

LUCAS V. SOUTH CAROLINA COASTAL COUNCIL (1992)

DIRECTIONS

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

CONSTITUTIONAL PRINCIPLES

*Limited government
Inalienable rights*

Case Background

David Lucas bought some beachfront property in South Carolina in 1986, and planned to build two homes on the land. Two years later, the South Carolina legislature banned new construction on the land Lucas had purchased, in an effort to combat beach erosion and other environmental concerns.

Lucas filed suit and his case eventually went to the Supreme Court. He argued that the state should pay him just compensation for depriving him of all economic use of his land. South Carolina countered that the ban on construction was designed to prevent public harm due to frequent flooding, and Lucas was owed nothing. Lucas asked the Supreme Court to rule that, since the South Carolina government had taken his land, he should be compensated for it.

Lucas v. South Carolina Coastal Council (1992) illustrates the concept of a “regulatory taking,” and the principles the Supreme Court applies in such cases. The government had plausible and legitimate reasons for regulating coastlines, which are necessarily a limited and valuable resource in this country. At the same time, the government regulation had potentially severe effects on the rights and expectations of the citizens who owned and purchased private properties along ocean coastlines.

TEACHING TIPS: LUCAS V. SOUTH CAROLINA COASTAL COUNCIL

LEARNING OBJECTIVES

- Students trace the historical background of government power to regulate private property for public use.
- Students analyze modern examples of government regulation and/or taking of private property for public use.

ACTIVITIES

1. As a warm-up activity, have students brainstorm a list of reasons that government might regulate the use of private property. Responses might include:
 - Flood control
 - Zoning to separate business from residential property
 - Homeowners Association regulations to maintain property values in a neighborhood
 - Restrictions on handling and disposal of hazardous materials
 - Ordinances to prevent loud music or other disruptive activities
 - Discuss the principle that no one has a right to use private property in ways that threaten the rights of others. (e.g.: indiscriminate burning, unsightly trash piles, loud music, illegal businesses, etc.)
2. Assign appropriate documents for student analysis.
3. Have students complete the handout **Graphing Property Rights—Lucas DBQ**.
4. Use **Key Question**, “How much should government be able to regulate property before it becomes a ‘taking’ requiring just compensation?” for class discussion or writing assignment, focusing on the constitutional principles involved in the cases.
5. Discuss
 - Compare the Court’s decisions in the cases addressed to your responses in Activity 1 above.
 - To what extent do you think the Supreme Court majority in each case correctly interpreted the constitutional principles involved?
 - What are the main arguments addressed in the dissenting opinion(s)?

See Appendix for additional Graphic Organizers.

BACKGROUND INFORMATION ON LUCAS V. SOUTH CAROLINA COASTAL COUNCIL

Document D: *Pennsylvania Coal v. Mahon* (1922), Majority Opinion (8-1)

In 1878, Pennsylvania Coal Company sold to H.J. Mahon the surface rights to some property, but retained the mineral rights. Mahon waived any claim for damages that might occur related to the mining of the underground coal. In 1921 Pennsylvania enacted the Kohler Act, which prohibited the mining of anthracite coal found under houses or various public buildings, in order to prevent the danger of subsidence. (Subsidence is sinking or settling of the earth's surface, and can lead to foundation problems in any structures nearby.) When Pennsylvania Coal Company informed Mahon that it intended to mine the coal under his house, he sued the company to prevent the mining, basing his claim on the Kohler Act. The coal company maintained that since it retained mineral rights in the contract with Mahon, the Kohler Act deprived Pennsylvania Coal Company of property without compensation. The state of Pennsylvania took the position that the Kohler Act was a legitimate exercise of the police power to protect the welfare, health, and safety of the people. Justice Oliver Wendell Holmes delivered the opinion of the Court.

Document E: *U.S. v. Causby* (1946), Majority Opinion (5-2)

Thomas Causby owned a home and chicken farm near an airport outside of Greensboro, North Carolina. During World War II, the U.S. Government leased the airport beginning on June 1, 1942. The flight path of the military aircraft was only 83 feet directly above Causby's farm, and the increased air traffic destroyed the use of the property as a chicken farm. The airplane noise, along with the glare of the aircraft lights, brought production to a stop, because the frightened chickens flew into walls. At least 150 were killed.

Under common law, the owner of land also owned the space below and above the earth. Causby maintained that, by flying through his airspace, the U.S. Government had taken an easement (a certain right to use property owned by others) on his property and owed him just compensation. Justice William O. Douglas delivered the opinion of the Court.

Document G: *Penn Central Transp. Co. v. New York* (1978), Majority Opinion (6-3)

Under its Landmarks Preservation Law of 1965, New York City had designated certain neighborhoods and structures, including Grand Central Terminal, as "landmarks" of historical significance. Penn Central, which owned the terminal, planned to build a 55-story office building above it, in order to enhance the revenue they could derive from the property. However, the Landmarks Preservation Commission, made up of architects, historians, and city planners, denied Penn Central's proposal, maintaining that the new construction would destroy the terminal's historic and aesthetic features. The Commission stated: "[We have] no fixed rule against making additions to designated buildings – it all depends on how they are done. ... But to balance a 55-story office tower above a flamboyant Beaux-Arts facade seems nothing more than an aesthetic joke. Quite simply, the tower would overwhelm the Terminal by its sheer mass. The "addition" would be four times as high as the existing structure, and would reduce the Landmark itself to the status of a curiosity..."

Penn Central claimed that application of the Landmarks Law resulted in a "taking" under the Fifth and Fourteenth Amendments, depriving them of their property without due process. Justice William Brennan wrote the opinion of the Court.

LUCAS V. SOUTH CAROLINA COASTAL COUNCIL

CONSTITUTIONAL PRINCIPLES

Limited government
Inalienable rights

KEY QUESTION

How much should government be able to regulate property before it becomes a “taking” requiring just compensation?

- A *Magna Carta* Excerpts (1215)
- B Federal Farmer, December 25, 1787
- C The Fifth Amendment (1791)
- D *Pennsylvania Coal v. Mahon* (1922), Majority Opinion
- E *U.S. v. Causby* (1946), Majority Opinion
- F *Penn Central Transp. Co. v. New York* (1978), Majority Opinion
- G *Penn Central Transp. Co. v. New York* (1978), Dissenting Opinion
- H Beachfront Management Act, South Carolina Department of Health and Environmental Control Summary (1988)
- I *Lucas v. So. Carolina Coastal Council* (1992), Majority Opinion
- J *Lucas v. So. Carolina Coastal Council* (1992), Dissenting Opinion
- K Lucas’s Property (1994)
- L The Site of Lucas’s Former Property (2000)

GOVERNMENT TAKING OF PRIVATE PROPERTY FOR PUBLIC USE

by Stephen R. McAllister

Going back for centuries in English and American law, there has been a high regard for property rights. As William Blackstone (1765) observed, the “third absolute right, inherent in every Englishman, is that of property The original [right] of private property is probably founded in nature.” Furthermore, Blackstone observed that so “great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community.” Similarly, at the Constitutional Convention, Alexander Hamilton described “the security of Property” as one of the “great [obj]ects] of Gov[ernment].” Madison wrote, “that alone is a *just* government which *impartially* secures to every man, whatever is his *own*.” Property rights have always been important to Americans.

On the other hand, governments long have been deemed to have the inherent sovereign power to exercise eminent domain—the power to appropriate private property and devote it to governmental purposes, uses that might include building a school, a highway, a prison, or a hospital, for example, or creating a public park or other public facilities. In pre-constitutional America, some states exercised such power without necessarily even compensating the landowners whose property was taken, while other states required that government pay for appropriated private property. There was not necessarily a consensus in America on these questions prior to the ratification of the Constitution and Bill of Rights.

The Bill of Rights, however, strongly and clearly adopts the rule that government must pay a fair price for any private property that it takes for public use. Indeed, the Fifth Amendment expressly protects citizens’ rights in private property from governmental confiscation – known as a “taking” – unless two constitutional requirements are met: (1)

the property must be taken for “public use”; and (2) the government must pay “just compensation” for the property. The precise language of the Fifth Amendment’s Takings Clause is that “nor shall private property be taken for public use without just compensation.”

This unit focuses on two legal issues that have arisen under the Takings Clause, both of which have proven difficult to resolve and sources of public controversy. The question that the first two cases in the unit address is: When,

short of government physically occupying or seizing private property, does government *regulation* of private property amount to a “taking” that implicates the Fifth Amendment’s protections? Commonly referred to as a “regulatory taking” claim, rather than actual

Governments long have been deemed to have the inherent sovereign power to exercise eminent domain.

physical occupation by the government – the latter of which is treated as a *per se* taking – answering the question of when the regulation of private property amounts to a “taking” for constitutional purposes is much more difficult than might at first be apparent. As discussed below, the Supreme Court has wrestled with that question for almost 100 years, and has not been able to provide a clear answer or a single test.

Nineteenth century decisions of the Supreme Court took the view that the Takings Clause applied only to a “direct appropriation” of private property, *Legal Tender Cases* (1871), or at a minimum the functional equivalent of dispossessing a private owner of the property, *Transp. Co. v. Chicago* (1879). Twentieth century cases continued to recognize that basis for a taking. For example, in *United States v. Causby* (1946), the Court found a taking that required just compensation when the federal government operated a military airbase next to a farm, with the result that the constant aviation activity significantly interfered with the farmer’s ability to raise chickens (the chickens kept killing themselves by flying into walls when the airplane noise scared them!) and even to live on the property. Another modern example is *Loretto v. Teleprompter Manhattan CATV Corp.* (1982), in which the Court found a *per se* taking when the government authorized television cable lines to be run across the rooftops of privately-owned buildings, even though the intrusion was minimal and caused no real interference with use of the properties. The Court emphasized that actual physical occupation of land on a permanent basis by the government, no matter how small or slight, is a taking.

In early cases, the Supreme Court also recognized that governments may regulate the use of private property without being required to pay compensation for a “taking” if the regulation was designed to prevent a serious public harm, such as a use of the property that could cause harm to other citizens, *Mugler v. Kansas* (1887). A critical turning point under the Takings Clause was the Supreme Court’s decision in *Pennsylvania Coal Co. v. Mahon* (1922), a case involving a claim by a coal company that government had taken the company’s property by requiring the company to leave pillars of coal in its underground mines in order to lessen the risk that neighboring lands might subside or be adversely affected by nearby coal mines. In *Mahon*, Justice Holmes argued that government could not have unlimited power to redefine the legal rights of private property owners or else the Takings Clause could be rendered meaningless. Instead, Justice Holmes articulated the now firmly entrenched constitutional principle that “While property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking.”

For the past 90 years, the Supreme Court has wrestled with the question of when



Patrick Nollan and his son in front of their house around the time his case was litigated. Courtesy of Pacific Legal Foundation.

“While property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking.”

government regulation of private land has gone “too far.” An important decision in this line of cases is *Penn Central Transp. Co. v. New York City* (1978), in which the Supreme Court upheld a New York City ordinance that limited the development or alteration of historically significant buildings. When the owners of Penn Central station sought to build a massive multi-story building on top of the station and were denied permission by New York they sued, arguing that restricting their ability to develop

their property and obtain a return on their investment was a “taking.” The Supreme Court rejected the claim, concluding that in spite of the limitation on development the owners of Penn Central still could use the property in many valuable ways. The *Penn Central* decision is often noted for the proposition that the Court has no “set formula” for determining when the *Mahon* line of regulation that “goes too far” has been crossed. Instead, the Court typically has applied an “essentially ad hoc, factual” inquiry.

Two cases in this unit, *Nollan v. California Coastal Comm’n* (1987) and *Lucas v. South Carolina Coastal Council* (1992), illustrate the concept of a “regulatory taking,” and the principles the Supreme Court applies in such cases. In each case, you will see that the government had plausible and legitimate reasons for regulating coastlines, which are necessarily a limited and valuable resource in this country. At the same time, the government regulation had potentially severe effects on the rights and expectations of the citizens who owned and purchased private properties along ocean coastlines.

The second question the unit addresses follows the first: If there is a “taking” for purposes of the Fifth Amendment, is the government devoting the private property to a “public use”? There is no sliding scale under the Fifth Amendment that would, for example, allow government to expand the purposes for which it takes property if government pays more than just compensation. Rather, no matter how much government is willing to pay, the Takings Clause precludes the government from utilizing its power of eminent domain if the taking is not for a “public use.” Thus, the definition of “public use” is an important constitutional question.

In *Calder v. Bull* (1798), Justice Samuel Chase wrote that it “is against all reason and justice, for a people to entrust a Legislature with” the power to enact “a law that takes property from A. and gives it to B.” For a long time, the “public use” limitation was understood to require that the government actually use the property it was taking, for example to build a road, a school, a hospital, a prison, or other government facilities. No one would seriously question that such purposes are within the meaning of “public use” as used in the Takings Clause.

But what if government takes private property because that property is run down, impoverished, deteriorating, or blighted and the government plans to redevelop the property to more valuable “private” uses? In other words, what if government seeks to transfer lower value properties to private developers who will construct new buildings, perhaps drawing in new business and new residents, as well as increasing the government’s property tax revenues as a consequence of the property becoming more valuable? Ultimately, this question has proven difficult and controversial for the Supreme Court.

The Court first addressed these issues in *Berman v. Parker* (1954), a case in which the Court upheld a redevelopment plan targeting a blighted area of Washington, D.C. where most of the housing was beyond repair. Part of the plan included the building of new streets, schools and public facilities, but the plan also provided that much of the property would be leased or sold to private parties for redevelopment. The Court unanimously held that the plan involved a “public use” because the plan, as a whole, served public purposes. Then, in *Hawaii Housing Authority v. Midkiff* (1984), the Court unanimously upheld a Hawaii statute that (with just compensation) redistributed private property among private owners in order to reduce the concentration of land ownership in Hawaii. The Court concluded that the redistribution served a public purpose.

There is no longer unanimity on this question in the Supreme Court, as the third case in this unit demonstrates. In *Kelo v. City of New London* (2005), a sharply divided Supreme Court concluded that redeveloping a “distressed” municipal neighborhood was a “public use” that justified a city in taking private property and transferring that property to others for redevelopment. *Kelo* involved a debate between the Justices about the meaning of “public use,” with the majority equating that term with “public purpose,” as did *Berman* and *Midkiff*. The dissenters, in sharp contrast, argued that “public use” means just that – the government must “use” the property. Thus, transferring property to other private owners such as developers was not a “public use.”

Kelo provoked strong, negative responses from more than 40 states. Some responses have been statutory, with state legislatures enacting laws to limit the grounds on which government can exercise its power of eminent domain. Other responses have been judicial, with state supreme courts interpreting their state constitutions to adopt a narrower definition of “public use” than the definition the Supreme Court endorsed in *Kelo*, *Berman* and *Midkiff*. The result is that many states provide greater protection to private property owners than the Constitution requires. Notably, as *Kelo* and the public reaction to the decision make clear, property rights are just as important to Americans today as they were at the Founding.



Susette Kelo in front of her little pink house, which was saved and moved to a new location in New London. Photo courtesy of the Institute for Justice.

DOCUMENT A

Magna Carta Excerpts (1215)

28. No constable or other bailiff of ours shall take corn or other provisions from anyone without immediately tendering money therefor, unless he can have postponement thereof by permission of the seller.

30. No sheriff or bailiff of ours, or other person, shall take the horses or carts of any freeman for transport duty, against the will of the said freeman.

31. Neither we nor our bailiffs shall take, for our castles or for any other work of ours, wood which is not ours, against the will of the owner of that wood.

39. No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

- 1. List some types of property protected in the *Magna Carta*.**
- 2. According to these passages, if the King's officers take property from an individual, what must also happen?**
- 3. This document is from 1215. What does this reveal about the importance of property rights in Western Civilization?**

DOCUMENT B

Federal Farmer, December 25, 1787

The people have a right to hold and enjoy their property according to known standing laws, and which cannot be taken from them without their consent, or the consent of their representatives; and whenever taken in the pressing urgencies of government, they are to receive a reasonable compensation for it...

- 1. According to this document, what kinds of laws are required for secure property rights?**
- 2. According to this document, under what conditions can government take private property? What must the property owner receive when private property is taken for public use?**

DOCUMENT C

The Fifth Amendment (1791)

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

- 1. What protections for private property are listed in the Fifth Amendment of the U.S. Constitution?**
- 2. Are these protections meant to secure the rights of individuals (in the same way that other amendments protect freedom of religion, freedom of speech, etc.,) or are they meant to secure the collective rights of communities (i.e. those who would benefit from the government taking the property)?**

DOCUMENT D

Pennsylvania Coal v. Mahon (1922), Majority Opinion

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. ... One fact for consideration in determining such limits is the extent of the diminution [loss of property value resulting from the law]. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.

The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. ... A strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.

- 1. According to this ruling, does government need to actually take away someone's property in order for it to be a taking? How do you know?**
- 2. Under the Fifth Amendment [Document C], what must government provide to owners if it takes their property?**

DOCUMENT E

U.S. v. Causby (1946), Majority Opinion

We have said that the airspace is a public highway. Yet it is obvious that, if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. Otherwise buildings could not be erected, trees could not be planted and even fences could not be run....

The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land ... the fact the he does not occupy it in a physical sense—by the erection of buildings and the like—is not material... We would not doubt that, if the United States erected an elevated railway over respondents' land at the precise altitude where its planes now fly, there would be a partial taking, even though none of the supports of the structure rested on the land. The reason is that there would be an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it....

[It has been] establish[ed] that there was a diminution in value of the property, and that the frequent, low-level flights were the direct and immediate cause. We agree with the Court of Claims that a servitude [taking] has been imposed upon the land.

- 1. According to this ruling, do property owners “own” the air space above it?**
- 2. According to this ruling, does government need to actually take away someone's property in order for it to be a taking? How do you know?**
- 3. Under the Fifth Amendment, what must government provide to citizens if it takes their property?**

DOCUMENT F

Penn Central Transp. Co. v. New York (1978), Majority Opinion

A use restriction on real property may constitute a “taking” if not reasonably necessary to the effectuation of a substantial public purpose, or perhaps if it has an unduly harsh impact upon the owner’s use of the property....

The [Landmarks Preservation Law] embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city....

The [Landmarks Preservation Law] does not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits, but contemplates, that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions. ...More importantly, on this record, we must regard the New York City law as permitting Penn Central not only to profit from the Terminal but also to obtain a “reasonable return” on its investment.

We conclude that the application of New York City’s Landmarks Law has not effected a “taking” of appellants’ property. The restrictions imposed are substantially related to the promotion of the general welfare, and not only permit reasonable beneficial use of the landmark site, but also afford appellants opportunities further to enhance not only the Terminal site proper but also other properties.

- 1. According to this ruling, what kinds of use restrictions may be considered “takings”?**
- 2. What was the Landmarks Preservation Law?**
- 3. According to this ruling, was New York City Landmarks Preservation Commission’s denial of Penn Central’s proposal to build a 55-story office building above the terminal a taking? How do you know?**

DOCUMENT G

Penn Central Transp. Co. v. New York (1978), Dissenting Opinion

The record is clear that the proposed office building was in full compliance with all New York zoning laws and height limitations. ...Although appellants' architectural plan would have preserved the facade of the Terminal, the Landmarks Preservation Commission has refused to approve the construction...

The Fifth Amendment provides in part: "nor shall private property be taken for public use, without just compensation." In a very literal sense, the actions of [New York] violated this constitutional prohibition. Before the city of New York declared Grand Central Terminal to be a landmark, Penn Central could have used its "air rights" over the Terminal to build a multistory office building, at an apparent value of several million dollars per year. Today, the Terminal cannot be modified in any form, including the erection of additional stories, without the permission of the Landmark Preservation Commission, a permission which appellants, despite good faith attempts, have so far been unable to obtain....

Over 50 years ago, [the Court's opinion in *Pennsylvania Coal Co. v. Mahon*] warned that the courts were "in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." The Court's opinion in this case demonstrates that the danger thus foreseen has not abated.

- 1. Why does the dissenting opinion cite *Pennsylvania Coal Co. v. Mahon* [in Document D]?**
- 2. How do laws that affect how property acquired in the past can be used in the future square with the Federal Farmer's view [Document B] that people have the right to enjoy their property according to "known, standing laws"? Explain.**

DOCUMENT H

Beachfront Management Act, South Carolina Department of Health and Environmental Control Summary (1988)

In 1988, the South Carolina “Beachfront Management Act” (Coastal Tidelands and Wetlands Act, as amended, §48-39-250 et seq.) established a comprehensive statewide beachfront management program. The Act included several key legislative findings, including (summarized):

The importance of the beach and dune system in protecting life and property from storms, providing significant economic revenue through tourism, providing habitat for important plants and animals, and providing a healthy environment for recreation and improved quality of life of all citizens...

- Unwise development has been sited too close to and has jeopardized the stability of the beach/dune system...
- The Beachfront Management Act then established eight state policies to guide the management of ocean beaches
- Protect, preserve, restore, and enhance the beach/dune system;
- Create a comprehensive, long-range beach management plan and require local beach management plans for the protection, preservation, restoration, and enhancement of the beach/dune system....

1. List some reasons South Carolina established a comprehensive statewide beachfront management program.

2. When was this program enacted?

**Lucas v. South Carolina Coastal Council (1992)**

In 1986, petitioner Lucas bought two residential lots on a South Carolina barrier island, intending to build single family homes such as those on the immediately adjacent parcels. At that time, Lucas's lots were not subject to the State's coastal zone building permit requirements. In 1988, however, the state legislature enacted the Beachfront Management Act, which barred Lucas from erecting any permanent habitable structures on his parcels. He filed suit against respondent state agency, contending that, even though the Act may have been a lawful exercise of the State's police power, the ban on construction deprived him of all "economically viable use" of his property and therefore effected a "taking" under the Fifth and Fourteenth Amendments that required the payment of just compensation.

Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist [paying the owner] compensation only if the ... proscribed use interests were not part of his title to begin with.

In the case of land ... we think the notion pressed by the South Carolina Coastal Council that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.

- 1. What did Lucas intend to do with the land he bought in 1986?**
- 2. Did he have legal title to do this at the time?**
- 3. Why was he unable to carry out his plans?**
- 4. How do laws that affect how property acquired in the past can be used in the future square with the Federal Farmer's view [Document B] that people have the right to enjoy their property according to "known, standing laws"? Explain.**
- 5. The 6-2 ruling asserts that the idea that government can regulate away all the economic value of land someone owns without compensating them for their loss is contrary to our "constitutional culture." What does this mean? Do you agree? Explain.**

DOCUMENT J

Lucas v. South Carolina Coastal Council (1992), Dissenting Opinion

Petitioner Lucas is a contractor, manager, and part owner of the Wild Dune development on the Isle of Palms. He has lived there since 1978. In December 1986, he purchased two of the last four pieces of vacant property in the development. The area is notoriously unstable. In roughly half of the last 40 years, all or part of petitioner's property was part of the beach or flooded twice daily by the ebb and flow of the tide. ...Between 1981 and 1983, the Isle of Palms issued 12 emergency orders for sandbagging to protect property in the Wild Dune development....

The South Carolina Supreme Court found that the Beachfront Management Act did not take petitioner's property without compensation. The decision rested on two premises that until today were unassailable -- that the State has the power to prevent any use of property it finds to be harmful to its citizens, and that a state statute is entitled to a presumption of constitutionality....

I find no evidence in the record supporting the trial court's conclusion that the damage to the lots by virtue of the restrictions was "total."

...In this case, apparently, the State now has the burden of showing the regulation is not a taking. The Court offers no justification for its sudden hostility toward state legislators, and I doubt that it could....

I dissent.

- 1. This dissenting Justice asserts that "the State has the power to prevent any use of property it finds to be harmful to its citizens." What evidence was there that building on Lucas's land could have been harmful?**
- 2. List two other objections that this Justice raises against the majority opinion in this case.**

DOCUMENT K

Lucas's Property (1994)



Photos Courtesy of
William A. Fischel,
*Lucas v. South
Carolina Coastal
Council: A
Photographic Essay*,
1994



1. The dunes in the first photo are in front of Lucas's lot. Do you observe signs of erosion or other factors that might have made construction unsafe?
2. Can you identify the two vacant lots owned by Lucas in the second photograph? Do there appear to be many vacant lots?

DOCUMENT L

The Site of Lucas's Former Property (2000)



Courtesy of
William A.
Fischel, A
*Photographic
Update On
Lucas v South
Carolina
Coastal
Council: A
Photographic
Essay, 2000*

- 1. The state purchased Lucas's land from him in a settlement of his lawsuit, and the state then subsequently sold the land to a developer without building restrictions. What differences do you observe in this picture compared to the ones from 1994?**

DIRECTIONS

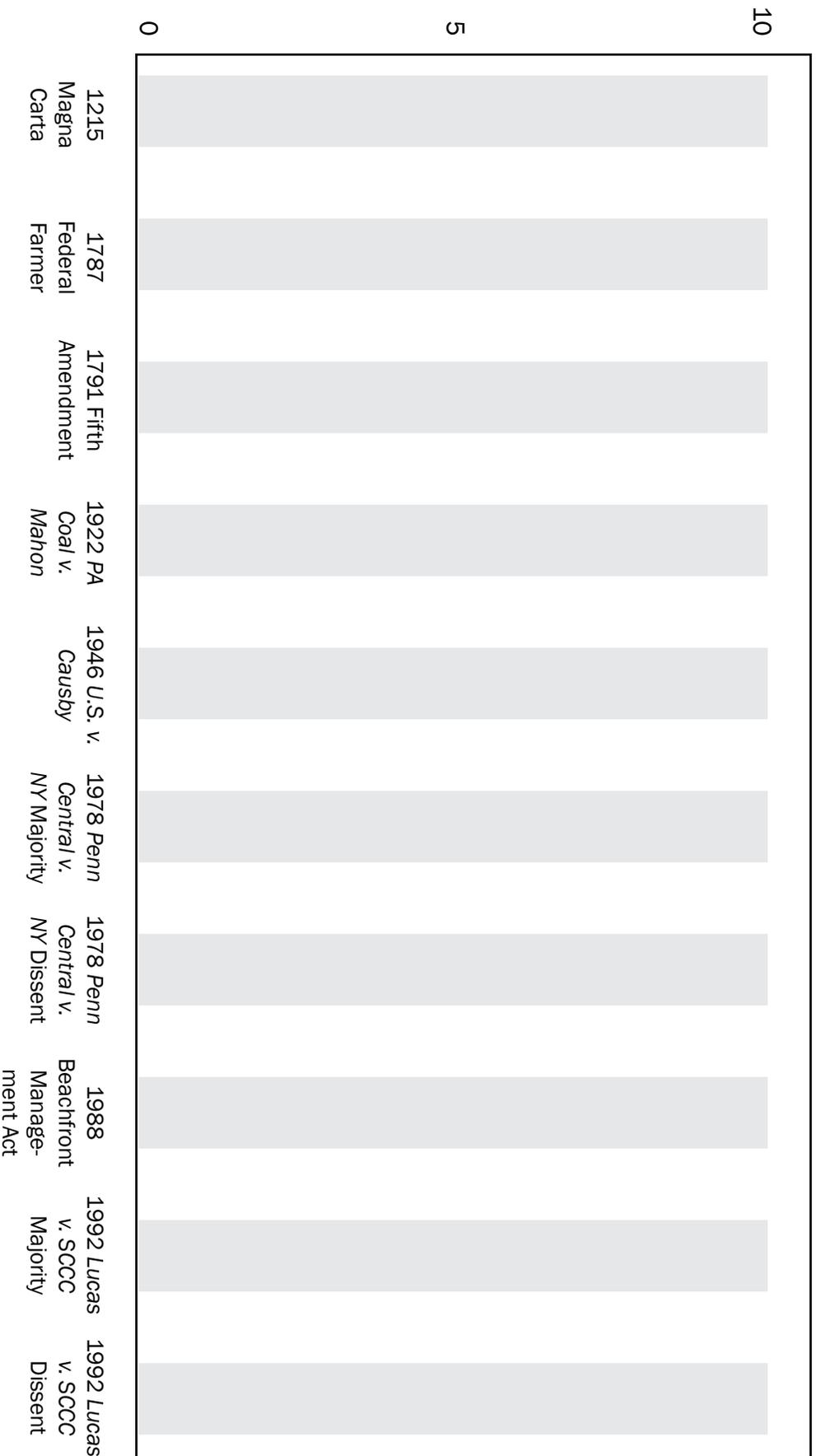
Read the Case Background and Key Question. Then analyze the Documents provided. Finally, answer the Key Question in a well-organized essay that incorporates your interpretations of the Documents as well as your own knowledge of history.

KEY QUESTION

How much should government be able to regulate property before it becomes a "taking" requiring just compensation?

GRAPHING PROPERTY RIGHTS LUCAS V. SOUTH CAROLINA COASTAL COUNCIL

For each document or case listed on the table below, assign a score on a scale of 1 – 10, showing to what extent property rights were supported.



SUPPLEMENTARY PRIMARY SOURCES RELATED TO PROPERTY RIGHTS

Use these document excerpts to supplement the document-based lessons in this unit, or to make your own document-based questions.

Petition of Right, Sir Edward Coke, 1628

IV. And in the eight-and-twentieth year of the reign of King Edward III, it was declared and enacted by authority of parliament, that no man, of what estate or condition that he be, should be put out of his land or tenements, nor taken, nor imprisoned, nor disinherited nor put to death without being brought to answer by due process of law.

- ▶ **Under what conditions could the king take the life, freedom, or property of an individual?**

Only by due process of law

Massachusetts Body of Liberties & Constitution, 1641

[8] No man's Cattle or goods of what kinde soever shall be pressed or taken for any publique use or service, unless it be by warrant grounded upon some act of the generall Court, [Massachusetts legislature] nor without such reasonable prices and hire as the ordinarie rates of the Countrie do afford. And if his Cattle or goods shall perish or suffer damage in such service, the owner shall be sufficiently recompenced. (Massachusetts Colonial Laws, p. 35)

- ▶ **Rephrase this provision in your own words.**

No one's livestock or other property will be taken for use by the community unless the legislature has passed a law allowing for it. Government must pay property owners a fair price for any property taken.

Pennsylvania Constitution, 1776

VIII. That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expense of that protection, and yield his personal service when necessary, or an equivalent thereto: But no part of a man's property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal representatives...

- ▶ **According to this document, what responsibilities correspond to the rights to enjoy life, liberty, and property?**

Pay taxes, personal service (for example, in the military)

- ▶ **What conditions must be met if property is taken for public use?**

Owner's consent or a law passed by legal representatives

Virginia Declaration of Rights, 1776

VI. That elections of members to serve as representatives of the people, in Assembly, ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed or deprived of their property for public uses without their own consent, or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assented, for the public good.

▶ **In addition to property rights, what other rights are listed in this passage?**

Free elections, the right of suffrage (voting)

▶ **What are some possible reasons that the people of Virginia restricted the right to vote to “all men having sufficient evidence of permanent common interest with and attachment to the community”?**

People committed to a location are the ones with a stake in the outcome whenever voting takes place. In this way, property rights are central to the principle of consent of the government. Owning property in a community can be a signal that one is personally attached and invested in it – not only in terms of money, but also possibly in terms of time and personal commitment to remain there.

The Northwest Ordinance, 1787

...No man shall be deprived of his liberty or property but by the judgment of his peers, or the law of the land; and should the public exigencies make it Necessary for the common preservation to take any person’s property, or to demand his particular services, full compensation shall be made for the same; and in the just preservation of rights and property it is understood and declared that no law ought ever to be made, or have force in the said territory, that shall in any manner whatever interfere with, or affect private contracts or engagements bona fide and without fraud, previously formed.

▶ **Other than property rights, what additional rights are listed in this passage from the Northwest Ordinance?**

Writ of habeas corpus, trial by jury, proportional representation in the legislature, court proceedings based on common law, reasonable bail and fines, protection against cruel and unusual punishment, jury trial before a person is deprived of liberty or property

▶ **How are these rights related?**

All of them have been considered part of the definition of liberty at least as far back as Magna Carta

▶ **What specific property rights are addressed in the passage?**

No deprivation of property without due process; full compensation for private property taken by the government; protection of private contracts

Woodrow Wilson “Socialism and Democracy,” 1887

... ‘State socialism’ is willing to act through state authority as it is at present organized. It proposes that all idea of a limitation of public authority by individual rights be put out of view, and that the State consider itself bound to stop only at what is unwise or futile in its universal superintendence alike of individual and of public interests. The thesis of the state socialist is, that no line can be drawn between private and public affairs which the State may not cross at will; that omnipotence of legislation is the first postulate of all just political theory.

... For it is very clear that in fundamental theory socialism and democracy are almost if not quite one and the same. They both rest at bottom upon the absolute right of the community to determine its own destiny and that of its members. Men as communities are supreme over men as individuals. Limits of wisdom and convenience to the public control there may be; limits of principle there are, upon strict analysis, none. ...

The difference between democracy and socialism is not an essential difference, but only a practical difference—is a difference of *organization* and *policy*, not a difference of primary motive. Democracy has not undertaken the tasks which socialists clamour to have undertaken; but it refrains from them, not for lack of adequate principles or suitable motives, but for lack of adequate organization and suitable hardihood; because it cannot see its way clear to accomplishing them with credit...

- ▶ **According to Wilson, what is the proper limit on public authority over individual rights?**

The State [should] consider itself bound to stop only at what is unwise or futile in its universal superintendence alike of individual and of public interests.

- ▶ **Which does Wilson assert is more important—community or individuals?**

Community

- ▶ **Put this phrase in your own words: “the absolute right of the community to determine its own destiny and that of its members.”**

The community’s right to make decisions for itself and for its members is unlimited. (Accept reasoned responses.)

- ▶ **Why has democracy not attempted the same tasks as socialism has?**

Democracy is not well-organized or courageous enough to do so.

PRIVATE PROPERTY VOCABULARY

Bundle of Sticks: Metaphor for the complex nature of property rights. Each “stick” in the bundle represents a right associated with property. *Examples: possession, the right to sell, mortgage, or subdivide property, the right to exclude others from property, grazing rights, mineral rights, etc.*

Due Process: Understand that the government must follow established rules and procedures when dealing with persons accused of crimes, or when taking property for public use.

Easement: A certain, limited right to use property owned by another. *Examples: A strip of land enabling people to cross a beach over a private property.*

Eminent Domain: Name for government’s power to seize private property for public use.

Just Compensation: Payment—usually fair market value—required by the Fifth Amendment when government takes property for public use.

Police Power: The power of state governments to protect the safety, health, welfare, and morals of citizens.

Property Rights: A system where individuals have the right to obtain and control possessions, as well as the fruits of their own labor.

Property: Something physical or intangible that is owned by a person or group. *Examples: land, businesses, homes, cars, blueprints, computer coding, creative works, secret formulas, etc.*

Rule of Law: a free government requires that laws follow stable, transparent processes, and cannot be changed on the whim of a ruler.



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

By Diana E. Hess

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

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

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

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

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

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

1. THE CONSTITUTION APPLIES TO EVERYONE AND EVERYTHING

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

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

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

2. THE LIBERATION GENERALIZATION

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

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

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

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

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

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

3. THE BELIEF IN ERROR CORRECTION

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

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

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

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

4. THE GIDEON EFFECT

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

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

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

5. A RULING IS A “RIGHT” ANSWER

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

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

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

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

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

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

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

THE EFFECT OF CORRECTING MISCONCEPTIONS

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

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

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

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

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

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

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

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

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

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

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

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

CLASSROOM APPLICATIONS

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

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

DBQ Strategies:

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

ONLINE RESOURCES

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

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

CASE BRIEFING SHEET

Case Name and Year: _____

Facts of the Case: _____

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

What constitutional principles are indicated in the case? _____

Summary of one side's arguments:

Summary of the other side's arguments:

How would you decide the case and why? _____

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

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

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

CONSTITUTIONAL ISSUE EVIDENCE FORM

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

Case Name and Year:

Constitutional Issue:

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

DOCUMENTS SUMMARY

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

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

ATTORNEY DOCUMENT ANALYSIS

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

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

MOOT COURT PROCEDURES

Preparation

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

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

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

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

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

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

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

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

TIPS FOR THESIS STATEMENTS AND ESSAYS

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

A good thesis statement—

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

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

DBQ Do and Don't

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

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

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

Adapted from AP US History guidelines

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

KEY QUESTION SCORING GUIDELINES FOR ALL ESSAYS

The Good-Excellent Essay

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

The Average-Good Essay

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

The Below Average-Average Essay

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

The Poor-Below Average Essay

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



CONSTITUTIONAL PRINCIPLES AND THEIR DEFINITIONS

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

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

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

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

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

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

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

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

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

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

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

ANSWER KEY

Document K: *Dolan v. City of Tigard* (1993), Dissenting Opinion

1. This view seems to be in contrast with Documents A-C. This view may be in greater agreement with Document D.

LUCAS V. SOUTH CAROLINA COASTAL COUNCIL (1992)

Document A: *Magna Carta Excerpts* (1215)

1. Corn, money, horses, carts, wood
2. He must be paid for his property.
3. They are deeply rooted traditional rights.

Document B: *Federal Farmer, December 25, 1787*

1. Known, standing laws.
2. Only by consent of the governed or consent of their elected representatives, in cases of “pressing urgencies.” Reasonable compensation

Document C: *The Fifth Amendment* (1791)

1. Listed are protection against being deprived of life, liberty, or property without due process; guarantee of just compensation if one’s property is taken, and that takings will occur for public use.
2. Individual rights

Document D: *Pennsylvania Coal v. Mahon* (1922)

1. No. “While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”
2. Government must provide just compensation for taken property.

Document E: *U.S. v. Causby* (1946)

1. Yes, to an extent.
2. No, “[It has been] establish[ed] that there was a diminution in value of the property, and that the frequent, low-level flights were the direct and immediate cause. We agree with the Court of Claims that a servitude [taking] has been imposed upon the land.”
3. Government must provide just compensation for taken property.

Document F: *Penn Central Transp. Co. v. New York* (1978)

1. “A use restriction on real property may constitute a “taking” if not reasonably necessary to the effectuation of a substantial public purpose, or perhaps if it has an unduly harsh impact upon the owner’s use of the property.”
2. A comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city.
3. No. Government did not interfere with the present use of the terminal, or with Penn Central’s reasonable expectations for use of the property as a transportation hub. The restrictions promoted the general welfare by preserving the aesthetic features of the property.

Document G: *Penn Central Transp. Co. v. New York* (1978), Dissenting Opinion

1. He believes the Court was prescient in its warning that it would be easy, but not constitutional, to put the burden on property owners when government wants to improve the public condition by limiting what they can do with their property.
2. Accept reasoned answers.

ANSWER KEY

Document H: Beachfront Management Act, South Carolina Department of Health and Environmental Control Summary (1988)

1. Protecting life and property from storms, providing tourism revenue, preventing unwise development too close to the beach and dunes.
2. 1988

Document I: Lucas v. South Carolina Coastal Council (1992)

1. He intended to build two single family homes.
2. Yes.
3. In 1988, the state legislature enacted the Beachfront Management Act, which barred Lucas from erecting any permanent habitable structures on his land.
4. Accept reasoned answers.
5. Accept reasoned answers.

Document J: Lucas v. South Carolina Coastal Council (1992), Dissenting Opinion

1. The area had been unstable and vulnerable to flooding for decades.
2. He finds no evidence to support the premise that the restrictions preventing Lucas from building homes on his property make it totally valueless; States had traditionally been entitled to the presumption of constitutionality. In this case, the state was being asked to prove that its regulation was not a taking.

Document K: Lucas's Property (1994)

1. Accept reasoned answers.
2. There are few, if any, other vacant lots.

Document L: The Site of Lucas's Former Property (2000)

1. The beach appears to have more sand and the dunes are not as low. A pink, 5,000-square foot house has been built in one of Lucas's former two lots.

Document A: Blackstone's Commentaries on the Laws of England (1765)

1. Only by consent of the owner

Document B: The Fifth Amendment, 1791

1. Listed are protection against being deprived of life, liberty, or property without due process; guarantee of just compensation if one's property is taken for public use.
2. Individual rights

Document C: James Madison's On Property (1792)

1. Property includes not only physical possessions but also one's opinions, person, faculties [talents], possessions, safety, liberty, religion, labor, and choices of how to spend one's time.
2. The concept of "property" includes such physical things as one's possessions, but one's rights, such as those listed in the essay, are also a type of property that no just government would violate.
3. Protect all property rights.

Document D: Berman v. Parker (1954)

1. Under this ruling, it was now within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as safe. If those who governed the District of Columbia decided that the Nation's Capital should be beautiful as well as sanitary, there was nothing in the Fifth Amendment that would stand in the way. If the object was within the authority of Congress, the power to realize it through the exercise of eminent domain was clear.
2. Accept reasoned answers.