many of the rights protected against federal infringement by the Bill of Rights as protected against state infringement by the Due Process Clause because they satisfied either or both of these two criteria. Still, the Court’s acceptance of these two criteria in many ways simply shifted rather than solved the initial problem. How do we know if a right is one protected by the Due Process Clause? How do we then know when a right is “implicit in the concept of ordered liberty” or is a “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental”?

The problem here is that, in the absence of specific words in a written text, it appears quite difficult to get people to agree on what rights are part of ordered liberty or even on what rights are fundamental in our political and legal traditions. On the one hand, we do not want to claim more rights than are permissible, because asserting a right means limiting majority rule. On the other hand, if we want to defer to the preferences of a popular



majority we run the risk of allowing that majority to infringe on individual rights that it really should not endanger. This is why the right to privacy is so controversial, for people disagree about whether it exists and, if it does, about what it protects. Thus, in *Griswold v. Connecticut* (1965), Justice William Douglas wrote with regard to marriage: “We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system,” whereas Justice Black wrote: “I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision.”

To be sure, also writing in *Griswold*, Justice Arthur Goldberg argued, “The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments” (488). Nevertheless, almost no one either before or after *Griswold* appealed to the Ninth Amendment to justify the protection of an unenumerated—

unmentioned—right. Thus, in *Roe v. Wade*, Justice Harry Blackmun stated: “This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” Whether one favors or opposed a right to abortion, it is clear that Justice Blackmun neglected to do the hard work here of dealing with the difficult interpretive questions we have raised. Specifically, why does abortion fall within the right to privacy? (Indeed, appealing to the other criterion, the dissenters in *Roe* argued that a right to abortion is not a principle of justice grounded in American traditions.) Why, as in the case of *Lawrence v. Texas*, do homosexual relations fall within the right to privacy?

We could say, of course, that there is no such thing as a right to privacy in the Constitution, because there is no black-

letter textual provision containing those words. If we were to say this, however, we would have to remember that there is no black-letter text that provides for either the presumption of innocence or the power of judicial review, both of which are conventionally considered to be in the Constitution. Additionally, we would have to address what is perhaps the central question about the protection of individual rights in our constitutional system: do we have a right to make our own decisions about certain personal and even intimate matters that we consider absolutely fundamental to our identity and sense of self in the absence of an explicit, black-letter text in the Constitution that protects any such right?



Long ago, in the case of *Calder v. Bull*, Justice Samuel Chase wrote: “I cannot subscribe to the omnipotence of a State Legislature, or that it is absolute and without controul; although its authority should not be expressly restrained by the Constitution, or fundamental law, of the State.” As you read and think about the following materials on the right to privacy, ask yourself whether you agree or disagree with Justice Chase. 

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## DOCUMENT A

### **Lord Ellenborough's Act, 1803**

*Note: Connecticut adopted this British Law in 1821.*

That if any Person or Persons...shall wilfully, maliciously, and unlawfully administer to, or cause to be administered to or taken by any of his Majesty's Subjects, any deadly Poison, or other noxious and destructive Substance or Thing, with Intent such his Majesty's Subject or Subjects thereby to murder, or thereby to cause and procure the Miscarriage of any Woman then being quick with Child... shall be and are hereby declared to be Felons, and shall suffer Death as in Cases of Felony without Benefit of Clergy.

- ▶ **What stage of abortions did Lord Ellenborough's Act criminalize?**

## DOCUMENT B

### **Article 1191 of Texas Penal Code, first adopted in 1857**

If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By "abortion" is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused.

- ▶ **Compare and contrast this law's definition of and penalty for abortion with the law in Document A.**

## DOCUMENT C

### **Section of The Fourteenth Amendment, 1868**

[N]o state shall ... deprive any person of life, liberty, or property, without due process of law.

- ▶ **What is required in order for states to deprive people of liberty?**

## DOCUMENT D

### **Majority Opinion, *Griswold v. Connecticut*, 1965**

Various guarantees create zones of privacy. The right of association contained in the penumbra [arc] of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers “in any house” in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

The Fourth and Fifth Amendments were described ... as protection against all governmental invasions “of the sanctity of a man’s home and the privacies of life.”

- ▶ **On which Bill of Rights amendments does the Court base the right to privacy?**

## DOCUMENT E

### “Large Abortion Billboard Alongside Road,” 1971



- ▶ If abortions were legal in some states, how could they be illegal in others?

## DOCUMENT F

### Pro-Life Demonstrators, 1971



- ▶ What is the message of these demonstrators?

Abortion Petition in *Ms* Magazine Debut Issue, 1972

- ▶ In what magazine did the petition below appear?
- ▶ What do Documents F and G reveal about the controversial nature of the abortion issue?

# “We have had abortions”

## These 53 American women invite you to join them in a campaign for honesty and freedom

Last year, 343 prominent and respected Frenchwomen were willing to sign a public manifesto declaring that they had undergone abortions. This *acte de révolte* dramatized their individual determination to take their lives and liberation into their own hands. It also showed their willingness to stand with and to speak for their less well-known sisters, who were forced to suffer unwanted pregnancies or illegal abortions in silence.

To many American women and men it seems absurd, in this allegedly enlightened age, that we should still be arguing for a simple principle: that a woman has the right to sovereignty over her own body. Still, there are tragically few places in the country where a woman can obtain an abortion without the expense and deception of conforming to inhuman laws, or the expense and physical danger of going outside the law. (Organizations offering information on the laws and on abortion availability are listed on page 126 of this issue.) The vast majority of abortion laws in this country are remnants of obscurantist attitudes and medieval prejudices.

In fact, at least one of every four women in the United States has had an abortion. Until the recent legal reform in two states, all of those had to be either therapeutic or illegal. Given the difficulty of securing a therapeutic abortion, the great majority of abortions endured by American women have been illegal—and therefore dangerous. This has caused untold suffering, especially on the part of poor women who must resort to self-induced or butchered abortions. Some idea of the lives to be saved by repealing abortion laws is suggested by the recent drastic reduction in deaths from childbirth, a statistic that includes deaths from bungled abortions, in New York City alone. During the first nine months of the new legal abortion program, “deaths from childbirth” dropped by at least 60 per cent.

To save lives and to spare other women the pain of socially-imposed guilt, 53 respected women residents in the United States have volunteered to begin the American Women’s Petition by signing the statement below. Our purpose is not to alternate or to ask for sympathy, but to repeal archaic and inhuman laws. Because of the social stigma still wrongly attached to abortion, many women in public life, or with husbands in public life, have felt unable to join us. We are mostly women active in community work, or in the arts. But we invite all women, from every walk of life, to help eliminate this stigma by joining us in this petition, and signing the statement below. The complete list will be sent to the White House, to every State Legislature, and to our sisters in other countries who are signing similar petitions for their lawmakers.

Barbaralee D. Diamonstein

The attitudes and laws against abortion in this country are causing untold suffering. Approximately one million American women had “illegal” abortions in 1971—many of them self-induced or performed by the unqualified, some of them fatal.

I have had an abortion. I publicly join millions of other American women in demanding a repeal of all laws that restrict our reproductive freedom.

Name: \_\_\_\_\_

Address: \_\_\_\_\_

Identification: \_\_\_\_\_

Send to: *American Women’s Petition, “Ms,” 370 Lexington Avenue, New York, N.Y. 10017*

Eve Auchincloss	Nora Ephron	Grace Paley
Sunny Aurelio	Lee Grant	Beverly Pepper
Lorraine Beebe	Gael Greene	Eleanor Perry
Joan Bingham	Nancy Grossman	Frances Fox Piven
Patricia Bosworth	Barbara Barrie Harnick	Letty Cottin Pogrebin
Kay Boyle	Lillian Hellman	Mary Rodgers
Adelyn D. Breeskin	Dorothy Pittman Hughes	Naomi Ellen Rubin
Susan Brownmiller	Elizabeth Janeway	Nora Sayre
Hortense Calisher	Lucy Jarvis	Anita Siegel
Jaqueline Michot Ceballos	Jill Johnston	Marcia B. Siegel
Lucinda Cisler	Billie Jean King	Anne Sexton
Shirley Clarke	Maxine Kumin	Ruth P. Smith
Judy Collins	Irma Lazarus	Susan Sontag
Mary Cunningham	Viveca Lindfors	Gloria Steinem
Anselma Dell’Olio	Marya Mannes	Lena Tabori
Karen De Crow	Dorothy Millstone	Barbara W. Tuchman
Barbaralee D. Diamonstein	Marcia Colman Morton	Shirley Ann Wheeler
Susan Edmiston	Anaïs Nin	

## DOCUMENT H

### ***Eisenstadt v. Baird, 1972***

If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision to whether to bear or beget a child.

- ▶ **What is the difference between this decision and the one in *Griswold v. Connecticut* (Document D)?**

## DOCUMENT I

### MAJORITY OPINION



### **Majority Opinion (7-2), *Roe v. Wade, 1973***

It is ... apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century ... a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice was present in this country well into the 19th century. Even later, the law continued for some time to treat less punitively an abortion procured in early pregnancy....

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however ... the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution....

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy....

[T]he right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.

The pregnant woman cannot be isolated in her privacy. ...[I]t is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved....

*(continued on next page)*

With respect to the State’s important and legitimate interest in the health of the mother, the “compelling” point, in the light of present medical knowledge, is at approximately the end of the first trimester.

With respect to the State’s important and legitimate interest in potential life, the “compelling” point is at viability. ...If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother....

The [Texas] statute, that excepts from criminality only a lifesaving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment....

- ▶ **How did this decision build upon the rulings in *Griswold and Eisenstadt* (Documents D and H)?**
- ▶ **Compare the Court’s use of the term “viability” to the phrase “quick with child” in Document A.**
- ▶ **Why do you think the decision in *Roe* remains controversial, while the rulings in *Griswold* and *Eisenstadt* do not?**
- ▶ **Should the Court have devised the trimester framework?**

## DOCUMENT J

### **Dissenting Opinion (William Rehnquist), *Roe v. Wade*, 1972**

I have difficulty in concluding, as the Court does, that the right of “privacy” is involved in this case....

The fact that a majority of the States reflecting, after all, the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not “so rooted in the traditions and conscience of our people as to be ranked as fundamental.” Even today, when society’s views on abortion are changing, the very existence of the debate is evidence that the “right” to an abortion is not so universally accepted as the appellant would have us believe.

- ▶ **On what bases does Rehnquist disagree with the majority opinion?**

## DOCUMENT K

### **Dissenting Opinion (Byron White), *Roe v. Wade*, 1973**

The Court, for the most part, sustains this position: during the period prior to the time the fetus becomes viable, the Constitution of the United States values the convenience, whim, or caprice of the putative mother more than the life or potential life of the fetus; the Constitution, therefore, guarantees the right to an abortion as against any state law or policy seeking to protect the fetus from an abortion not prompted by more compelling reasons of the mother.... With all due respect, I dissent. I find nothing in the language or history of the Constitution to support the Court's judgment....

The Court apparently values the convenience of the pregnant mother more than the continued existence and development of the life or potential life that she carries. Whether or not I might agree with that marshaling of values, I can in no event join the Court's judgment because I find no constitutional warrant for imposing such an order of priorities on the people and legislatures of the States... This issue, for the most part, should be left with the people and to the political processes the people have devised to govern their affairs.

► **Why does White object to the majority ruling?**

### DIRECTIONS

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

### KEY QUESTION

Evaluate the Court's constitutional reasoning in *Roe v. Wade*.

# THE ISSUE ENDURES



SUPREME COURT 'SWING VOTE!..

Courtesy Adam Zyglis and The Buffalo News; publication date January 13, 2006

- Identify the symbolic significance of the tree, the axe, and the term “swing vote.”



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

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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.<sup>1</sup>

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.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>

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.*<sup>6</sup>

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

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

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

### **3. THE BELIEF IN ERROR CORRECTION**

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

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

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

The vast majority of cases the Court agrees to decide each year involve a question about which there is disagreement among the lower federal Courts of Appeals (this is called a “circuit conflict”).<sup>7</sup> 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.<sup>8</sup> 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.*

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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.

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*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).<sup>9</sup>

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.<sup>10</sup> What became clear to the teachers attending the event was that interest groups are much more involved with the Court than those teachers had previously believed—and they now needed to figure out how to communicate that to students.

## THE EFFECT OF CORRECTING MISCONCEPTIONS

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

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

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<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> 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.

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

<sup>5</sup> 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*).

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

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

<sup>8</sup> Information received from Tom Goldstein via personal communications on September 5, 2006.

<sup>9</sup> 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.

<sup>10</sup> 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://billofrightsinsitute.org/resources/educator-resources/landmark-cases/  
www.oyez.org](http://billofrightsinsitute.org/resources/educator-resources/landmark-cases/www.oyez.org)  
<http://www.streetlaw.org/en/landmark.aspx>  
<http://www.supremecourt.gov/>  
<http://www.law.cornell.edu/supct/cases/name.htm>  
<http://www.scotusblog.com/>

# CASE BRIEFING SHEET

Case Name and Year: \_\_\_\_\_

Facts of the Case: \_\_\_\_\_

\_\_\_\_\_

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

\_\_\_\_\_

\_\_\_\_\_

What constitutional principles are indicated in the case? \_\_\_\_\_

\_\_\_\_\_

Summary of one side's arguments:

Summary of the other side's arguments:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

How would you decide the case and why? \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

How did the Supreme Court majority decide the case and why? \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

What were the main points raised in any dissenting opinions? \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

What other Supreme Court cases are related in important ways? \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

# CONSTITUTIONAL ISSUE EVIDENCE FORM

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

Case Name and Year:

Constitutional Issue:

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

# DOCUMENTS SUMMARY

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

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

# ATTORNEY DOCUMENT ANALYSIS

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

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

# MOOT COURT PROCEDURES

## Preparation

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

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

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

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

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

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

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

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

# TIPS FOR THESIS STATEMENTS AND ESSAYS

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

A good thesis statement—

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

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

## DBQ Do and Don't

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

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

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

Adapted from AP US History guidelines

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

# KEY QUESTION SCORING GUIDELINES FOR ALL ESSAYS

## **The Good-Excellent Essay**

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

## **The Average-Good Essay**

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

## **The Below Average-Average Essay**

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

## **The Poor-Below Average Essay**

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



## CONSTITUTIONAL PRINCIPLES AND THEIR DEFINITIONS

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

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

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

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

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

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

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

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

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

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

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

## ANSWER KEY

Document C: Due process.

Document D: Using birth control or providing advice related to it.

Document E: The Court acknowledged a parental “right to privacy” as it relates to the decisions parents make in raising their children. The Constitution does not list every right. The right of parents to make these types of decisions is a natural right.

Document F: Freedom of speech.

Document G: The Due Process Clause only applied to the states those rights understood to be fundamental to the notion of liberty.

Document H: The right to be free from “arbitrary ... restraints.”

Document I: Law is grounded in morality and, in some cases, religious precepts.

Document J: 1. Answers will vary. 2. Areas (such as the home, the conscience, papers and effects), that are free from arbitrary government intrusion. 3. The privacy of the marital relationship has been acknowledged for centuries and predates the Bill of Rights.

Document K: The Ninth Amendment allows individuals to make legitimate claims of rights beyond those written in the Constitution.

Document L: The dissenter disagrees with the Connecticut law as a matter of policy preference but he finds nothing in it that violates the Constitution.

Document M: Yes.

### **Roe v. Wade**

Document A: After “quickening” had occurred.

Document B: Both laws prohibited drugs and devices designed to cause abortion. The 1803 law permitted abortion before quickening; in contrast, the 1857 law prohibited abortion for the entirety of

pregnancy. The 1803 law provided for the punishment of death, the 1857 Texas law provided for prison sentences of 2-5 years.

Document C: Due process.

Document D: Parts of the First, Third, Fourth, Fifth, and Ninth Amendments.

Document E: The Tenth Amendment, which says that powers not granted to the federal government are kept by the states, made abortion a state issue. Abortion laws, therefore, differed from state to state.

Document F: Do not allow abortion.

Document G: 1. *Ms* magazine. 2. They reveal the personal, emotional and divisive nature of the issue, as well as the widespread nature of the controversy.

Document H: The right of privacy, as it relates to “bear[ing] and beget[ting]” a child, is a right held by all individuals. In *Griswold*, the Court said this right only applied to married people.

Document I: 1. *Griswold* said there is a right to privacy; *Eisenstadt* said the right applies to everyone, not just married people; *Roe* held that the established right to privacy applied to the abortion decision. 2. Both the Court and the 1803 law were identifying a point in pregnancy after which abortion could be/was illegal. “Viability” (1973) is the point at which the baby can live outside the womb; “quickening” (1803) was the point at which movement could be felt by the mother. Both are terms that reflect medical understanding for their time. 3. Critics of *Roe* contend that, unlike the two earlier cases, it involves the taking of innocent life. Supporters contend that the right to an abortion is fundamental to their liberty and privacy. 4. Some students will say yes, because the trimester framework balances individual liberty with the state’s interest in protecting life. Others will say no,

## ANSWER KEY

because this type of determination should be made by state legislatures.

Document J: He disagreed that the issue of abortion involved the right to privacy, and he disagreed that abortion was a fundamental right.

Document K: Justice White believed this to be a judgment call and not something the Constitution itself supports. He believed this issue should be resolved through the people and the political process, not a Court ruling.

### Lawrence v. Texas

Document A: A “crime against nature” and a “disgrace to human nature.” It was punished by death.

Document B: 1. Oppression of the people by their rulers and oppression of one part of society by another part. 2. Any majority that comes together in such a varied society will most likely be rooted in principles of “justice and the general good.”

Document C: The best way to ensure government is not acting arbitrarily and violating the rights of a disfavored minority is to make its laws generally applicable to all.

Document D: 1. The right of married couples to privately choose contraceptive methods. 2. The promotion of virtues including harmony, loyalty, longevity, perpetuating a “way of life.”

Document E: The right of privacy is a right held by all individuals. According to *Griswold*, this right only applied to married couples.

Document F: *Griswold* said there is a right to privacy; *Eisenstadt* said the right applies to everyone, not just married people; *Roe* held that the established right to privacy applied to the abortion decision.

Document G: As time has gone on, Americans have supported it more.

Document H: 1. The Court claimed that there was no connection between the right to privacy claimed in *Bowers* and the right to privacy found in *Griswold* and *Eisenstadt*. Those two rulings did not bar states from banning certain sexual acts. 2. Laws can reflect the morality of the majority of the people.

Document I: Liberty concerning private sexual behavior between consenting adults in the privacy of one’s home is protected by the Constitution; the meaning of liberty, and public morality (that forms the basis for laws against certain exercises of personal liberty,) is an evolving notion to be determined by each generation, it is not static within the meaning of “liberty” written into the Fifth and Fourteenth Amendment’s Due Process Clause.

Document J: Because it criminalizes the same behavior depending on who does it and therefore violates the Equal Protection Clause of the Fourteenth Amendment.

Document K: The Due Process Clause does not create or expand liberty, but rather expressly allows states to restrict liberty as long as due process is provided.

Document L: The Constitution is not a guarantee against silly laws.

Document M: There can be conflicts between individual sexual privacy and law.