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

By Diana E. Hess

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My colleagues in science and math tell me that discussing students’ preconceptions and misconceptions is a typical part of the discourse about teaching in their fields. By contrast, I rarely hear social studies teachers talk about this—perhaps because so much of the content in social studies is or could be contested and we therefore shy away from labeling students’ ideas as “pre” or “mis” conceptions.

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

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

By comparison, 63 percent of Americans cannot name two Supreme Court justices. Clearly, we should not over-generalize—it may be that some people who cannot name justices actually know a lot about the Supreme Court. Conversely, knowing the name of a justice does not indicate that a person understands anything substantive about the Court. Yet it is my sense that most people are not informed about what the Supreme Court does—in part because the media typically pays little attention to the Court, except when a Supreme Court position falls vacant and a new justice has to be nominated and approved.
For many teachers, then, it is likely that while most of their students may have vague ideas and feelings about the Court, they are not coming into the classroom with robust content knowledge. However, this does not mean that they do not have any conceptions about the Court and what it does, or should do. In my experience teaching high school students in a variety of venues, and listening to hundreds of middle and high school teachers talk about their understandings about the Court—and what their students tend to know and not know—I have encountered six key misconceptions that many people hold about the Court (and the Constitution) that need to be corrected, or at least contested.

1. **THE CONSTITUTION APPLIES TO EVERYONE AND EVERYTHING**

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

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

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

2. **THE LIBERATION GENERALIZATION**

Another belief that many people hold is that the Court’s primary and most frequently enacted function is to liberate people from the heavy hand of a discriminatory majority.
Supreme Court scholar Michael Klarman traces this misconception to the Court’s landmark decision in *Brown v. Board of Education*. Klarman explains,

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

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

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

### 3. THE BELIEF IN ERROR CORRECTION

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

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

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

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. 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.

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*).


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

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

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

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

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

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

DBQ Strategies:

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

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

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

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

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

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

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

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

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

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

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

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

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

http://billofrightsinstitute.org/resources/educator-resources/landmark-cases/
www.oyez.org
http://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? ______________________________________
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How did the Supreme Court majority decide the case and why?___________________
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What were the main points raised in any dissenting opinions? ___________________
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What other Supreme Court cases are related in important ways? _______________
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<th>Constitutional Issue:</th>
<th>Case Name and Year:</th>
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### How would you use the documents provided to answer the constitutional question?

#### Yes (Source/Evidence)

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## DOCUMENTS SUMMARY

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

<table>
<thead>
<tr>
<th>Document name &amp; date</th>
<th>Author</th>
<th>Answer to scaffolding question</th>
<th>How each side might use this document to answer the Key Question — OR — What is the main idea of this document?</th>
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Additional notes:

How did majority/dissenting opinions align with each attorney's position?

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

Preparation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A good thesis statement—

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

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

**DBQ Do and Don’t**

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<th>Steps</th>
<th>Do</th>
<th>Don’t</th>
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<tr>
<td>1. Analyze the prompt and divide it into its components. A graphic organizer helps with this step.</td>
<td>Fully address the prompt. It is better to address all parts of the prompt, even if you must do some in a way that is less complete, than to spend all your time on just one of two parts or 3 of 4 parts.</td>
<td>Neglect part of the prompt because you spent too much time on the part you know more about.</td>
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<tr>
<td>2. Plan to prove your point. It is best to begin by planning the overall structure BEFORE even looking at the documents.</td>
<td>Organize your thoughts before writing the thesis statement. What are the logical points your essay needs to include?</td>
<td>Write a “laundry list” that simply summarizes each document.</td>
</tr>
<tr>
<td>Steps</td>
<td>Do</td>
<td>Don’t</td>
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<tr>
<td>3. Check the documents to see how you can use them as tools.</td>
<td>Strive to use all the documents; but be sure you accurately understand their main ideas.</td>
<td>Take quotes or ideas out of context to use them in a manner other than the author intended.</td>
</tr>
<tr>
<td>4. Ask yourself when writing every paragraph: “How does this help to prove my thesis?”</td>
<td>Analyze to prove the position asserted in the thesis statement. Analysis is not the same thing as description or narrative. Merely making a series of true statements is not analysis. Key to analysis—is the essay answering the “So what?” question?</td>
<td>Use 1st-or 2nd-person pronouns “I think the Supreme Court has the authority to use judicial review because…” “Have you ever wondered how the Supreme Court got the authority to overturn federal laws?”</td>
</tr>
<tr>
<td>5. Manage time wisely; writing long quotes will eat up thinking time.</td>
<td>Use relevant facts, evidence, proof. A well-chosen brief phrase in quotations and worked into your own sentence is powerful.</td>
<td>Use lengthy quotes. Pad the paper in an attempt to conceal a lack of analysis.</td>
</tr>
<tr>
<td>6. Give credit to sources.</td>
<td>Cite sources using the author’s name and/or document title.</td>
<td>Write “According to Document B,...”</td>
</tr>
<tr>
<td>7. Think as you write!</td>
<td>Let logic and analysis drive the essay.</td>
<td>Let documents drive the essay.</td>
</tr>
<tr>
<td>Score</td>
<td>Thesis</td>
<td>Analysis (tends to be the most difficult component)</td>
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<tr>
<td>8-9</td>
<td>Contains a well-developed thesis which clearly addresses all aspects of the prompt and shows organizational roadmap.</td>
<td>Effective analysis which shows &amp; proves relationships; fully answers the &quot;so what?&quot; questions; more analytical than narrative.</td>
</tr>
<tr>
<td>5-6</td>
<td>Contains a thesis which addresses the prompt.</td>
<td>Limited analysis; simplistic explanations that do not indicate mastery of the content; may list facts without analysis.</td>
</tr>
<tr>
<td>2-3</td>
<td>Presents a limited, confused and/or poorly developed thesis.</td>
<td>Shows inadequate or inaccurate understanding of the prompt.</td>
</tr>
<tr>
<td>0-1</td>
<td>Contains no thesis or a thesis which does not address the prompt.</td>
<td>Shows complete or nearly complete ignorance of the prompt.</td>
</tr>
</tbody>
</table>

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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."
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.
Case Background

Throughout history, society has passed laws restricting sexual activity. Laws regarding incest, adultery, and prostitution exist in all 50 states today. Historically, state laws dealing with sexual activity included prohibitions on sodomy. These laws were based in English common law. The growing acceptance of homosexual lifestyles in America led to challenges of sodomy laws. Most states forbade gay sex until the 1960s.

Griswold v. Connecticut (1965), Eisenstadt v. Baird (1972), and Roe v. Wade (1973) were cases which sought to define a right to privacy with regard to reproductive choices. Reproductive decisions involve sexual activity between consenting adults, and the Court ruled in 1965 that the Bill of Rights protected a zone of privacy in America’s bedrooms. The challenge, therefore, became how to define the limits of Americans’ rights to privacy with regard to sex.

In 1986, the Supreme Court refused to recognize a “fundamental right of homosexuals to engage in sodomy” in the case of Bowers v. Hardwick. The Court declined to extend the protections afforded under Griswold and Eisenstadt, and upheld the power of the states to limit sexual activity. The Court was asked to revisit its decision seventeen years later. In Lawrence v. Texas, John Lawrence challenged a Texas state law banning certain sexual acts between people of the same sex. He claimed the law violated privacy and due process rights protected by the Constitution.
KEY QUESTION

Analyze how the Court’s definition of privacy evolved from 1965 to 2003.

Documents you will examine:

A. Commentaries on the Laws of England, Book IV, 1765-1769
B. Federalist No. 51, 1788
F. Majority Opinion, Roe v. Wade, 1973
I. Majority Opinion (6-3), Lawrence v. Texas, 2003
K. Dissenting Opinion (Antonin Scalia), Lawrence v. Texas, 2003
L. Dissenting Opinion (Clarence Thomas), Lawrence v. Texas, 2003
M. “What Are You Doing Here?” 2003
DOCUMENT A

*Commentaries on the Laws of England, Book IV, 1765-1769*

IV. WHAT has been here observed ... ought to be the more clear in proportion as the crime is the more detestable, may be applied to another offence, of a still deeper malignity; the infamous crime against nature, committed either with man or beast....

I WILL not ... dwell any longer upon a subject, the very mention of which is a disgrace to human nature. ...Which leads me to add a word concerning its punishment.

THIS the voice of nature and of reason, and the express law of God, determine to be capital. Of which we have a signal instance, long before the Jewish dispensation, by the destruction of two cities by fire from heaven: so that this is an universal, not merely a provincial, precept.

- How did English common law view and punish sodomy?

DOCUMENT B

*Federalist No. 51, 1788*

It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure....

In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good.

- According to this document, what two possible sources of injustice exist?
- According to this document, why does the extended nature of the American republic help ensure justice?
Concurring Opinion, Railway Express Agency v. New York, 1949

The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

- Restate this assertion in your own words.

Majority Opinion, Griswold v. Connecticut, 1965

The present case ... concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees....

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

- What right to privacy was defined in Griswold v. Connecticut?
- What is the “noble purpose” that this privacy promotes?
**DOCUMENT E**


The marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child ... the State could not, consistently with the Equal Protection Clause, outlaw distribution [of birth control] to unmarried but not to married persons....

- What is the difference between this decision and the one in the *Griswold* case (Document D)?

**DOCUMENT F**


The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, ... the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. This right of privacy... is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.

- How did the decision in *Roe* build on the decisions in *Griswold* (Document D) and *Eisenstadt* (Document E) with respect to the right of privacy?

Question: “Do you think homosexual relations between consenting adults should or should not be legal?”

What trends do you see concerning Americans’ support for legalizing homosexual activity?
Majority Opinion, Bowers v. Hardwick, 1986

We think it evident that none of the rights announced in [Griswold and Eisenstadt] bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy. ...Moreover, any claim that these cases [mean] that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable.

Plainly enough, otherwise illegal conduct is not always immunized whenever it occurs in the home. Victimless crimes, such as the possession and use of illegal drugs, do not escape the law where they are committed at home....

[R]espondent asserts that there must be a rational basis for the law, and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed....

- How does the Court contrast the right to privacy protected in the Griswold and Eisenstadt cases with the right claimed in Bowers?
- What statement does the Court make about morality and the law?
Majority Opinion (6-3), Lawrence v. Texas, 2003

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. ...Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. ...The laws involved in Bowers [Document H] and here ... purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. ...It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. ...The liberty protected by the Constitution allows homosexual persons the right to make this choice.

It must be acknowledged, of course, that the Court in Bowers was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. Our obligation is to define the liberty of all, not to mandate our own moral code. ...

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

▶ Restate the majority opinion in two to three sentences.
Concurring Opinion, Lawrence v. Texas, 2003

I agree with the Court that Texas’ statute banning same-sex sodomy is unconstitutional. ...I base my conclusion on the Fourteenth Amendment’s Equal Protection Clause. ...The statute at issue here makes sodomy a crime only if a person “engages in deviate sexual intercourse with another individual of the same sex.” Sodomy between opposite-sex partners, however, is not a crime in Texas. That is, Texas treats the same conduct differently based solely on the participants.

- Why does the concurring Justice believe the Texas law is unconstitutional?

Dissenting Opinion (Antonin Scalia), Lawrence v. Texas, 2003

[The Texas sodomy law] undoubtedly imposes constraints on liberty- so do laws prohibiting prostitution, recreational use of heroin, and, for that matter, working more than 60 hours per week in a bakery. But there is no right to “liberty” under the Due Process Clause, though today’s opinion repeatedly makes that claim... The Fourteenth Amendment expressly allows States to deprive their citizens of liberty so long as “due process of law” is provided....

[T]he Due Process Clause prohibits States from infringing fundamental liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest. [emphasis original]

- What argument does Justice Scalia make about the Due Process Clause in his dissent?
Dissenting Opinion (Clarence Thomas), Lawrence v. Texas, 2003

The law before the Court today “is ... uncommonly silly.”...If I were a member of the Texas Legislature, I would vote to repeal it. Punishing someone for expressing his sexual preference through noncommercial consensual conduct with another adult does not appear to be a worthy way to expend valuable law enforcement resources.

Notwithstanding this, I recognize that as a member of this Court I am not empowered to help petitioners and others similarly situated. My duty, rather, is to “decide cases ‘agreeably to the Constitution and laws of the United States.’ “ And, just like Justice Stewart [dissenting in Griswold v. Connecticut, 1965], I “can find [neither in the Bill of Rights nor any other part of the Constitution a] general right of privacy.”...

- If Justice Thomas believes the law is “uncommonly silly,” why does he not find it unconstitutional?
What is the cartoonist’s viewpoint about privacy and the Texas law at issue in Lawrence v. Texas?

DIRECTIONS

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

KEY QUESTION

Analyze how the Court’s definition of privacy evolved from 1965 to 2003.
Jody Thompson (L) and his partner Jesse Adams, of Asbury Park, New Jersey, hold hands at a 2006 rally at The Unitarian Church of Montclair.

- How do some state initiatives to ban or legalize gay marriage apply to the issues in Lawrence v. Texas?

- Some scholars suggest that the majority in Lawrence did not adopt the reasoning used by Justice Sandra O’Connor in her concurrence, because O’Connor’s equal protection argument could have opened the door to constitutional claims to a right to gay marriage. Evaluate this assertion.
because this type of determination should be made by state legislatures.

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

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

**Lawrence v. Texas**

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

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

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

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

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

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

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

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

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

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

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

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

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