

LIBERTY AND THE SUPREME COURT

DIRECTIONS

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

CONSTITUTIONAL PRINCIPLES

*Inalienable rights
Liberty
Limited government*

Background

John Locke wrote that the reason men choose to form communities is “for the mutual preservation of their lives, liberties and estates, which I call by the general name, property.” Echoing Locke, the iconic second paragraph of the Declaration of Independence explains that the purpose of legitimate government is protect inalienable rights such as life and liberty, and to provide a structure that allows people to freely pursue happiness. The inextricable relationship between liberty and happiness was familiar to eighteenth century Americans. Founding charters and state constitutions of all 13 original states, from 1601 to 1786, include the promotion of liberty, safety, and happiness as goals of government.

To Americans of the seventeenth and eighteenth centuries, “happiness” encompassed much more than just individual pleasure, but also referred to the freedom to take care of oneself and one’s family, to build wealth, and enjoy the fruits of one’s labor. Happiness was attained by living in liberty and by practicing virtue. The Oxford English Dictionary includes this citation from Isaac Watts’s *Logick* in 1725: “Happiness consists in the attainment of the highest and most lasting natural good.”

Also included in the understanding of liberty in early America was the right to control one’s own property. Locke’s definition of property included “estates” – physical possessions like land and cattle – but also included the “liberty to follow my own will in all things” within a structure that protects that same liberty for everyone else. In his essay *On Property* (1792), James Madison also emphasized the connection between liberty and property. It was the natural right of all individuals to create, obtain, and control their possessions, beliefs, faculties, and opinions, as well as the fruits of their labor.

This document-based question explores the ways the concepts of liberty and property have been understood over time in the United States, and in particular how the Supreme Court has interpreted the right to liberty.

TEACHING TIPS: LIBERTY AND THE SUPREME COURT

LEARNING OBJECTIVES

- Students will trace major events and controversies related to the Supreme Court's interpretation of the principle of liberty.
- Students understand and apply constitutional principles to evaluate the Supreme Court's rulings in cases related to inalienable rights including property rights.

ACTIVITIES

1. To prepare students for his lesson, have them read the **Background Essay**.
2. Lead students to consider **Document B**, from the Declaration of Independence, to clarify differences between the Founders' understanding of "happiness," and the common usage of that term today.
3. Direct students to read **Document A**, from John Locke's Second Treatise of Civil Government, to clarify that Locke understood the term, "property" to include "Lives, Liberties, and Estates." That is, to Locke, property included not only one's physical possessions, but also one's liberty itself.
4. Use **Document D**, excerpts from Madison's essay "On Property" to show similarities between Locke's view and Madison's view. Students should understand that, to the Founding generation, the definition of "property" was much deeper and richer than just one's physical possessions. Emphasize Madison's point that "Government is instituted to protect property of every sort..."
5. Use **Documents E** and **F**, the Fourteenth Amendment and the Slaughterhouse Cases decision, to help students analyze these three clauses of the Fourteenth Amendment: Privileges or Immunities Clause, Due Process Clause, and Equal Protection Clause.
6. Use **Document G**, "This is One of a Hundred Murdered," to help students understand the Triangle Factory Fire and its effects.
7. Assign appropriate documents for students to examine independently or in small groups. If it is necessary to abbreviate the lesson, it is recommended that students at least discuss in depth **Documents H, I, J, K, L, and M** because these Supreme Court cases illustrate a turning point in the Court's interpretation of property rights relative to other civil rights.
8. You may wish to use one or both of these graphic organizers to help students understand the changes over time in the Supreme Court's handling of property rights: **Classifying Liberty**, and **Liberty Timeline and Scorecard**.
9. Use key question, "Evaluate the Supreme Court's interpretation of the constitutional principle of liberty over time" for class discussion or writing assignment.

See Appendix for additional Graphic Organizers.

BACKGROUND INFORMATION FOR LIBERTY AND THE SUPREME COURT DOCUMENTS

Documents E and F

The Fourteenth Amendment, **Document E**, includes three clauses that prohibit the states from making laws that infringe on individual liberty: the Privileges or Immunities Clause, the Due Process Clause, and the Equal Protection Clause. Just five years after this amendment was ratified, the Supreme Court took the opportunity to interpret it, and effectively gutted the Privileges or Immunities Clause in the *Slaughterhouse cases*, **Document F**. Just upstream from New Orleans, butchers processed thousands of animals each year, often dumping their waste into backwaters of the Mississippi River. This resulted in many problems for the city, including repeated outbreaks of cholera. In 1869 the Louisiana legislature required the city to create a corporation that centralized all slaughterhouse operations downstream of the city, resulting in a monopoly. The Butchers' Benevolent Association sued to stop this takeover of the slaughterhouse business, referring to all three clauses of the Fourteenth Amendment. They argued that they had been deprived of their right to exercise their trade and earn an honest living. In a 5-4 decision, the U.S. Supreme Court majority focused its ruling in this case on only the Privileges or Immunities Clause, and read it narrowly. Justice Samuel Freeman Miller wrote in the majority opinion that the Fourteenth Amendment did not restrict the police powers of the state. The right to earn a living in one's chosen trade was not included in the Fourteenth Amendment's protections.

Document G: This is One of a Hundred Murdered (1911)

The Triangle Waist Company's owners, Max Blanck and Isaac Harris, were indicted and tried on charges of manslaughter, but they were acquitted. Their attorney had argued that the prosecution failed to prove that Blanck and Harris knew the exits were locked during work hours. The tragedy led to reform movements focusing on worker rights to unionize and on workplace safety. The New York legislature created the Factory Investigating Commission, whose investigation revealed that many businesses maintained dangerous facilities where workers were often in jeopardy of fire, illness, injury, or death. The Commission recommended a variety of new laws to protect workers, ranging from fire safety to more sanitary conditions and limits on the number of hours that women and children could work. Almost all of the recommended laws were enacted in New York, and a similar movement swept other states, as well.

Document H: *Meyer v. State of Nebraska* (1922), Majority Opinion (7-2)

In 1919, Nebraska's legislature passed a law severely restricting foreign-language instruction. Justice McReynolds wrote for the majority that the law violated the Due Process Clause of the Fourteenth Amendment, arbitrarily depriving teachers and parents of liberty.

Document I: *Pierce v. Society of Sisters* (1924), Unanimous Opinion

In 1922, Oregon voters passed an initiative amending Oregon's Compulsory Education Act seeking to eliminate parochial schools. Justice McReynolds wrote for a unanimous court that parents' choice to send their children to private schools was part of the liberty protected by the Fourteenth Amendment. The Court ruled that the amended law unjustly interfered with freedom of both schools and families.

Document J: *Schechter Poultry Corp. v. U.S.* (1935), Unanimous Opinion

During the Great Depression, the U.S. government acted to control the economy in many ways. One of the most important of the New Deal laws, the National Industrial Recovery Act, created codes of fair competition and attempted to keep wages and prices up by imposing many very specific regulations on businesses across the country. The Schechter brothers, who were Jewish immigrants, ran two butcher shops in Brooklyn according to the laws of Kashrut, which include strict adherence to safe and ethical practices. During the summer of 1934, NRA (National Recovery Administration) inspectors repeatedly visited the Schechters' shops, charging them with many violations of NRA rules, including the selling of "sick chickens." Chief Justice Charles Evans Hughes wrote for a unanimous court that the NRA regulations violated the separation of powers doctrine, and that these regulations exceeded Congress's power under the Commerce Clause.

Document K: *Palko v. Connecticut* (1937), Majority Opinion (7-1)

Frank Palka, whose name was misspelled in the Court's official records, killed two police officers in the course of a robbery. He was convicted of second degree murder and sentenced to life in prison. Prosecutors, however, wanted him to receive the death penalty, and moved to retry him according to Connecticut law. In this second trial, Palka was found guilty of first-degree murder and sentenced to be executed. Palka's lawyer argued that the Fifth Amendment's protection against double jeopardy should be applied to the state through the Fourteenth Amendment's Due Process Clause. Justice Cardozo wrote for the majority that the Fifth Amendment's protection against double jeopardy is not included in the Fourteenth Amendment's Due Process Clause. Only those rights "essential to a fundamental scheme of ordered liberty" are incorporated. Palka was executed in 1938. The Court reversed the Palko decision in the 1969 case, *Benton v. Maryland*, ruling that protection against double jeopardy is applied to the states through the Due Process Clause.

Document L: *West Coast Hotel Co. v. Parrish* (1937), Majority Opinion (5-4)

From 1897 to 1937 the Court interpreted the Due Process Clause of the Fourteenth Amendment as protecting economic rights to the same degree as other personal rights. The Supreme Court's majority opinion, authored by Chief Justice Hughes, upheld the constitutionality of Washington state's minimum wage law, taking a new approach to the concept of liberty of contract.

Document M: *U.S. v. Carolene Products*, Footnote 4 (1938)

In this footnote in a case involving the production of "filled milk" (skimmed milk with vegetable oil added to give it the consistency of cream) the Court gave the presumption of constitutionality to economic regulation, with no requirement under the "rational basis" test for the government to prove the law is necessary and proper. It established a hierarchy of rights that gave a higher level of protection to expressive rights than to property rights.

Document N: *Griswold v. Connecticut* (1964), Majority Opinion (7-2)

Justice William O. Douglas authored the majority opinion in this case. The Court invalidated a Connecticut law that had prohibited doctors from providing married couples with contraception. The Court found a right to privacy by taking together the First, Third, Fourth, and Ninth Amendments.

Document O: *Lawrence v. Texas* (2003), Majority Opinion (6-3)

Justice Kennedy wrote the majority opinion in this case, in which the Court overturned a Texas law prohibiting same-sex sexual activity. The Court ruled that such intimate conduct between consenting adults is included in the liberty protected under the Fourteenth Amendment.

LIBERTY AND THE SUPREME COURT

CONSTITUTIONAL PRINCIPLES

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KEY QUESTION

Evaluate the Supreme Court's interpretation of the constitutional principles of liberty over time.

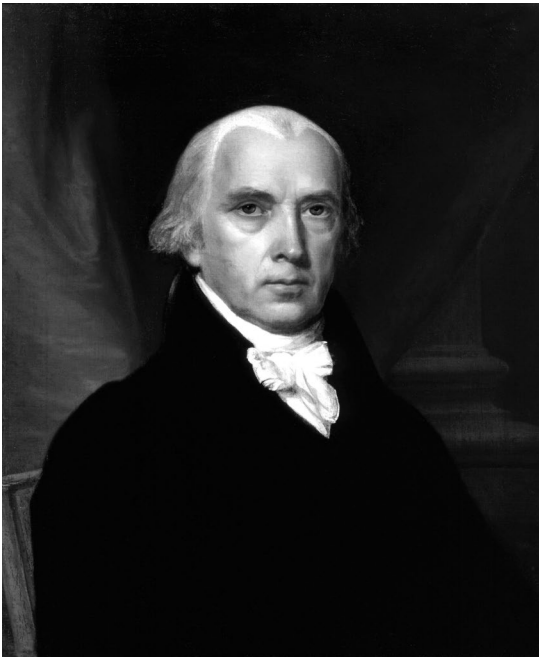
- A John Locke, *Second Treatise of Civil Government* (1690)
- B Declaration of Independence (1776)
- C The United States Constitution and Amendments (1789-1791)
- D James Madison, *On Property* (1792)
- E The Fourteenth Amendment (1868)
- F *Slaughterhouse Cases* (1873)
- G This is One of a Hundred Murdered (1911)
- H *Meyer v. State of Nebraska* (1922), Majority Opinion
- I *Pierce v. Society of Sisters* (1924), Unanimous Opinion
- J *Schechter Poultry Corp. v. U.S.* (1935), Unanimous Opinion
- K *Palko v. Connecticut* (1937), Majority Opinion
- L *West Coast Hotel Co. v. Parrish* (1937), Majority Opinion
- M *U.S. v. Carolene Products*, Footnote 4 (1938)
- N *Griswold v. Connecticut* (1964), Majority Opinion
- O *Lawrence v. Texas* (2002), Majority Opinion

EXPLORING CIVIL AND ECONOMIC FREEDOM

by Veronica Cruz Burchard

When you hear the term “civil rights,” which rights come to mind? Perhaps they include freedom of speech and assembly, the right to vote, and other actions frequently associated with political participation. More broadly, however, civil rights refer to any legally enforceable freedom of action. Some civil rights — e.g., life, liberty, and the pursuit of happiness — were so fundamental, so inextricably linked to a free society, that the Framers considered them to be inalienable. That is, they could not be voluntarily waived or surrendered. If, for instance, someone consented to labor for another, that consent could be revoked at any time.

To Enlightenment thinkers, classical liberals, British colonists in America, and, later, the Founding generation, the right to private property was intimately connected to the individual. Put another way, it was inalienable. A particular property could of course be sold or otherwise surrendered, but not the right to own and control property *per se*. John Locke argued that the right to own and control a piece of land, for example, arose by laboring to improve the land or draw resources from it. The Framers also understood property as encompassing much more than tangible objects or land. Conscience, according to James Madison, was “the most sacred of all property.”



James Madison, the Father of the Constitution. Image from the White House Collection, courtesy The White House Historical Association.

Property and its owners, then, were bound together as intimately as individuals and their expressive activities — our freedom of speech, our right to march in protest, our right to cast ballots for our preferred policies and candidates. Our property — our beliefs, our opinions, our faculties, our things — is part of who we are. The ability to freely pursue property in all its forms was considered an essential freedom. It was at the heart of the pursuit of happiness.

While we may define “happiness” today in terms of contentment or even entertainment, to 18th century Americans the idea meant much more. Happiness encompassed the ability to take care of oneself and one’s family, to build wealth and enjoy the fruits of one’s labor. It was attained by living in liberty and by practicing virtue. Understanding the term as the Founders did is key to our understanding of the Declaration’s pronouncement that governments are instituted to protect our inalienable rights to “life, liberty, and the pursuit of happiness.”

Debate Over a Bill of Rights

The Constitution was written with several ends in mind. Listed in the Preamble, they had the multi-generational goal of ensuring “the blessings of liberty to ourselves and our posterity.” The now-familiar constitutional principles such as separation of powers, checks and balances, and our federal system served to limit and divide power in order to prevent tyranny and frustrate excessive government control over individual liberties.

With this purpose and structure in place, the Constitution submitted to the states for approval in 1787 did not contain a bill of rights. The Federalists, who supported the Constitution as written, argued that bills of rights were needed only against kings who wielded unlimited power, but they weren’t necessary for a free, popular government of enumerated powers. As Alexander Hamilton wrote in *Federalist 84*, “[W]hy declare that things shall not be done which there is no power to do?”

Federalists went even further. Hamilton and Madison argued that the addition of a bill of rights was not only unnecessary, but could even be dangerous. Rights were sacred spaces around sovereign individuals into which government could not justly intrude. Carving out certain secured rights might cause people to think that, but for those few exceptions, other rights were not secured. In short, a bill of rights at the end of the Constitution might result in a massive increase in government power that would turn the very idea of limited government on its head.

Madison’s Promise and the Ninth Amendment

Several states sent lists of proposed amendments to Congress. With the Constitution still in doubt, Madison promised that Congress would take up a bill of rights after ratification. In the summer of 1789, he kept his promise and introduced draft amendments in the House. Mindful of his own warning against identifying a limited list of rights, Madison included what would ultimately become the Ninth Amendment: “*The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.*”

The Ninth Amendment would be a signal that while government powers were few and definite, the rights of naturally-free individuals were indefinite and numerous, even innumerable. Though maligned in modern times by the late Supreme Court nominee Robert Bork as an “inkblot,” the amendment served in the Founding era, and was intended to serve for all time, as a reminder that the list of individual rights and due process protections in the Bill of Rights was not exhaustive. Madison wrote later in 1792, “As a man is said to have a right to his property, he may be equally said to have a property in his rights.”

The Supreme Court and Liberty

Congress approved twelve amendments and sent them to the states for ratification. Of those 12, the states ratified ten, which became the Bill of Rights in 1791. Because the limits on government applied only at the federal level and the scope of federal power was relatively small, federal lawmaking faced few constitutional challenges for several decades. The states, however, were not subject to the federal Bill of Rights and condoned numerous violations — slavery being the most egregious.

Not until the 14th Amendment, ratified 77 years later in 1868, were the states prevented from making or enforcing “any law which shall abridge the privileges or immunities of citizens of the United States; ... deprive any person of life, liberty, or property, without due process of law; [or] deny to any person within its jurisdiction the equal protection of the laws.”

Through a series of cases involving rights, the Supreme Court identified the particular rights that would be “incorporated,” i.e., applied to limit state power.

But which rights would be protected from unjust abrogation by state governments? Through a series of cases involving rights ranging from freedom of religion to protection against cruel and unusual punishment, the Supreme Court identified the rights that would be “incorporated,” i.e., applied to limit state power. Generally, the Court asked whether claimed rights were “fundamental,” which depended in turn on whether they were “implicit in the concept of ordered liberty” or “rooted in the traditions and conscience of our people.” Not all rights qualified, and that meant some rights would be less vigorously protected than others.

In cases like *Meyer v. Nebraska* (1923) and *Pierce v. Society of Sisters* (1925) the right to liberty was interpreted broadly. Under the 14th Amendment’s Due Process Clause, the Court protected the right to educate one’s children in a private school (*Pierce*) and the right to teach young children a foreign language (*Meyer*). Further, the Court held in *Meyer*, if government wanted to bring about an outcome in society, no matter how noble, it could not go about reaching that goal via unconstitutional means. “That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected....a desirable end cannot be promoted by prohibited means.”

In *Lochner v. New York* (1905), the Court struck down a state law limiting the number of hours bakers could work. The Court held that a law of this scope was outside of the legislature’s constitutional power, and that citizens’ liberty included the right to earn an honest living, as well as the right for employers and employees to enter into contracts. This case began what is now called the “*Lochner* Era” during which the Court interpreted the Due Process Clause of the Fourteenth Amendment as protecting economic rights to the same degree as other personal rights. For this reason, and because the Court’s rulings came into direct conflict with Congress’s attempts to intervene in the marketplace and redistribute wealth, many regard *Lochner* Era rulings as examples of judicial activism.

The New Deal and the Switch in Time that Saved Nine

After several economic regulations advanced by President Franklin D. Roosevelt’s administration were struck down by the Court’s conservative bloc, Roosevelt proposed the Judicial Procedures Reform Bill of 1937, giving the President the power to appoint a new justice to the high Court for each current justice over the age of 70-1/2. This would have resulted in six new justices at that time. In what is now called “the switch in time that saved nine,” Justice Owen Roberts, who often sided with the conservatives, voted to uphold a Washington state minimum wage law for women. That case, *West Coast Hotel v. Parrish* (1937) marked the end of the *Lochner* Era. The new Court majority held that “deprivation of liberty to contract is forbidden by the Constitution if without due process of law, but restraint or regulation of this liberty, if reasonable in relation to its subject and if adopted for the protection of the community against evils menacing the health, safety, morals and welfare of the people, is due process.”

While the Supreme Court had previously treated individual economic freedom as fundamental to “ordered liberty” under the Due Process Clause, after 1937 these rights were to be subordinated. Moreover, another part of the 14th Amendment, the Privileges or Immunities clause, offered no further protection. Decades earlier in the *Slaughterhouse Cases* (1873), the Court had limited the scope of “privileges or immunities” to activities such as petitioning government, access to navigable waters, and the writ of *habeas corpus*. Economic rights were not included.

Footnote 4

In *U.S. v. Carolene Products Company* (1938), the Court held that Congress could ban “filled milk” as a health hazard (a charge for which there was no evidence, but which protected large corporate milk producers from smaller competitors selling a lower-cost product). “Filled milk” refers to skim milk to which some form of fat other than milk fat has been added. Often vegetable oil was used. The result resembled cream, but was less expensive. *Carolene* might have been just another case upholding Congress’s power to regulate economic activity, but a single footnote supplied a rationale for elevating some rights over others.

In Footnote 4, the Court established a hierarchy of rights. In the top tier, entitled to the highest level of protection, are “fundamental” rights such as some of those secured by the first ten amendments to the Constitution, access to key political processes such as voting, and equal treatment of “discrete and insular minorities.” Government restrictions on those rights are rigorously scrutinized to determine their necessity and effectiveness. To be upheld, a restriction must be narrowly tailored to serve a compelling government interest. By contrast, in the bottom tier, are “non-fundamental” economic liberties such as the right to own property and earn an honest living. Government regulation of economic liberties is subject only to a “rational basis” test: The regulation is presumed to be constitutional; the burden is on the citizen to prove it is not; and the regulation will be upheld if it is reasonably related to a legitimate government purpose.

The history of the Court’s treatment of various rights suggests that certain types of activities — the ones we think of today as implicating “civil rights” — receive the greatest constitutional protection. The question whether other rights just as fundamental to our nature have been “den[ie]d or disparage[d]” should be the subject of searching inquiry.

Critical Thinking Questions

1. How did the Founding generation understand “property”?
2. What was a chief reason that Federalists opposed a listing of specific liberties (a bill of rights)?
3. Which branch of government do you believe is best suited to determine which rights government cannot infringe? Why?
4. Was the Court right in *Carolene Products* to distinguish between types of rights? Explain.
5. Are civil and economic liberties different? If so, why? If not, why not?
6. Does Footnote 4 of *Carolene Products* prove the Federalists right about the dangers of listing certain rights at the end of the Constitution, or was the footnote consistent with the Constitution and the goal of protecting liberty?

DOCUMENT A

John Locke, *Second Treatise of Civil Government* (1690)

[Ch. IX, 123] 'Tis not without reason, that [man] seeks out, and is willing to join in Society with others who are already united, or have a mind to unite for the mutual *Preservation* of their Lives, Liberties and Estates, which I call by the general Name, *Property*. ...The great and *chief end* therefore, of Men's uniting into Commonwealths, and putting themselves under Government, *is the Preservation of their Property*. To which in the state of Nature there are many things wanting.

[Ch. V, 27] [E]very man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property.

(Italics are Locke's.)

1. How did Locke define property?
2. According to Locke, why do people unite into “commonwealths” i.e. communities, nations, etc.?
3. According to Locke, how do external things become our “property”?

DOCUMENT B

Declaration of Independence (1776)

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, — That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

1. According to the Declaration of Independence, what are some of the inalienable rights that all people have equally?
2. Why would Jefferson write that government's purpose is to “secure” right rather than to “grant” them?
3. What are some definitions that people apply to the term “happiness” today? How was the term understood in 1776?

DOCUMENT C

The United States Constitution and Amendments (1789-1791)

Article I, Section 10, 1789

No state shall ... pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

Amendment I, 1791

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment V, 1791

No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment IX, 1791

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X, 1791

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

- 1. How does each of these constitutional provisions protect property?**
- 2. Taken together, what do they reveal about the power of government in relationship to the rights of citizens?**

DOCUMENT D

James Madison, *On Property* (1792)

This term in its particular application means “that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual.”

In its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right; and *which leaves to every one else the like advantage.*

In the former sense, a man’s land, or merchandize, or money is called his property.

In the latter sense, a man has a property in his opinions and the free communication of them.

He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them.

He has a property very dear to him in the safety and liberty of his person.

He has an equal property in the free use of his faculties and free choice of the objects on which to employ them.

In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.

Where an excess of power prevails, property of no sort is duly respected. No

man is safe in his opinions, his person, his faculties, or his possessions.

Where there is an excess of liberty, the effect is the same, tho’ from an opposite cause.

Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*.

Conscience is the most sacred of all property; other property depending in part on positive law, the exercise of that, being a natural and unalienable right. To guard a man’s house as his castle, to pay public and enforce private debts with the most exact faith, can give no title to invade a man’s conscience which is more sacred than his castle, or to withhold from it that debt of protection, for which the public faith is pledged, by the very nature and original conditions of the social pact.

If the United States mean to obtain or deserve the full praise due to wise and just governments, they will equally respect the rights of property, and the property in rights.

(Italics are Madison’s.)

- 1. How did Madison define property? Is it an inalienable right?**
- 2. Madison notes that when there is “an excess of power,” no property of any sort is safe. He also notes that the same problem occurs when there is an “excess of liberty.” How might John Locke (Document A) have responded to this idea?**
- 3. What did Madison call “the most sacred of all property”?**
- 4. In Madison’s view, how will the United States earn respect as a just government?**

DOCUMENT E

The Fourteenth Amendment (1868)

Section 1. ...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.

- 1. Explain three ways this amendment protects the liberty of citizens.**
- 2. Did this amendment in any way change the protections for individual rights, as well as the division between state and federal power enshrined in the Bill of Rights? Explain.**

DOCUMENT F

***Slaughterhouse Cases* (1873)**

...We venture to suggest some [privileges and immunities] which owe their existence to the Federal government, its National character, its Constitution, or its laws.

...It is said to be the right of the citizen of this great country, protected by implied guarantees of its Constitution, “to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the subtreasuries, land offices, and courts of justice in the several States.”

Another privilege of a citizen of the United States is to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. ...The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of *habeas corpus*, are rights of the citizen guaranteed by the Federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several States, all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citizenship of a State....

- 1. Did this decision define the “privileges or immunities” of U.S. citizens narrowly or broadly? Explain.**

DOCUMENT G

This is One of a Hundred Murdered (1911)



"This Is One of a Hundred Murdered. Is any one to be punished for this?" Photographer: Artist TAD [Thomas Aloysius Dorgan], 1911, Kheel Center, Cornell University

On March 25, 1911, a fire that started on the eighth floor engulfed the Triangle Waist Company, a garment manufacturer in New York City. As was a common practice at the time, exits and stairwells were kept locked to prevent employees from theft and from taking unauthorized breaks during the workday. Although the fire department responded promptly to the blaze, the fire spread rapidly because of the many combustible materials in the factory. An estimated 500 people were at work that day. Because there was no safe way to exit the upper floors of the building, dozens of employees jumped out of windows to their deaths as the flames advanced. The death toll was 146 workers, most of them young immigrant women. The Triangle Waist Company tragedy was one of the most shocking of the events that focused national attention on unsafe working conditions.

- 1. What is depicted in the artist's drawing?**
- 2. Why does the title refer to "murder"? Whom do you think was responsible for the tragedy at the Triangle Waist Company?**

DOCUMENT H

Meyer v. State of Nebraska (1922), Majority Opinion

While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected ... a desirable end cannot be promoted by prohibited means.

- 1. How did this decision define liberty?**
- 2. How did the Court define the limits of government's power to improve the quality of citizens' mental, physical and moral states?**

DOCUMENT I

Pierce v. Society of Sisters (1924), Unanimous Opinion

[A lower court] declared the right to conduct schools was property, and that parents and guardians, as a part of their liberty, might direct the education of children by selecting reputable teachers and places.

We think it entirely plain that the Act of 1922 [requiring all children to attend public school] unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control: as often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State....

Appellees are corporations [schools], and therefore, it is said, they cannot claim for themselves the liberty which the Fourteenth Amendment guarantees. Accepted in the proper sense, this is true. But they have business and property for which they claim protection. These are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools. And this court has gone very far to protect against loss threatened by such action.

- 1. How did this decision define liberty?**

DOCUMENT J

Schechter Poultry Corp. v. U.S. (1935), Unanimous Opinion

Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary. Such assertions of extra constitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'

- 1. How did this decision interpret the power of the national government in extraordinary circumstances?**
- 2. Why did this ruling refer to the Tenth Amendment (Document C)?**

DOCUMENT K

Palko v. Connecticut (1937), Majority Opinion

[T]he due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the freedom of speech which the First Amendment safeguards against encroachment by the Congress; or the like freedom of the press, or the free exercise of religion, or the right of peaceable assembly, without which speech would be unduly trammelled; or the right of one accused of crime to the benefit of counsel. In these and other situations, immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.

The line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence.

The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”

- 1. How did this decision define liberty?**
- 2. According to this decision, what are two rights guaranteed by the Bill of Rights that are “not of the very essence of a scheme of ordered liberty”?**
- 3. Should the Court decide which rights are “implicit in the concept of ordered liberty”? If so, how should it decide? If not, who should decide?**

DOCUMENT L

***West Coast Hotel Co. v. Parrish* (1937), Majority Opinion**

Deprivation of liberty to contract is forbidden by the Constitution if without due process of law, but restraint or regulation of this liberty, if reasonable in relation to its subject and if adopted for the protection of the community against evils menacing the health, safety, morals and welfare of the people, is due process....

The State has a special interest in protecting women against employment contracts which through poor working conditions, long hours or scant wages may leave them inadequately supported and undermine their health; because:

- (1) The health of women is peculiarly related to the vigor of the race;
- (2) Women are especially liable to be overreached and exploited by unscrupulous employers....

- 1. How did this decision define liberty?**
- 2. How did this decision define the due process necessary to deprive someone of their freedom to choose to enter into a contract?**
- 3. In this context, how should “reasonable” be understood?**

DOCUMENT M

***U.S. v. Carolene Products*, Footnote 4 (1938)**

Even in the absence of [reports of legislative committees revealing the rationale of the legislation], the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless, in the light of the facts made known or generally assumed, it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.⁴

Footnote 4

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth....

[We do not need to] enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

- 1. According to this ruling, what should the Supreme Court generally presume about laws passed by Congress that affect commercial transactions?**
- 2. How, if at all, did Footnote 4 clarify the body of the ruling?**
- 3. Was the Court right to distinguish between types of rights? Explain.**
- 4. Does Footnote 4 of *Carolene Products* prove the Federalists right about the dangers of listing certain rights at the end of the Constitution, or was the footnote consistent with the Constitution and the goal of protecting liberty?**

DOCUMENT N

Griswold v. Connecticut (1964), Majority Opinion

We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law [banning the sale of birth control to married couples], however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.

By *Pierce v. Society of Sisters* (Document H), the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By *Meyer v. Nebraska* (Document G), the same dignity is given the right to study the German language in a private school. ...The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read, and freedom of inquiry, freedom of thought, and freedom to teach. Without those peripheral rights, the specific rights would be less secure. And so we reaffirm the principle of the *Pierce* and the *Meyer* cases....

[Many] cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.

- 1. How did this decision define liberty?**
- 2. Why do you think the Court notes that it does not judge the wisdom of laws touching on economic problems, business affairs, or social conditions?**
- 3. What do you think the Court means by “Without those peripheral rights, the specific rights would be less secure”?**
- 4. What do you think the Court meant by “penumbras, formed by emanations”? Are these equal to enumerations? Explain.**

DOCUMENT O

Lawrence v. Texas (2002), Majority Opinion

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.

- 1. How did this decision define liberty?**
- 2. What types of rights were not listed in the definition?**

CLASSIFYING LIBERTY

Directions: Read Documents A – O and use the table to indicate how each document defines/ explains liberty.

- Put a check in Column 1 if the document defines liberty as including those freedoms commonly referred to as “civil rights” (expressive activities, intimate conduct, political participation).
- Put a check in Column 2 if the document defines liberty as including those freedoms commonly called “economic rights” (right to own property, to earn a living, etc.).
- Use Column 3 to indicate whether the document approaches civil and economic liberty as one and the same or as different types of liberty.

Each document may have checks in one or both of the first two columns. Documents A and B are done for you as an example.

	1. Liberty includes expressive activities, intimate conduct, political participation	2. Liberty includes economic rights	3. Same/ Different
A. Locke’s <i>Second Treatise</i>	✓	✓	Same
B. Declaration of Independence	✓	✓	Same
C. Constitution excerpts			
D. <i>On Property</i> , Madison, 1792			
E. Fourteenth Amendment 1868			
F. Slaughterhouse Cases, 1873			
H. <i>Meyer</i> , 1922—a desirable end cannot be promoted by prohibited means.			

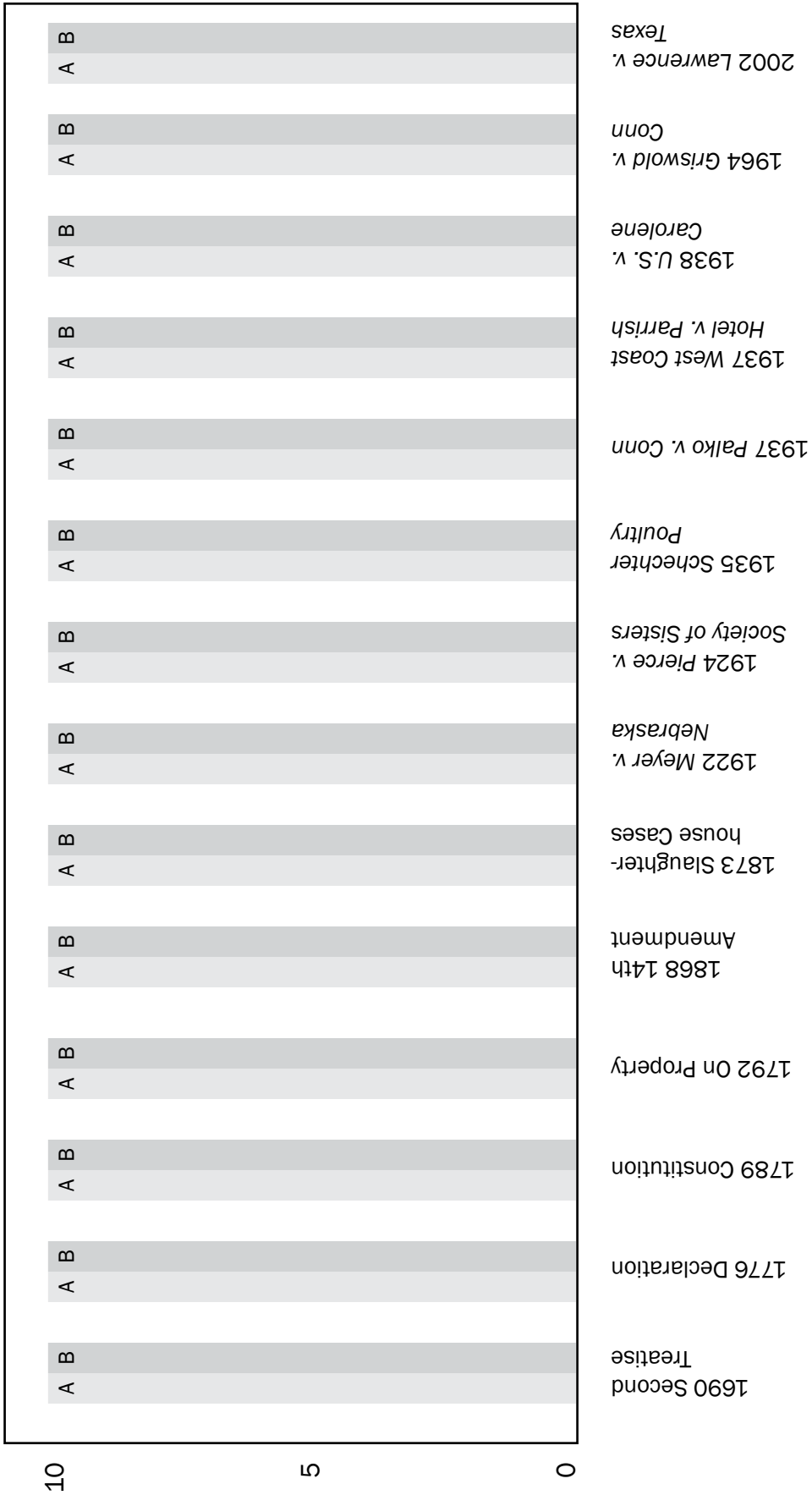
CLASSIFYING LIBERTY (CONT.)

	1. Liberty includes expressive activities, intimate conduct, political participation	2. Liberty includes economic rights	3. Same/ Different
I. <i>Pierce</i> , 1924—“(R)ights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State.”			
J. <i>Schechter</i> , 1935 Extraordinary conditions do not create or enlarge constitutional power.	Not squarely addressed	Not squarely addressed	Not squarely addressed
K. <i>Palko</i> , 1937 “implicit in the concept of ordered liberty... ranked as fundamental”			
L. <i>Parrish</i> , 1937			
M. <i>Carolene</i> , 1938			
N. <i>Griswold</i> , 1964			
O. <i>Lawrence</i> , 2002			

COMPARING CIVIL AND ECONOMIC LIBERTY

For each document or case listed on the table below, assign two scores on a scale of 1 – 10.

Score A will show to what extent the document excerpt expresses protection for **civil liberties, such as expression and political participation**. **Score B** will show to what extent the document excerpt expresses protection for **economic liberties, such as the right to own property and earn a living**.





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

By Diana E. Hess

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

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

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

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

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

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

1. THE CONSTITUTION APPLIES TO EVERYONE AND EVERYTHING

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

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

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

2. THE LIBERATION GENERALIZATION

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

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

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

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

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

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

3. THE BELIEF IN ERROR CORRECTION

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

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

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

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

4. THE GIDEON EFFECT

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

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

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

5. A RULING IS A “RIGHT” ANSWER

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

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

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

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

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

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

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

THE EFFECT OF CORRECTING MISCONCEPTIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

CLASSROOM APPLICATIONS

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

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

DBQ Strategies:

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

ONLINE RESOURCES

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

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

CASE BRIEFING SHEET

Case Name and Year: _____

Facts of the Case: _____

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

What constitutional principles are indicated in the case? _____

Summary of one side's arguments:

Summary of the other side's arguments:

How would you decide the case and why? _____

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

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

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

CONSTITUTIONAL ISSUE EVIDENCE FORM

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

Case Name and Year:

Constitutional Issue:

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

DOCUMENTS SUMMARY

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

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

ATTORNEY DOCUMENT ANALYSIS

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

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

MOOT COURT PROCEDURES

Preparation

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

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

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

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

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

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

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

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

TIPS FOR THESIS STATEMENTS AND ESSAYS

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

A good thesis statement—

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

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

DBQ Do and Don't

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

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

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

Adapted from AP US History guidelines

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

KEY QUESTION SCORING GUIDELINES FOR ALL ESSAYS

The Good-Excellent Essay

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

The Average-Good Essay

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

The Below Average-Average Essay

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

The Poor-Below Average Essay

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



CONSTITUTIONAL PRINCIPLES AND THEIR DEFINITIONS

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

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

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

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

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

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

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

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

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

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

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

ANSWER KEY

Document J: *Kelo v. New London* (2005), Dissenting Opinion

1. The Court's prior cases which read "public use" to mean "public purpose."
2. The text of the Constitution, which requires a "public use."
3. Poor communities, i.e., those most likely to be deemed by governments to be in need of economic redevelopment in an attempt to increase such "blighted" neighborhoods' value and the economic benefit to the community and the local government.

Document K: "A Wreck of a Plan," Charlotte Allen, *Washington Post* (2005)

1. Government entities almost always fail badly at effective urban revitalization, at the expense of lost homes, neighborhoods, businesses and jobs.
2. The free market, i.e. individual consensual transactions

Document L: *Newspaper Accounts* (2009)

1. Pfizer left the city.
2. Virtually nothing.
3. Accept reasoned answers.

Document M: *Satellite View of Fort Trumbull* (2010)

1. None

The Issue Endures

1. The vast majority of states have responded to the *Kelo* ruling by enacting reforms providing greater protection for property owners than the Court was willing to enforce in its ruling.
2. This label reveals the Institute for Justice's viewpoint that the use of eminent domain for redevelopment is unjust.

UNIT 3 – CIVIL AND ECONOMIC FREEDOM

EXPLORING CIVIL AND ECONOMIC FREEDOM

Critical Thinking Questions

1. The Founders understood that property is the natural right of all individuals to create, obtain, and control their possessions, beliefs, faculties, and opinions as well as the fruits of their own labor.
2. The Federalists feared that listing certain rights would lead people to think that the rights not listed were less important.
3. Accept reasoned responses.
4. Accept reasoned responses.

5. Accept reasoned responses.
6. Accept reasoned responses.

DBQ: LIBERTY AND THE SUPREME COURT

Document A: John Locke, *Second Treatise of Civil Government* (1690)

1. lives, liberties and estates; his own person; labor of his body, and the work of his hands
2. for the preservation of their property
3. When we remove something from the state of nature and mix it with it our own labor, we make it our property.

ANSWER KEY

Document B: Declaration of Independence (1776)

1. Life, liberty and the pursuit of happiness.
2. Jefferson wrote that government's purpose is to "secure" rights because rights were pre-existing in individuals. They were not given by government. This means that government's role is to protect peoples' rights that belong to them by nature.
3. Today: synonyms include pleasure, joy, exhilaration, contentment, good fortune.

1776: Ability to take care of oneself, one's family, to build wealth and enjoy the fruits of one's labor. Happiness was attained by living in liberty and by practicing virtue.

Document C: The United States Constitution and Amendments (1789-1791)

1. The First Amendment protects property including beliefs, opinions, and the free expression of them. The Fifth Amendment protects property by requiring due process and just compensation. The Ninth Amendment protects property by stating that individuals have unlisted rights. The Tenth Amendment protects property by reserving to the states and the people any powers not granted by the Constitution to the national government.
2. Government's power is limited, and it is the role of government to protect the rights of citizens.

Document D: James Madison, *On Property* (1792)

1. Madison defines property as everything to which a man may attach a value and have a right: land, merchandise, or money, as well as opinions and the free communication of them, religious opinions, safety and liberty, free use of his faculties. According to Madison, property is an inalienable right: "... (A)s a man is said to have a right to his property, he may be equally said to have a property in his rights."

2. Madison's thinking is consistent with Locke's thinking. An "excess of liberty" (Madison) is what Locke would call the "state of nature." Locke starts with the premise that government exists only because man creates it for his own ends, and that no one but the individual has a right to the work of his own hands. Depriving one of the work of his hands, the free use of his faculties, or the expression of his beliefs corresponds to what Madison called "an excess of power."
3. conscience
4. According to Madison, a just government "will equally respect the rights of property, and property in rights."

Document E: The Fourteenth Amendment (1868)

1. This amendment protects the following from abridgment by states: a. "privileges and immunities" of citizens, b. guarantee of due process before government can take a person's life, liberty, and property, and c. equal protection of the laws for all persons in a state's jurisdiction.
2. Yes. This amendment changed the relationship between the national government and individuals by making the federal government a protector of people's rights against the action of the states. The federal government gained power while the states lost it.

Document F: Slaughterhouse Cases (1873)

1. The decision defined privileges and immunities narrowly, as rights which owe their existence to the national government, as opposed to the state governments.

Examples are: The right to come to the seat of government to assert a claim upon it, or to transact business with it, to seek its protection, to share its offices, and administer its functions; Free access to seaports, land offices, and courts of the

ANSWER KEY

states; The right to demand the federal government's protection of life, liberty, and property when on the high seas or in the jurisdiction of a foreign government; The rights to peaceable assembly, petition, privilege of *habeas corpus*; The right to use navigable waters; Any rights secured to U.S. citizens by treaties with foreign governments

Document G: This is One of a Hundred Murdered (1911)

1. One of the dead factory workers
2. The title uses the term, "murder" because conditions at the factory were so unsafe. Students may say that the factory's owners were to blame. They may also say that government officials were responsible because no effective process was in place to inspect workplaces or prevent such tragedies.

Document H: Meyer v. State of Nebraska (1922)

1. Broadly, as encompassing a wide range of activities: "Freedom from bodily restraint," individual right to contract, "to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates" of conscience, to enjoy common law privileges "essential to the orderly pursuit of happiness by free men." The decision affirmed the teacher's right to teach, the parents' right to hire him to do so, and the authority of parents to direct the education of their children.
2. The government could not abridge the rights of individuals; the ends did not justify the means. "Certain fundamental rights must be respected...a desirable end cannot be promoted by prohibited means."

Document I: Pierce v. Society of Sisters (1924)

1. Broadly, as encompassing a wide range of activities. "Parents and guardians, as a part of their liberty, might direct the education of children by selecting reputable teachers and places." (Schools) "have business and property for which they claim protection." "(R)ights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State."

Document J: Schechter v. U.S. (1935)

1. The power of the national government is not made greater by crisis "powers of the national government are limited by the constitutional grants." "Extraordinary conditions do not create or enlarge constitutional power."
2. The ruling asserts that the Founders "anticipated and precluded" the argument that times of crisis would justify enlarging the power of the federal government, and acted to prevent it from taking place by adding the Tenth Amendment to the Constitution.

Document K: Palko v. Connecticut (1937)

1. The decision defined liberty as including rights to speech, press, religion, peaceable assembly, benefit of counsel when accused of crime, or those rights "implicit in the concept of ordered liberty...ranked as fundamental."
2. Two rights not included in "the concept of ordered liberty" include the right to trial by jury and immunity from prosecution except as the result of an indictment.
3. Accept reasoned responses.

ANSWER KEY

Document L: *West Coast Hotel Co. v. Parrish* (1937)

1. Regulation of liberty of contract is constitutional as long as the restraint is reasonable for its goal, and is done with the intent of protecting people.
2. Reasonable in relation to a regulation's subject, and adopted for the protection of the community's health, safety, morals, and welfare.
3. Accept reasoned answers.

Document M: *U.S. v. Carolene Products* (1938)

1. The Court will presume that laws are constitutional. The Court should trust the knowledge and experience of the legislators in laws that regulate commercial transactions, and ask only whether the law is rationally related to a legitimate state interest. The rational basis test is a very low standard and results in most laws that are subjected to it being interpreted as constitutional.
2. Footnote 4 lists circumstances in which the Court might NOT assume the constitutionality of a law: when legislation appears on its face to be a violation of a protection listed in the Bill of Rights, or is directed against particular religious, or national, or racial minorities, or against discrete and insular minorities who lack the normal protections of the political process. In these instances, the Court should apply a stricter standard ("strict scrutiny") in determining constitutionality, and will be less likely to find them constitutional. (Fewer laws survive strict scrutiny from the Supreme Court.)
3. Accept reasoned responses.
4. Accept reasoned responses.

Document N: *Griswold v. Connecticut* (1964)

1. As encompassing "intimate relations," which are protected by virtue of emanations and penumbras of other constitutional protections.

2. Since 1938, the Court had followed the pattern set by Footnote 4 in the *Carolene Products* decision, applying only the rational basis test to laws touching on these areas.
3. Related, implied rights help support stated rights.
4. Accept reasoned responses.

Document O: *Lawrence v. Texas* (2002)

1. Liberty was defined as protection from "unwarranted government intrusions into a dwelling or other private places." Even outside the home, we should have an expectation "of an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."
2. The definition did not include economic rights.



Handout A: Too Much, Too Little, or Just Right?

1-6: Accept reasoned responses.

Handout B: Who Said it? Quote Sorting

1. Founder – The Declaration of Independence, 1776
2. Progressive – Reverends Josiah Strong and W.D.P. Bliss, *The Gospel of the Kingdom* magazine editors, 1914
3. Founder – Thomas Jefferson, *Notes on the State of Virginia*, 1785
4. Progressive – Franklin D. Roosevelt, Speech to the Democratic National Convention, 1936
5. Founder - Patrick Henry, Speech to the Second Virginia Convention, 1775
6. Founder – Alexander Hamilton, *The Farmer Refuted*, 1775