

WHO SAID IT? QUOTE MATCH

CRITICAL ENGAGEMENT QUESTION

Evaluate the Founders' and Progressives' views on the subjects of human nature and the purpose of government.

CONSTITUTIONAL PRINCIPLES

*Liberty
Limited government
Property*

The Progressive Era was a significant shift away from the traditional American understanding of the purpose of government. The Founders believed citizens could best pursue happiness if government was limited to protecting the life, liberty, and property of individuals. Civil and economic liberty, therefore, were mutually reinforcing. The Founders believed that people were naturally flawed, and government should be structured so that people's natural self-interest would lead officials to check one another's attempts to exercise more power than the Constitution allows. Unlike the framers of the Constitution, Progressives believed that people's natures can and should be bettered by enlightened rulers. Therefore, they believed, government should provide citizens with the environment and the means to improve themselves through government-sponsored programs and policies and economic redistribution. To Progressives, concepts such as personal liberty — including civil and economic rights — did not matter as much as the greater goal of improving social order.

Learning Objectives

Students will:

- Examine quotations demonstrating the Founders' view of the purpose of government.
- Examine quotations demonstrating the Progressives' view of the purpose of government.
- Evaluate the differences between the Founders' and Progressives' views.
- Assess which view is more likely to protect inalienable rights such as life, liberty, and the pursuit of happiness.

Materials

- Handout A: Too Much, Too Little, or Just Right?
- Handout B: Who Said It?

LESSON PLAN

Warm-up

15 minutes

Note: Before class, copy several sets of the quote cards on **Handout B: Who Said It?**

- A. Project or put up an overhead of **Handout A: Too Much, Too Little, or Just Right?** and reveal the statements one at a time. Have students raise their hands in response to each and take brief responses to the “Why?” question.
- B. Discuss how their responses to the statements on **Handout A** are probably based in part on their sense of the nature of personal liberty and the purpose of just government.

Activity

20 minutes

- A. Put students in small groups, and give each group a complete set of quotes from **Handout B**. Students should read and discuss the quotations.
- B. Have students write paraphrases of the ideas expressed. Clarify any questions as needed.
- C. Students should analyze each quotation to determine what views it expresses. To help in their analysis, they could ask:
 - What does this quotation seem to assume about human nature?
 - How does this quotation define the purpose of government?
 - How does this quotation define civil liberty? Economic liberty?
 - How does this quotation characterize the proper relationship between the citizen and government?
- D. Have students sort the quotations into two stacks — one for Founders and one for Progressives.
- E. As a class, read all the quotations aloud and have students share their answers. Debrief as needed to clarify understanding.

Wrap-Up

15 minutes

- A. Ask students to summarize what they observe in these quotations about the differences between the Founders’ philosophy on citizens and government and the Progressives’ philosophy.
- B. Return to the statements on **Handout A**, and apply the Founders’ and Progressives’ understandings of government. Which statements, if any, would each group be likely to support? Which, if any, would they oppose? How would you summarize the differences between the types of statements in each group?
- C. As a class, discuss the question of which philosophy is more likely to:
 - Prevent tyranny
 - Protect inalienable rights such as liberty, property, and the pursuit of happiness.

Variations

- Post a sign on one side of the room that says “Founders” and on the other side one that says “Progressives.” Have students choose one card to paraphrase and analyze, and then stand closest to the sign they believe correctly describes the author of their quotation. Check answers and then debrief as a large group on the differences between the points of view in the quotations. Invite volunteers from each group to participate, one at a time, in a “fishbowl” discussion about their respective points of view. Allow several pairs the chance to discuss, and debrief as a large group.
- Have students chose ONE card each to paraphrase and analyze. They should come to a decision individually as to whether the quotation comes from a Founder or a Progressive. Then have students mingle with each other, sharing their quotations and taking on identities as “Founders” or “Progressives.” Founders should look for other Founders; Progressives should look for other Progressives. Once all students have assembled into two large groups, check answers. Invite volunteers from each group to participate, one at a time, in a “fishbowl” discussion about their respective points of view. Allow several pairs the chance to discuss, and debrief as a large group.

Homework

Have students write one paragraph in response to the question: Which concept is more accurate:

“People are naturally flawed, and government should be structured so that people’s natural self-interest will lead officials to check one another’s attempts to exercise more power than the Constitution allows.”

Or

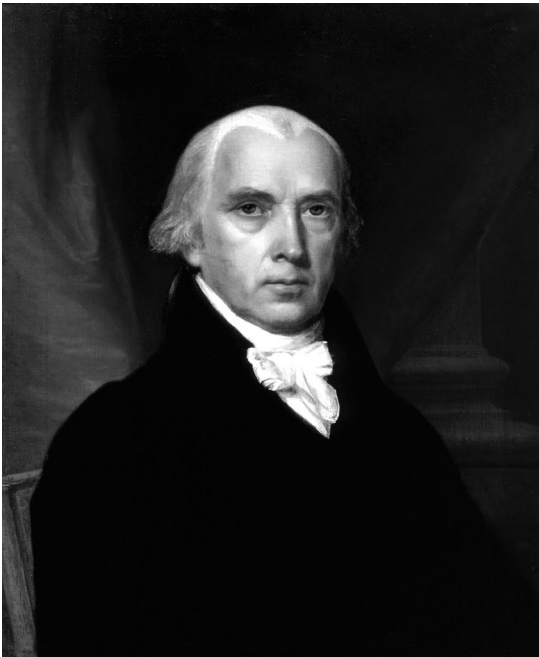
“People are naturally good, and can and should be made better through government action.”

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?

TOO MUCH, TOO LITTLE, OR JUST RIGHT?

1. In response to predictions of a harsh winter, your city government hires additional snow-plow drivers.

Support ____ Oppose ____ Why?

2. To combat high blood pressure and obesity, your city government wants to limit salt in restaurants, ban all trans-fats, and ban the sale of sugary drinks above a certain size.

Support ____ Oppose ____ Why?

3. In order to prevent poisonous chemicals from entering the water supply, your county government fines businesses that dump hazardous waste into rivers.

Support ____ Oppose ____ Why?

4. Worried that not enough children are entering kindergarten with skills to succeed, Congress awards grants to states that provide infant and toddler education programs for free to citizens.

Support ____ Oppose ____ Why?

5. In order to ensure justice is carried out in criminal cases, due process requirements such as jury trials, the right to call witnesses, and bans on double jeopardy are established at the local, state, and federal levels.

Support ____ Oppose ____ Why?

6. In response to studies showing that children who eat dinner with their families most nights go on to succeed in college at higher rates than those who don't, the federal government passes a law requiring parents to sit down to dinner with their minor children at least five nights per week.

Support ____ Oppose ____ Why?

WHO SAID IT? QUOTE SORTING

1 “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.”

3 “Can the liberties of a nation be sure when we remove their only firm basis, a conviction in the minds of the people, that these liberties are a gift from God?”

2 “Personal liberty is at last an uncrowned, dethroned king, with no one to do him reverence. ...We are no longer frightened by that ancient bogy — ‘paternalism in government.’ We affirm boldly, it is the business of government to be just that — paternal. ...Nothing human can be foreign to a true government.”

4 “Better the occasional faults of a government that lives in a spirit of charity than the consistent omissions of a government frozen in the ice of its own indifference.”

WHO SAID IT? QUOTE SORTING

5 “Is life so dear, or peace so sweet, as to be purchased at the price of chains and slavery? Forbid it, Almighty God! I know not what course others may take; but as for me, give me liberty or give me death!”

7 “This is not a contest between persons. The humblest citizen in all the land, when clad in the armor of a righteous cause, is stronger than all the hosts of error.”

6 “[N]atural liberty is a gift of the beneficent Creator, to the whole human race; and ... civil liberty is founded in that; and cannot be wrested from any people, without the most manifest violation of justice. Civil liberty is only natural liberty, modified and secured by the sanctions of civil society.”

8 “In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution.”

WHO SAID IT? QUOTE SORTING

9 “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.”

11 “Our country has deliberately undertaken a great social and economic experiment, noble in motive and far-reaching in purpose.”

10 “For it is very clear that in fundamental theory socialism and democracy are almost if not quite one and the same. They both rest at bottom upon the absolute right of the community to determine its own destiny and that of its members. Men as communities are supreme over men as individuals.”

12 “The doctrine of ‘personal liberty’ as applied to the use of liquor has been over-worked by the liquor men. As a matter of fact, there is no such thing as an absolute individual right to do any particular thing, or to eat or drink any particular thing, or to enjoy the association of one's own family, or even to live, if that thing is in conflict with ‘the law of public necessity.’”



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.

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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://billofrights.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.

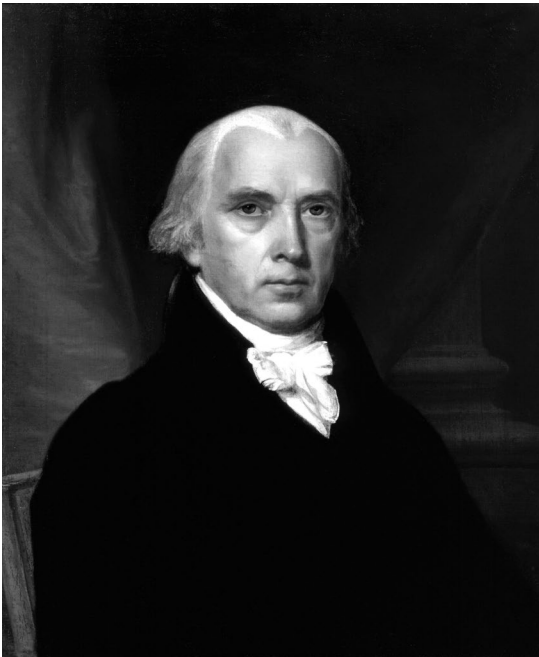
Separation of powers/Checks and balances: a system of distinct powers built into the Constitution, to prevent an accumulation of power in one branch

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?

WHO SAID IT? QUOTE MATCH

CRITICAL ENGAGEMENT QUESTION

Evaluate the Founders' and Progressives' views on the subjects of human nature and the purpose of government.

CONSTITUTIONAL PRINCIPLES

*Liberty
Limited government
Property*

The Progressive Era was a significant shift away from the traditional American understanding of the purpose of government. The Founders believed citizens could best pursue happiness if government was limited to protecting the life, liberty, and property of individuals. Civil and economic liberty, therefore, were mutually reinforcing. The Founders believed that people were naturally flawed, and government should be structured so that people's natural self-interest would lead officials to check one another's attempts to exercise more power than the Constitution allows. Unlike the framers of the Constitution, Progressives believed that people's natures can and should be bettered by enlightened rulers. Therefore, they believed, government should provide citizens with the environment and the means to improve themselves through government-sponsored programs and policies and economic redistribution. To Progressives, concepts such as personal liberty — including civil and economic rights — did not matter as much as the greater goal of improving social order.

Learning Objectives

Students will:

- Examine quotations demonstrating the Founders' view of the purpose of government.
- Examine quotations demonstrating the Progressives' view of the purpose of government.
- Evaluate the differences between the Founders' and Progressives' views.
- Assess which view is more likely to protect inalienable rights such as life, liberty, and the pursuit of happiness.

Materials

- Handout A: Too Much, Too Little, or Just Right?
- Handout B: Who Said It?

LESSON PLAN

Warm-up

15 minutes

Note: Before class, copy several sets of the quote cards on **Handout B: Who Said It?**

- A. Project or put up an overhead of **Handout A: Too Much, Too Little, or Just Right?** and reveal the statements one at a time. Have students raise their hands in response to each and take brief responses to the “Why?” question.
- B. Discuss how their responses to the statements on **Handout A** are probably based in part on their sense of the nature of personal liberty and the purpose of just government.

Activity

20 minutes

- A. Put students in small groups, and give each group a complete set of quotes from **Handout B**. Students should read and discuss the quotations.
- B. Have students write paraphrases of the ideas expressed. Clarify any questions as needed.
- C. Students should analyze each quotation to determine what views it expresses. To help in their analysis, they could ask:
 - What does this quotation seem to assume about human nature?
 - How does this quotation define the purpose of government?
 - How does this quotation define civil liberty? Economic liberty?
 - How does this quotation characterize the proper relationship between the citizen and government?
- D. Have students sort the quotations into two stacks — one for Founders and one for Progressives.
- E. As a class, read all the quotations aloud and have students share their answers. Debrief as needed to clarify understanding.

Wrap-Up

15 minutes

- A. Ask students to summarize what they observe in these quotations about the differences between the Founders’ philosophy on citizens and government and the Progressives’ philosophy.
- B. Return to the statements on **Handout A**, and apply the Founders’ and Progressives’ understandings of government. Which statements, if any, would each group be likely to support? Which, if any, would they oppose? How would you summarize the differences between the types of statements in each group?
- C. As a class, discuss the question of which philosophy is more likely to:
 - Prevent tyranny
 - Protect inalienable rights such as liberty, property, and the pursuit of happiness.

Variations

- Post a sign on one side of the room that says “Founders” and on the other side one that says “Progressives.” Have students choose one card to paraphrase and analyze, and then stand closest to the sign they believe correctly describes the author of their quotation. Check answers and then debrief as a large group on the differences between the points of view in the quotations. Invite volunteers from each group to participate, one at a time, in a “fishbowl” discussion about their respective points of view. Allow several pairs the chance to discuss, and debrief as a large group.
- Have students chose ONE card each to paraphrase and analyze. They should come to a decision individually as to whether the quotation comes from a Founder or a Progressive. Then have students mingle with each other, sharing their quotations and taking on identities as “Founders” or “Progressives.” Founders should look for other Founders; Progressives should look for other Progressives. Once all students have assembled into two large groups, check answers. Invite volunteers from each group to participate, one at a time, in a “fishbowl” discussion about their respective points of view. Allow several pairs the chance to discuss, and debrief as a large group.

Homework

Have students write one paragraph in response to the question: Which concept is more accurate:

“People are naturally flawed, and government should be structured so that people’s natural self-interest will lead officials to check one another’s attempts to exercise more power than the Constitution allows.”

Or

“People are naturally good, and can and should be made better through government action.”

TOO MUCH, TOO LITTLE, OR JUST RIGHT?

1. In response to predictions of a harsh winter, your city government hires additional snow-plow drivers.

Support ____ Oppose ____ Why?

2. To combat high blood pressure and obesity, your city government wants to limit salt in restaurants, ban all trans-fats, and ban the sale of sugary drinks above a certain size.

Support ____ Oppose ____ Why?

3. In order to prevent poisonous chemicals from entering the water supply, your county government fines businesses that dump hazardous waste into rivers.

Support ____ Oppose ____ Why?

4. Worried that not enough children are entering kindergarten with skills to succeed, Congress awards grants to states that provide infant and toddler education programs for free to citizens.

Support ____ Oppose ____ Why?

5. In order to ensure justice is carried out in criminal cases, due process requirements such as jury trials, the right to call witnesses, and bans on double jeopardy are established at the local, state, and federal levels.

Support ____ Oppose ____ Why?

6. In response to studies showing that children who eat dinner with their families most nights go on to succeed in college at higher rates than those who don't, the federal government passes a law requiring parents to sit down to dinner with their minor children at least five nights per week.

Support ____ Oppose ____ Why?

WHO SAID IT? QUOTE SORTING

1 “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.”

3 “Can the liberties of a nation be sure when we remove their only firm basis, a conviction in the minds of the people, that these liberties are a gift from God?”

2 “Personal liberty is at last an uncrowned, dethroned king, with no one to do him reverence. ...We are no longer frightened by that ancient bogy — ‘paternalism in government.’ We affirm boldly, it is the business of government to be just that — paternal. ...Nothing human can be foreign to a true government.”

4 “Better the occasional faults of a government that lives in a spirit of charity than the consistent omissions of a government frozen in the ice of its own indifference.”

WHO SAID IT? QUOTE SORTING

5 “Is life so dear, or peace so sweet, as to be purchased at the price of chains and slavery? Forbid it, Almighty God! I know not what course others may take; but as for me, give me liberty or give me death!”

7 “This is not a contest between persons. The humblest citizen in all the land, when clad in the armor of a righteous cause, is stronger than all the hosts of error.”

6 “[N]atural liberty is a gift of the beneficent Creator, to the whole human race; and ... civil liberty is founded in that; and cannot be wrested from any people, without the most manifest violation of justice. Civil liberty is only natural liberty, modified and secured by the sanctions of civil society.”

8 “In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution.”

WHO SAID IT? QUOTE SORTING

9 “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.”

11 “Our country has deliberately undertaken a great social and economic experiment, noble in motive and far-reaching in purpose.”

10 “For it is very clear that in fundamental theory socialism and democracy are almost if not quite one and the same. They both rest at bottom upon the absolute right of the community to determine its own destiny and that of its members. Men as communities are supreme over men as individuals.”

12 “The doctrine of ‘personal liberty’ as applied to the use of liquor has been over-worked by the liquor men. As a matter of fact, there is no such thing as an absolute individual right to do any particular thing, or to eat or drink any particular thing, or to enjoy the association of one's own family, or even to live, if that thing is in conflict with ‘the law of public necessity.’”

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.

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 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.

QUOTE MATCH:
WHO SAID IT?

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

ANSWER KEY

- | | |
|---|---|
| <p>7. Progressive - William Jennings Bryan, Cross of Gold Speech at the Democratic National Convention, 1896</p> <p>8. Founder - Thomas Jefferson, Resolutions Relative to the Alien and Sedition Acts, 1798</p> <p>9. Founder – James Madison, <i>The National Gazette</i>, 1792</p> | <p>10. Progressive - Woodrow Wilson, <i>Socialism and Democracy</i>, 1887</p> <p>11. Progressive – Herbert Hoover, Letter on the Passage of the 18th Amendment to an Idaho Senator, 1928</p> <p>12. Progressive – Charles Stelze, <i>Why Prohibition!</i>, 1918</p> |
|---|---|

Classifying Liberty

	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	✓	✓	Same
D. <i>On Property</i> , Madison, 1792	✓	✓	Same
E. Fourteenth Amendment, 1868	✓	✓	Same
F. Slaughterhouse Cases, 1873	✓	✓	Same
H. <i>Meyer</i> , 1922	✓	✓	Same
I. <i>Pierce</i> , 1924	✓	✓	Same
J. <i>Schechter</i> , 1935	Not squarely addressed	Not squarely addressed	Not squarely addressed
K. <i>Palko</i> , 1937	✓		Different
L. <i>Parrish</i> , 1937		✓	Different
M. <i>Carolene</i> , 1938	✓	✓	Different
N. <i>Griswold</i> , 1964	✓		Different
O. <i>Lawrence</i> , 2002	✓		Different