

GIDEON v. WAINWRIGHT (1963)

DIRECTIONS

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

Case Background

At the time the Constitution was adopted, British courts denied lawyers to individuals charged with treason or felonies. People accused of criminal misdemeanors, however, were provided lawyers. The American colonies and, later, the states, rejected this practice. Most of the original thirteen states allowed defendants in all cases to have lawyers. Through the years, the Supreme Court has heard several cases involving the question of whether poor criminal defendants had a right to a lawyer at public expense, or whether the Sixth Amendment merely meant that the government could not stop accused persons from hiring one.

In 1961, Clarence Earl Gideon was arrested in Florida for breaking into a Panama City pool hall with the intent to steal money from the vending machines. This was a felony. When Gideon appeared in court, his request for a court-appointed lawyer was denied, as Florida law only required lawyers for defendants charged with capital offenses. Gideon defended himself at trial. He was found guilty, and sentenced to five years in prison.

While in prison, Gideon made frequent use of the prison library. With the knowledge he gained there, along with the help of a fellow inmate with a legal background, he submitted a hand-written petition to the Supreme Court. In his petition, he challenged the constitutionality of his conviction, as he had not been able to have the assistance of counsel for his defense.

KEY QUESTION

Does the Sixth Amendment guarantee the right to counsel in all cases? Further, does the Sixth Amendment require government to provide a lawyer to defendants who want one but cannot afford one?

Documents you will examine:

- A Sections of Colonial and State Constitutions, 1641-1777
- B Section of the Sixth Amendment, 1791
- C Section of the Fourteenth Amendment, 1868
- D *Powell v. Alabama*, 1932
- E *Betts v. Brady*, 1942
- F Clarence Gideon's Petition to the Supreme Court, 1962
- G Unanimous Majority Opinion, *Gideon v. Wainwright*, 1963
- H Concurring Opinion, *Gideon v. Wainwright*, 1963
- I "I Can't Defend Myself", 2004

RIGHTS OF THE ACCUSED

by Dennis Goldford, Ph.D.

All governments—whether a constitutional democracy, a monarchy, or a dictatorship—operate through the exercise of coercion. The fundamental question is, by what authority or criteria may government exercise that coercion? When we say in the United States that we have a government of law and not of men, we mean that government may exercise coercion only in terms of principle, embodied in the law, rather than according to the arbitrary whims of government officials. Under the rule of law coercion exists in two forms. First, law coerces us by prohibiting us from doing what we want to do (e.g., speeding), and requiring us to do what we do not want to do (e.g., pay taxes). Second, law coerces us by charging, convicting, and punishing us for not obeying either dimension of law in its first form.

Criminal law and procedures have to do with that second sense of the coercive power of law. In a society whose Founding document speaks of life, liberty, and the pursuit of happiness, the question of when and how government may legitimately employ its coercive power—in the words of the Fifth and Fourteenth Amendments, to deprive us of our life, liberty, and property—is thus central. Given the presumption of innocence that is implicit in our constitutional scheme, the rights of criminal suspects and defendants flow from and give effect to that presumption and the rule of law itself. For that reason, it is appropriate to think of these protections not as criminal rights, but rather as the rights of criminal suspects and defendants. Under our system of government people charged with criminal activity are not criminals in the eyes of the law until after they confess or are convicted in a trial. In simplest terms, we can say that the criminal-justice process consists of three stages: first, when police suspect someone of criminal activity, he is a criminal suspect; second, when police amass sufficient evidence for a prosecutor

to charge someone with a crime, he is a criminal defendant; and third, once someone has confessed or has been found guilty in a trial, he is a criminal. Broadly conceived, the Fourth Amendment covers the criminal suspect, the Fifth, Sixth, and Seventh Amendments cover the criminal defendant; and the Eighth Amendment (aside from bail) covers the criminal's punishment.

Some people argue that the rights of the accused are mere technicalities, but one could argue that it is those very “technicalities”—especially the protection against unreasonable searches and seizures in the Fourth Amendment, at issue

Some people argue that the rights of the accused are mere technicalities, but one could argue that it is those very “technicalities” that distinguish a constitutional democracy from an authoritarian, tyrannical, or totalitarian political system.

in *Mapp v. Ohio* (1961), the privilege against self-incrimination (as well as the guarantee of due process) in the Fifth Amendment, at issue in *Miranda v. Arizona* (1966), and the right to counsel in the Sixth Amendment, at issue in *Gideon v. Wainwright* (1963)—that distinguish a constitutional democracy from an authoritarian, tyrannical, or totalitarian political system. You may be familiar with a phrase out of the old American West: “Give him a fair trial and then hang him.” Sometimes used today as well, this phrase suggests that we know someone’s guilt prior to a trial, but under the law it is only through an elaborate set of procedures that we are authorized to determine one’s guilt or innocence. Under the presumption of innocence, the rights of the accused are the foundation of those procedures.

Understanding the rights of the accused requires us to consider four central issues. The first one is what we can call the interpretive question: what is the meaning of a particular right or procedural guarantee? For example, what is a search, what is a seizure, and what is the difference between a reasonable and unreasonable search and seizure? Is the government engaged in a reasonable search when it wiretaps telephone conversations (*Katz v. United States*, 1967), or when it points a thermal-imaging device at someone’s home to determine whether he is generating enough heat inside to indicate that he is using heat lamps to grow marijuana (*Kyllo v. United States*, 2001)?

If police officers see a suspect swallow a substance during a drug bust and they take him to hospital to have his stomach pumped to obtain that substance as possible evidence of a crime, is that a reasonable search and seizure or a violation of the privilege against self-incrimination (*Rochin v. California*, 1952)? How much time must pass before one is deprived of the right to a speedy trial? Does allowing a child to testify behind a screen against an alleged child molester deny the defendant his right to confront the witnesses against him? These and other interpretive questions arise constantly when criminal suspects and defendants assert their constitutional rights

Additionally, in answering the interpretive question we have to ask whether the meaning of a particular right or procedural guarantee can change over time. When we ask what “cruel and unusual punishment” is, for example, do we ask what those who wrote and ratified that prohibition in 1791 meant by it, or what we might consider it to mean today? Posing a hypothetical situation in which “some state should enact a new law providing public lashing, or branding of the right hand, as punishment for certain criminal offenses,” Justice Antonin Scalia, who as an originalist takes the former position, has written, “Even if it could be demonstrated unequivocally that these were not cruel and unusual measures in 1791 ... I doubt whether any federal judge—even among the many who consider themselves originalists—would sustain them against an eighth amendment challenge” (“Originalism: The Lesser Evil,” 57 *University of Cincinnati Law Review* 849, 861 [1989]). Relatedly, how do the criminal procedure guarantees ratified in 1791 apply to technological innovations unknown at the time, such as telephones, computers, automobiles, and airplanes?

How do the criminal procedure guarantees ratified in 1791 apply to technological innovations unknown at the time, such as telephones, computers, automobiles, and airplanes?

There is always a tension between liberty and security: too much concern for liberty can threaten our personal and national security, and too much concern for our personal and national security can threaten our liberty.


The second central issue is what we can call the federalism issue: to what extent are federal criminal procedure guarantees applicable against the states? In other words, to what extent are states, where we find the vast bulk of criminal law, free to deal with criminal justice matters as they see fit, and to what extent are they bound by a federally mandated floor of criminal procedures? For example, the exclusionary rule at issue in *Mapp v. Ohio* requires that evidence obtained by the government in violation of the rights of the accused be excluded from use by the prosecution at trial. The Supreme Court first announced this rule as binding on the federal government in *Weeks v. United States* (1914). The Court held in *Wolf v.*

Colorado (1949) that it was binding only on the federal government, and not the states. Do all rights of the accused in federal proceedings apply against the states, or only some of them—and how do we determine which do and which do not?

The exclusionary rule exemplifies the third central issue in understanding the rights of the accused: what is the constitutional status of rules the Supreme Court fashions to give meaning and effect to the procedural rights and guarantees stated explicitly in the Fourth through Eighth Amendments? It is one thing to state that criminal suspects and defendants are protected against unreasonable searches and seizures, have a right to counsel and due process, a protection against self-incrimination and cruel and unusual punishment, and so forth, but how are such rights and guarantees to be enforced?

Justice Benjamin Cardozo complained that the meaning of the exclusionary rule is that “the criminal is to go free because the constable has blundered” (*People v. Defore*, 1926). Standard arguments against such rules are, first, that they are not constitutional provisions; second, that they handicap the police, making investigation of crimes more difficult; and, third, that they let guilty people go. Standard arguments in favor of such rules are, first, that they are rules fashioned by the courts to give meaning, content, and effect to explicitly stated constitutional protections, protections that would not exist in any meaningful way otherwise. Second, that far from handicapping police, requiring adherence to the Miranda warning and the exclusionary rule actually makes the police more careful and thus more likely to sustain a case and secure a conviction. Third, that there is evidence that relatively few convictions are ever overturned on these “technical” grounds.

Finally, understanding the rights of the accused raises a fourth central issue, one with particular salience in our post-9/11 world: to what extent, if any, do those rights—especially the prohibition on unreasonable searches and seizures and the privilege against self-incrimination—apply, for example, in the case of suspected terrorists who may have knowledge of a conspiracy to detonate a nuclear explosion in an American city? Even in a constitutional democracy dedicated to liberty, the rule of law, and the presumption of innocence, we have to remember that the central function of government is to provide for

the national defense and the maintenance of law and order. There is always a tension between liberty and security: too much concern for liberty can threaten our personal and national security, and too much concern for our personal and national security can threaten our liberty. How do we strike the proper balance between liberty and security in ordinary cases of domestic criminal activity, and how do we do so in extraordinary cases of domestic and international terrorism? As you read the following materials on the rights of the accused, consider how you would balance your liberty against your need for protection against both criminals and terrorists. 

Dr. Dennis Goldford is Professor of Politics and International Relations at Drake University in Iowa. He teaches in the areas of political theory and constitutional law, and his recent research deals with the originalism debate in contemporary constitutional theory. He has published numerous articles in the areas of political theory and constitutional interpretation, and his recent book is entitled The American Constitution and the Debate Over Originalism (Cambridge, 2005). His current research deals with politics and religion, and with the theory of federalism. Professor Goldford is also a frequent commentator on Iowa and national politics through both local and national media outlets.

DOCUMENT A

Sections of Colonial and State Constitutions, 1641-1777

The Body of Liberties of the Massachusetts Collonie in New England, 1641

Every man that findeth himselfe unfit to plead his owne cause in any Court shall have Libertie to imploy any man against whom the Court doth not except, to helpe him, Provided he give him noe fee or reward for his paines.

Virginia Declaration of Rights, 1776

8. That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favour, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived of his liberty except by the law of the land, or the judgment of his peers.

Vermont Constitution, 1777

X. That, in all prosecutions for criminal offences, a man hath a right to be heard, by himself and his counsel—to demand the cause and nature of his accusation....

Georgia Constitution, 1777

Art. LVIII. No person shall be allowed to plead in the courts of law in this State, except those who are authorized so to do by the house of assembly; and if any person so authorized shall be found guilty of malpractice before the house of assembly, they shall have power to suspend them. This is not intended to exclude any person from that inherent privilege of every freeman, the liberty to plead his own cause.

- **Underline sections that protect a right to counsel.**

DOCUMENT B

Section of the Sixth Amendment, 1791

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

- **Compare or contrast this document with at least one selection from Document A.**

DOCUMENT C

Section of the Fourteenth Amendment, 1868

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law...

- ▶ **What level of government does this amendment restrict?**
- ▶ **Is the Sixth Amendment's protection of right to counsel in Document B part of the "due process" protected by the Fourteenth Amendment?**

DOCUMENT D

***Powell v. Alabama*, 1932**

Let us suppose the extreme case of a prisoner charged with a capital offense, who is deaf and dumb, illiterate, and feeble-minded, unable to employ counsel, with the whole power of the state arrayed against him, prosecuted by counsel for the state without assignment of counsel for his defense, tried, convicted, and sentenced to death. Such a result, which, if carried into execution, would be little short of judicial murder, it cannot be doubted would be a gross violation of the guarantee of due process of law; and we venture to think that no appellate court, state or federal, would hesitate so to decide....

The United States by statute and every state in the Union by express provision of law, or by the determination of its courts, make it the duty of the trial judge, where the accused is unable to employ counsel, to appoint counsel for him. In most states the rule applies broadly to all criminal prosecutions, in others it is limited to the more serious crimes, and in a very limited number, to capital cases. A rule adopted with such unanimous accord...lends convincing support to the conclusion we have reached as to the fundamental nature of that right.

- ▶ **What does the Court mean by "judicial murder" in the first paragraph?**
- ▶ **What reason does the Court give for its conclusion that the right to counsel is of a "fundamental nature" in the second paragraph?**

DOCUMENT E

***Betts v. Brady*, 1942**

The Sixth Amendment of the national Constitution applies only to trials in federal courts. The due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment....

Asserted denial [of due process] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances and in the light of other considerations, fall short of such denial....

States should not be straight-jacketed in this respect by a construction of the Fourteenth Amendment.

- ▶ **To which level of government does this ruling assert the Sixth Amendment applies?**
- ▶ **What method does the Court assert should be used when determining whether a state denied a defendant due process?**

DOCUMENT F

Clarence Gideon's Petition to the Supreme Court, 1962

DIVISION OF CORRECTIONS
CORRESPONDENCE REGULATIONS

MAIL WILL NOT BE DELIVERED WHICH DOES NOT CONFORM WITH THESE RULES

No. 1 -- Only 2 letters each week, not to exceed 2 sheets letter-size 8 1/2 x 11" and written on one side only, and if ruled paper, do not write between lines. Your complete name must be signed at the close of your letter. Clippings, stamps, letters from other people, stationery or cash must not be enclosed in your letters.

No. 2 -- All letters must be addressed in the complete prison name of the inmate. Cell number, where applicable, and prison number must be placed in lower left corner of envelope, with your complete name and address in the upper left corner.

No. 3 -- Do not send any packages without a Package Permit. Unauthorized packages will be destroyed.

No. 4 -- Letters must be written in English only.

No. 5 -- Books, magazines, pamphlets, and newspapers of reputable character will be delivered only if mailed direct from the publisher.

No. 6 -- Money must be sent in the form of Postal Money Orders only, in the inmate's complete prison name and prison number.

INSTITUTION _____ CELL NUMBER _____

NAME _____ NUMBER _____

In The Supreme Court of The United States
Washington D.C.
Clarence Earl Gideon
Petitioner } Petition for a writ
vs. } of Certiorari directed
H.G. Cochran, Jr. as } to The Supreme Court
Director, Division of } State of Florida.
Corrections State
of Florida } No. - 890 Misc.
OCT. TERM 1961
U. S. Supreme Court

To: The Honorable Earl Warren, Chief
Justice of the United States

Come now The petitioner, Clarence Earl Gideon, a citizen of The United States of America, in proper person, and appearing as his own counsel, Who petitions this Honorable Court for a Writ of Certiorari directed to The Supreme Court of The State of Florida, To review the order and Judgment of the court below denying The petitioner a Writ of Habeas Corpus.

Petitioner submits that The Supreme Court of The United States has the authority and jurisdiction to review The final Judgment of The Supreme Court of The State of Florida the highest court of The State Under sec. 344(B) Title 28 U.S.C.A. and Because The "Due process clause" of the

[Partial transcript] Petitioner submits that the Supreme Court of the United States has the authority and jurisdiction to review the final judgment of the Supreme Court of the state of Florida ... because the "due process clause" of the Fourteenth Amendment and the fifth and sixth articles of the Bill of Rights has [sic] been violated....

- What constitutional rights does Gideon claim the state of Florida has violated?

DOCUMENT G

MAJORITY OPINION



Unanimous Majority Opinion, *Gideon v. Wainwright*, 1963

Since 1942, when *Betts v. Brady* ... was decided by a divided Court, the problem of a defendant's federal constitutional right to counsel has been a continuing source of controversy and litigation in both state and federal courts....

We accept *Betts v. Brady*'s assumption, based as it was on our prior cases, that a provision of the Bill of Rights, which is "fundamental and essential to a fair trial" is made obligatory upon the States by the Fourteenth Amendment. We think the Court in *Betts* was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights.

[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments ... spend vast sums of money to ... try defendants accused of crimes. ... Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.

The Court in *Betts v. Brady* departed from the sound wisdom upon which the Court's holding in *Powell v. Alabama* rested. Florida, supported by two other States, has asked that *Betts v. Brady* be left intact. Twenty-two states, as friends of the Court, argue that *Betts* was "an anachronism when handed down" and that it should now be overruled. We agree.

- **On what key reasons does the unanimous Court base its ruling?**

DOCUMENT H

Concurring Opinion, *Gideon v. Wainwright*, 1963

[T]he Constitution makes no distinction between capital and noncapital cases. The Fourteenth Amendment requires due process of law for the deprivation of “liberty” just as for deprivation of “life,” and there cannot constitutionally be a difference in the quality of the process based merely upon a supposed difference in the sanction involved. How can the Fourteenth Amendment tolerate a procedure which it condemns in capital cases on the ground that deprivation of liberty may be less onerous than deprivation of life—a value judgment not universally accepted or that only the latter deprivation is irrevocable? I can find no acceptable rationalization for such a result, and I therefore concur in the judgment of the Court.

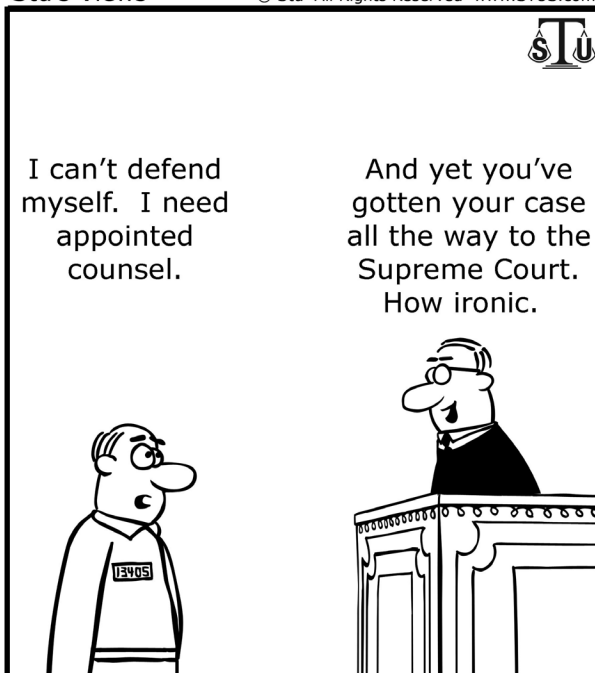
- **Summarize the main idea of the concurring opinion.**

DOCUMENT I

“I Can’t Defend Myself,” 2004

Stu’s Views

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- Identify the people in the cartoon and the point of view of the cartoonist.

DIRECTIONS

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

KEY QUESTION

Does the Sixth Amendment guarantee the right to counsel in all cases? Further, does the Sixth Amendment require government to provide a lawyer to defendants who want one but cannot afford one?

THE ISSUE ENDURES

Hamdi v. Rumsfeld, 2004

...Born an American citizen in Louisiana in 1980, Yaser Esam Hamdi moved with his family to Saudi Arabia as a child. By 2001, the parties agree, he resided in Afghanistan. At some point that year, he was seized by members of the Northern Alliance, a coalition of military groups opposed to the Taliban government, and eventually was turned over to the United States military ... [because the Government believed he participated in the waging of war against the United States].

The Government contends that Hamdi is an “enemy combatant,” and that this status justifies holding him in the United States indefinitely—without formal charges or proceedings—unless and until it makes the determination that access to counsel or further process is warranted....

Hamdi asks us to hold that the Fourth Circuit also erred by denying him immediate access to counsel upon his detention and by disposing of the case without permitting him to meet with an attorney. Since [we agreed to hear] this case, Hamdi has been appointed counsel, with whom he has met for consultation purposes on several occasions, and with whom he is now being granted unmonitored meetings. He unquestionably has the right to access to counsel in connection with the proceedings on remand. No further consideration of this issue is necessary at this stage of the case....

- ▶ **Should citizens who are accused of waging war against the United States have the right to counsel?**



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

By Diana E. Hess

This article originally appeared in Social Education, the official journal of the National Council for the Social Studies (NCSS). Reprinted here with permission of the author and NCSS.

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

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

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

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

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

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

1. THE CONSTITUTION APPLIES TO EVERYONE AND EVERYTHING

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

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

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

2. THE LIBERATION GENERALIZATION

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

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

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

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

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

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

3. THE BELIEF IN ERROR CORRECTION

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

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

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

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

4. THE GIDEON EFFECT

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

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

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

5. A RULING IS A “RIGHT” ANSWER

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

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

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

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

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

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

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

THE EFFECT OF CORRECTING MISCONCEPTIONS

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

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

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

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

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

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

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

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

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

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

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

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

CLASSROOM APPLICATIONS

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

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

DBQ Strategies:

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

ONLINE RESOURCES

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

<http://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
Additional notes: How did majority/dissenting opinions align with each attorney's position?		

MOOT COURT PROCEDURES

Preparation

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

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

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

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

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

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

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

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

TIPS FOR THESIS STATEMENTS AND ESSAYS

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

A good thesis statement—

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

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

DBQ Do and Don't

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

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

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

Adapted from AP US History guidelines

Score (Grade)	Thesis	Analysis (tends to be the most difficult component)	Entire Prompt	Documents	Outside Info (required for AP class)	Organization & Writing Skill	Errors
8-9 (95-100)	Contains a well-developed thesis which clearly addresses all aspects of the prompt and shows organizational roadmap	Effective analysis which shows & proves relationships; fully answers the "so what?" questions; more analytical than narrative.	Addresses all aspects of the prompt, though coverage may be slightly uneven	Effectively and appropriately uses all (or almost all) documents "The angels are starting to sing!"	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: If colleges are going to award points for certain attributes or accomplishments, they may do so for race.

Document K: She thought that if *Grutter's* was constitutional, then *Gratz's* must be constitutional as well, because at least it was honest.

Document L: Minorities will no longer be able to compete.



Mapp v. Ohio

Document A: General Writs of Assistance allow officials to search whenever and however they please, for whatever reason. Special Writs of Assistance allow officials to search a particular place and are only granted under an oath taken by the official.

Document B: Both require that a search warrant contain a description of the place to be searched and what they are looking for, and that such a warrant can only be if supported by oath.

Document C: Answering questions in ways that make one appear guilty; providing evidence that gives the appearance of guilt; offering or signing a confession; giving DNA samples.

Document D: Some will say that strict requirements for search and seizure and protection against self-incrimination are essential because they ensure government will not act arbitrarily and in ways that trample individual rights. Others may argue that such rights can allow criminals to go free.

Document E: When evidence is taken by "an official of the United States ... without any search warrant," the government's actions are too close to the "general search warrants" that the Founders

intended to eliminate with the Fourth Amendment. This "unreasonable search" should be reversed. Improperly obtained evidence may not be used because it prejudices the judicial process and gives to the police powers equivalent to a Writ of Assistance.

Document F: 1. Because states could ensure due process by "reliance" upon other methods" which were "equally effective" in protecting individual rights.

Document G: 1. The exclusionary rule is "an essential part of the right to privacy" necessary to the Fourth and Fourteenth Amendment protections. 2. Having a judge swear to uphold the Constitution, and applying it, even if the "the criminal is to go free" from time to time, is the only way to ensure the integrity of the law for everyone. 3. Answers will vary. Students may suggest fining or punishing police who conduct illegal searches.

Document H: This opinion argues that the exclusionary rule stems from both the requirements of the Fourth Amendment as well as the protections provided against "compelled self-incrimination" in the Fifth. The majority argues that the exclusionary rule stems from the Fourth and Fourteenth. He agrees with the majority, therefore, that the exclusionary rule exists, but for different reasons than the majority argues.

Document I: Because it will take away the ability of the states to decide on their own whether to apply the exclusionary rule.

Document J: Moral and legal justice are not necessarily the same. Overturning a conviction on the basis of unconstitutional government action may be legal justice, but it cannot change the truth that someone is "guilty as sin"

Gideon v. Wainwright

Document A: Massachusetts Body of Liberties - "Every man that findeth himselfe unfit to plead his owne cause

ANSWER KEY

in any Court shall have Libertie to imploy any man against whom the Court doth not except, to helpe him, Every man that findeth himselfe unfit to plead his owne cause in any Court shall have Libertie to imploy any man against whom the Court doth not except, to helpe him”; Virginia Declaration of Rights - nothing; Vermont Constitution - “That, in all prosecutions for criminal offences, a man hath a right to be heard, by himself and his counsel- -to demand the cause and nature of his accusation”; Georgia Constitution - nothing.

Document B: This document does guarantee the right to have a lawyer; answers will vary.

Document C: 1. State governments. 2. Answers will vary. Some will say it is an essential part of due process; others will say it might depend on the situation.

Document D: 1. The Court will be sentencing a man unfairly to death without proper due process, effectively committing murder. 2. Since the United States and each state, required, in some form, the trial judge to appoint counsel for a defendant “unable to employ counsel,” the right to counsel had become fundamental.

Document E: 1. Federal. 2. Examining the particular circumstances of each case.

Document F: The rights protected by Fifth, Sixth and Fourteenth Amendments.

Document G: A lawyer is a necessity, not a luxury, and one cannot have a fair trial without one.

Document H: The constitutional right to counsel is guaranteed regardless of the type of case.

Document I: A defendant and a Supreme Court Justice. The cartoonist implies that individuals can be effective advocates for themselves, as evidenced by Gideon’s successful petition to the highest court in the land.

Miranda v. Arizona

Document A: Force/torture is not allowed as a means of obtaining a confession. However, once convicted he may be forced/tortured, within limits, to produce evidence against others.

Document B: The Massachusetts Body of Liberties contains a provision allowing torture of a convicted person designed to produce evidence against others.

Document C: To confuse them, but not torture them.

Document D: Congress could pass a law allowing torture as a means of gaining a confession.

Document E: In criminal “case[s]” and “prosecutions”

Document F: Interrogating relentlessly, creating an atmosphere of domination, allowing minimal food and rest.

Document G: 1. Any setting in which freedom of action is significantly limited. 2. The process of interrogation is “inherently compelling.”

Document H: The ruling denies common sense. The Court holds that all answers to all questions are “compelled” and therefore unreliable. By this logic, no defendant can ever answer “no” when asked if he wants a lawyer.

Document I: The Sixth Amendment applies only to trial, not interrogation. Further, Justice Harlan argues that the Fifth Amendment “has never been thought to forbid all pressure.”

Document J: Some students will say requiring police to give these warnings prevents police from taking advantage of people who don’t know their rights. Others will say that it is citizens’ responsibility to know their rights.

Document K: The cartoonist’s perspective may be that common sense should tell defendants that confessions will be used against them. Or, the