



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

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By Diana E. Hess

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

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

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

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

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

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

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

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

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

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

## **2. THE LIBERATION GENERALIZATION**

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

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

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

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

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

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

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

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

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

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

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

#### 4. THE GIDEON EFFECT

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

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

## 5. A RULING IS A “RIGHT” ANSWER

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

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

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

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

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

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

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

## THE EFFECT OF CORRECTING MISCONCEPTIONS

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

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

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

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

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

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

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

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

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

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

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

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



# CLASSROOM APPLICATIONS

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

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

## **DBQ Strategies:**

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

## ONLINE RESOURCES

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

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

# CASE BRIEFING SHEET

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

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

\_\_\_\_\_

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

\_\_\_\_\_

\_\_\_\_\_

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

\_\_\_\_\_

Summary of one side's arguments:

Summary of the other side's arguments:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

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

\_\_\_\_\_

\_\_\_\_\_

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

\_\_\_\_\_

\_\_\_\_\_

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

\_\_\_\_\_

\_\_\_\_\_

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

\_\_\_\_\_

\_\_\_\_\_

# CONSTITUTIONAL ISSUE EVIDENCE FORM

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

Case Name and Year:

Constitutional Issue:

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

# DOCUMENTS SUMMARY

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

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

# ATTORNEY DOCUMENT ANALYSIS

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

Petitioner	Both sides	Respondent
<p><b>Additional notes:</b> 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 <sup>nd</sup> -person pronouns "I think the Supreme Court has the authority to use judicial review because..." "Have you ever wondered how the Supreme Court got the authority to overturn federal laws?"
5. Manage time wisely; writing long quotes will eat up thinking time.	Use relevant facts, evidence, proof.  A well-chosen brief phrase in quotations and worked into your own sentence is powerful.	Use lengthy quotes.  Pad the paper in an attempt to conceal a lack of analysis.
6. Give credit to sources.	Cite sources using the author's name and/or document title.	Write "According to Document B,..."
7. Think as you write!	Let logic and analysis drive the essay.	Let documents drive the essay.

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

Adapted from AP US History guidelines

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

# KEY QUESTION SCORING GUIDELINES FOR ALL ESSAYS

## **The Good-Excellent Essay**

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

## **The Average-Good Essay**

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

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

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

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

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



## CONSTITUTIONAL PRINCIPLES AND THEIR DEFINITIONS

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

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

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

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

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

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

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

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

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

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

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

## ANSWER KEY

### Document 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

### CITIZENS UNITED V. F.E.C. (2010)

#### Handout B: *Citizens United v. F.E.C.* (2010) Background Essay

1. The banning of direct campaign contributions by corporations (Tillman Act, 1907), limitations on activities of federal employees (Hatch Act, 1939), banning direct campaign contributions by labor unions (Taft-Hartley, 1947), public reporting requirements and dollar-amount limitations on contributions (FECA, 1971 & 1974), and a ban on “electioneering communications” within a set time period prior to elections (BCRA, 2002).
2. The Court deemed that restricting independent spending by individuals and groups to support or defeat a candidate interfered with speech protected by the First Amendment, so long as those funds were independent of a candidate or his/her campaign. Such restrictions, the Court held, unconstitutionally interfered with the speakers’ ability to convey their message to as many people as possible.
3. Citizens United, a non-profit group funded by donations, produced a feature-length movie critical of presidential candidate Hillary Clinton. The movie was to be shown nationwide in select theaters and through a major cable company’s On-Demand service. It potentially ran afoul of the BCRA’s limitation on “electioneering communications” within 30-days of a primary election or 60-days of a general election, paid for by a corporation’s general fund.
4. *Citizens United v. F.E.C.* extended the principle, set 34 years earlier in *Buckley*, that restrictions on spending money for the purpose of engaging in political speech unconstitutionally burdened the right to free speech protected by the First Amendment.
5. Accept reasoned answers.
6. Using the same reasoning as the Court did in *Buckley* and *Citizens United*, these laws would be unconstitutional. They would be unconstitutional not because “spending [on a lawyer] amounted to [assistance of counsel] protected by the [Sixth] Amendment,” or that “spending [on a private education] amounted to [private education] protected by the [Due Process Clause of the Fourteenth Amendment],” or that “spending [on an abortion] amounted to [an abortion] protected by the [Due Process Clause of the Fourteenth Amendment].” Rather, the reasoning would be that banning such spending *unconstitutionally interfered* with the rights to assistance of counsel, private education, or an abortion. Likewise, a government ban on candidates from traveling in order to give campaign speeches would likely be unconstitutional because the ban on travel unconstitutionally burdened the right to speak.

## ANSWER KEY

### Handout C: *Citizens United v. F.E.C.* (2010) Timeline of Campaign Finance Reform Initiatives

DATE	LAW/SUPREME COURT CASE	MAIN EFFECT
1907	Tillman Act	Prohibited corporate contributions for political purposes
1910	Federal Corrupt Practices Act	Added enforcement mechanisms to Tillman Act
1939	Hatch Act	Restricted political campaign activities of federal employees
1947	Taft-Hartley Act	Prohibited labor unions from expenditures that supported or opposed particular federal candidates
1971	Federal Elections Campaign Acts	Strengthened public reporting requirements of campaign financing
1974	Federal Elections Campaign Acts	Imposed specific limits to the amount of money that could be donated to candidates; set up Federal Election Commission
1976	Buckley v. Valeo	Ruled that restricting independent spending by individuals and groups to support or defeat a candidate interfered with speech
2002	Bipartisan Campaign Finance Reform Act (BCRA)	Ban on “electioneering communications”—speech that named a federal candidate within certain time periods if paid for out of a special interest’s general fund. Corporations could still fund electioneering through PACs.
2003	McConnell v. F.E.C.	Supreme Court upheld BCRA restriction (in spite of precedent set by Buckley).
2010	Citizens United v. F.E.C.	BCRA’s ban on corporate and union independent expenditures was unconstitutional under the First Amendment’s speech clause, extending the reasoning used in Buckley.

## ANSWER KEY

### CITIZENS UNITED V. F.E.C. DBQ

#### **Document A: *Federalist #10* by James Madison (1787)**

1. According to Madison, a faction is a number of citizens who are 1) united by a common interest and 2) opposed to the rights of others and/or the permanent interest of the community.
2. For Madison, one check on the influence of factions is regular elections.
3. Accept reasoned answers.

#### **Document B: Thomas Jefferson to Edward Carrington (1787)**

1. The opinion of the people
2. “The only safeguard of the public liberty” is, for Jefferson, the ability of the people to speak and publish their opinions on governmental matters freely. Too much information is preferable to too little.
3. A disadvantage to press freedom is that the people may be led astray at times. This possibility is acceptable to Jefferson because he believes their good sense will win out, and they will correct themselves. Also, for all the faults that people are prey to, government censorship would be more dangerous than public error.
4. Those with power will “become wolves,” which is to say they will oppress those without power.

#### **Document C: The First Amendment (1791)**

1. Accept reasoned answers.
2. Giving speeches, speaking persuasively to friends or larger audiences, producing creative works, writing for a newspaper or other publication, keeping a blog, posting to YouTube, Facebook, or other social media, writing letters to the editor, attending political rallies, meeting in clubs or other groups.

#### **Document D: *Dartmouth College v. Woodward* (1819)**

1. “It possesses only those properties which the charter of its creation confers upon it...Among the most important are immortality and individuality, so that a perpetual succession of many persons are considered as the same, and may act as a single individual.”
2. Act as a single individual, manage its own affairs, hold property, enter into contracts
3. Accept reasoned responses. Students may suggest: Chief Justice John Marshall affirmed the principle that corporations have the same rights as individuals with respect to property ownership, contracts, and the ability to sue and be sued. This is based on the legal agreement between the persons who formed the corporation. Those individuals have property rights; therefore they retain those rights when they operate as a group. This idea is not that the corporation somehow is philosophically equivalent to a person, but only that individuals do not give up their property rights when they associate with others. Dartmouth College, as an association of persons, was a party to a contract, and that contract was just as enforceable as any other contract under the law.

#### **Document E: “The Bosses of the Senate,” Joseph Keppler (1889)**

1. “Quid pro quo” refers to a more or less equal exchange. In the context of political discourse, the term often suggests bribery. “Quid pro quo” refers to an expectation that, if wealthy contributors donate large sums of money to a political campaign, the person receiving this benefit will, once elected, use his or her influence to provide some special benefit to the donor.
2. The cartoonist believes that, through their financial support of candidates, the business interests of the industrial



## ANSWER KEY

age have seized control of the Senate, and are the “bosses” of the Senators. The concern of quid pro quo corruption is indicated by the position and size, relative to the Senators, of the figures representing business interests. The closed door leading to the public gallery above the Senate reinforces the author’s message that the government is no longer open to “the people.”

3. Accept reasoned answers. Students may note that in the cartoon’s time period, Senators were appointed by state legislatures.

### **Document F: New Nationalism Speech, Theodore Roosevelt (1910)**

1. Business interests that seek to “control and corrupt the men and methods of government for their own profit.”
2. Roosevelt’s description of “special interests” seems very similar to Madison’s concept of “faction.”

### **Document G: Buckley v. Valeo (1976)**

1. Speech about candidates deserves the same First Amendment protection as other kinds of political speech. Civil discourse on politics is essential for self government. Engaging in speech requires spending money. Therefore, limits on spending by individuals and groups unconstitutionally burden their ability to speak freely. The First Amendment protects the ability to speak for or against a candidate, and was meant to ensure such speech could occur in a variety of ways.

### **Document H: Citizens United Mission Statement (1988)**

1. Probably not. While Citizens United is “a number of citizens...united and actuated by some common...interest,” its expressive activities do not satisfy the second part of the definition of faction: “adversed

to the rights of other citizens, or to the permanent and aggregate interests of the community.”

2. Accept reasoned answers.

### **Document I: McConnell v. F.E.C. (2003)**

1. Since the BCRA leaves PACs free to engage in political speech, corporations and unions are not limited in their ability to speak, they merely must do so through their PACs.
2. Accept reasoned answers.

### **Document J: Citizens United v. F.E.C. (2010)**

1. The First Amendment protects citizens, or associations of citizens, from being punished for engaging in political speech.
2. Accept reasoned answers.
3. Accept reasoned answers.

### **Document K: Citizens United v. F.E.C. (2010), Dissenting Opinion**

1. The dissent argues that the right to free speech was designed to protect an individual’s right to speak, and was never understood to apply to corporations, which are business associations, not political ones. The notion of “corporate speech” was foreign to the Founders, and the First Amendment doesn’t protect it at the same level. Congress has a legitimate interest in protecting against “undue influence” and corruption, and the vast resources of corporations — in comparison to individuals — makes this “undue influence” more likely. The BCRA’s ban may regulate how a person, or persons, may speak, but it does not prevent anyone from speaking “in his own voice.”
2. Accept reasoned answers.

## ANSWER KEY

### Document L: *Citizens United v. F.E.C.* (2010), Concurring Opinion

1. This concurring justice argues that corporations existed at the time of the Founding. They not only engaged in speech and petitioned the government, but were understood by the authors of the First Amendment to have speech rights equivalent to individual Americans. Further, the First Amendment does not allow restrictions to be made on the basis of who is speaking.

### Document M: “Another Dam Breaks,” Matt Wuerker, 2010

1. The cartoonist believes the Supreme Court’s ruling in *Citizens United* has “broken the dam” holding back union and corporate money from overwhelming American voters with political speech. The resulting wave of “special interest” money threatens to drown the influence and voices of individual voting Americans.
2. Accept reasoned answers.

## UNIT 4 – THE PRESIDENCY: CONSTITUTIONAL CONTROVERSIES

### Presidents and the Constitution Introductory Essay

1. According to Executive Order 9066, the military had authority to forcibly remove and incarcerate anyone of Japanese descent living within 60 miles of the California, Oregon, and Washington coast—an area deemed critical to national defense and potentially vulnerable to espionage.
2. Executive Order 9102 established the War Relocation Authority to carry out the internment.
3. Korematsu challenged the wartime provisions, believing that the President and Congress had exceeded their war powers by implementing exclusion and restricting the rights of Americans of Japanese descent.
4. The U.S. Supreme Court sided with the government and held that the need to protect against espionage outweighed

Korematsu’s rights. Compulsory exclusion, though constitutionally suspect, is justified during circumstances of emergency and peril. The majority accepted the military’s assertion that it was impossible to determine loyal from disloyal Japanese Americans and that their temporary exclusion was based on military judgment that an invasion of the West Coast by Japan was a real possibility.

5. The dissenters called the government’s actions racist and said the relocation centers were concentration camps. Justice Robert Jackson dissented and was particularly troubled that the Court had accepted the case in the first place and then, by ruling in favor of the government, had created a constitutional precedent for future action.
6. Accept reasoned answers.
7. Accept reasoned answers.