

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

## CRITICAL ENGAGEMENT QUESTION

*Assess whether the Supreme Court ruled correctly in Citizens United v. F.E.C., 2010, in light of constitutional principles including republican government, freedom of speech, and property rights.*

## CONSTITUTIONAL PRINCIPLES

*Republican government  
Freedom of speech  
Property rights*

During his 2010 State of the Union address, President Barack Obama did something very few presidents have done: he openly challenged a Supreme Court ruling in front of both chambers of Congress and members of the Supreme Court of the United States. That ruling, *Citizens United v. F.E.C.* (2010), and the President's commentary on it, reignited passions on both sides of a century-long debate: to what extent does the First Amendment protect the variety of ways Americans associate with one another and the diverse ways we "speak," "assemble," and participate in American political life? It is this speech — political speech — that the Founders knew was inseparable from the very concept of self-government.

### Learning Objectives

Students will:

- Understand the Founders' reasons for affording political speech the greatest protection.
- Apply principles of republican government and freedom of speech to evaluate the decision in *Citizens United v. F.E.C.* (2010).

### Materials

- Handout A: Agree or Disagree
- Handout B: *Citizens United v. F.E.C.* (2010) Background Essay
- Handout C: *Citizens United v. F.E.C.* (2010)

# TEACHING TIPS: CITIZENS UNITED

## LEARNING OBJECTIVES

- Students will understand the Founders' reasons for affording political speech the greatest protection.
- Students will apply principles of republican government, property rights, and freedom of speech to evaluate the decision in *Citizens United v. F.E.C.* (2010).

## ACTIVITIES

1. Have students read and answer the questions for **Handout B: Background Essay**. Alternatively, read it aloud in class, providing support as needed. You may wish to use **Handout C: Timeline of Campaign Finance Reform Initiatives** to help students understand these events. Review definitions of constitutional principles: republican government, freedom of speech, and property rights.
2. Have students complete **Handout A: Agree or Disagree**. Then, tell them that if the provision of the Bipartisan Campaign Reform Act at issue in *Citizens United* not been overturned, situations 1, 2, and 3 would have been felonies. You may wish to reveal to students that Statements 4, 5, and 6 are quotes from the majority opinion in *Citizens United*.
3. Divide the class into five groups and assign each group to analyze their assigned documents: Group 1: **Documents A, B, and C**; Group 2: **Documents D, E, and L**; Group 3: **Documents F, G, and H**; Group 4: **Document I** (Majority Opinion), and Group 5: **Documents J and K** (additional opinions). Each group should designate a spokesperson.
4. Have Groups 1, 2, and 3 report, summarizing their discussion. At this point, have students identify which aspects of the documents presented so far would be most helpful to each of the two attorneys arguing the case. For now, Groups 4 and 5 are merely observers, not participants.
5. Have students in Groups 1, 2, and 3 tell whether they think the BCRA was constitutional, and to provide their reasoning based on constitutional principles. Take a vote and write the results on the board. Who would have won this case if these students were the Supreme Court?
6. Next, have Groups 4 and 5 report the actual Supreme Court opinions. Which constitutional principles seem to have been most persuasive to the Supreme Court Justices?
7. Use key question, "Assess whether the Supreme Court ruled correctly in *Citizens United v. F.E.C.* (2010), in light of constitutional principles including republican government, property rights, and freedom of speech." In a writing assignment, focus on the constitutional principles involved in the case.
8. Have students collect and analyze current events articles related to the issues and constitutional principles in this case.

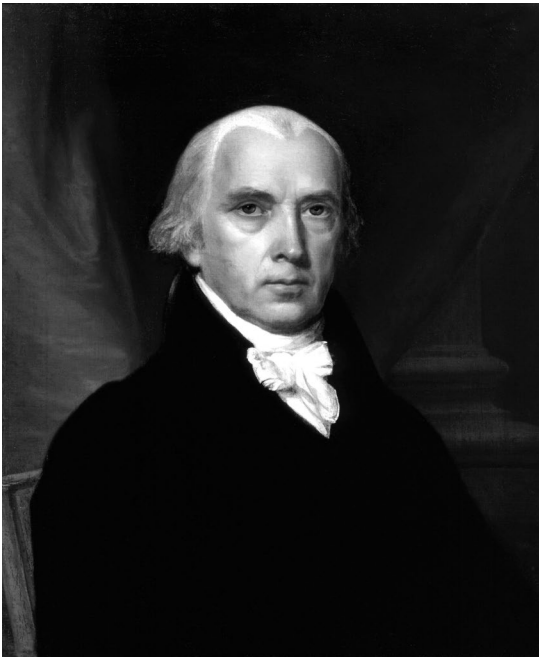
**See Appendix for additional Graphic Organizers.**

# EXPLORING CIVIL AND ECONOMIC FREEDOM

by Veronica Cruz Burchard

When you hear the term “civil rights,” which rights come to mind? Perhaps they include freedom of speech and assembly, the right to vote, and other actions frequently associated with political participation. More broadly, however, civil rights refer to any legally enforceable freedom of action. Some civil rights — e.g., life, liberty, and the pursuit of happiness — were so fundamental, so inextricably linked to a free society, that the Framers considered them to be inalienable. That is, they could not be voluntarily waived or surrendered. If, for instance, someone consented to labor for another, that consent could be revoked at any time.

To Enlightenment thinkers, classical liberals, British colonists in America, and, later, the Founding generation, the right to private property was intimately connected to the individual. Put another way, it was inalienable. A particular property could of course be sold or otherwise surrendered, but not the right to own and control property *per se*. John Locke argued that the right to own and control a piece of land, for example, arose by laboring to improve the land or draw resources from it. The Framers also understood property as encompassing much more than tangible objects or land. Conscience, according to James Madison, was “the most sacred of all property.”



*James Madison, the Father of the Constitution. Image from the White House Collection, courtesy The White House Historical Association.*

Property and its owners, then, were bound together as intimately as individuals and their expressive activities — our freedom of speech, our right to march in protest, our right to cast ballots for our preferred policies and candidates. Our property — our beliefs, our opinions, our faculties, our things — is part of who we are. The ability to freely pursue property in all its forms was considered an essential freedom. It was at the heart of the pursuit of happiness.

While we may define “happiness” today in terms of contentment or even entertainment, to 18th century Americans the idea meant much more. Happiness encompassed the ability to take care of oneself and one’s family, to build wealth and enjoy the fruits of one’s labor. It was attained by living in liberty and by practicing virtue. Understanding the term as the Founders did is key to our understanding of the Declaration’s pronouncement that governments are instituted to protect our inalienable rights to “life, liberty, and the pursuit of happiness.”

## Debate Over a Bill of Rights

The Constitution was written with several ends in mind. Listed in the Preamble, they had the multi-generational goal of ensuring “the blessings of liberty to ourselves and our posterity.” The now-familiar constitutional principles such as separation of powers, checks and balances, and our federal system served to limit and divide power in order to prevent tyranny and frustrate excessive government control over individual liberties.

With this purpose and structure in place, the Constitution submitted to the states for approval in 1787 did not contain a bill of rights. The Federalists, who supported the Constitution as written, argued that bills of rights were needed only against kings who wielded unlimited power, but they weren’t necessary for a free, popular government of enumerated powers. As Alexander Hamilton wrote in *Federalist* 84, “[W]hy declare that things shall not be done which there is no power to do?”

Federalists went even further. Hamilton and Madison argued that the addition of a bill of rights was not only unnecessary, but could even be dangerous. Rights were sacred spaces around sovereign individuals into which government could not justly intrude. Carving out certain secured rights might cause people to think that, but for those few exceptions, other rights were not secured. In short, a bill of rights at the end of the Constitution might result in a massive increase in government power that would turn the very idea of limited government on its head.

## Madison’s Promise and the Ninth Amendment

Several states sent lists of proposed amendments to Congress. With the Constitution still in doubt, Madison promised that Congress would take up a bill of rights after ratification. In the summer of 1789, he kept his promise and introduced draft amendments in the House. Mindful of his own warning against identifying a limited list of rights, Madison included what would ultimately become the Ninth Amendment: *“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”*

The Ninth Amendment would be a signal that while government powers were few and definite, the rights of naturally-free individuals were indefinite and numerous, even innumerable. Though maligned in modern times by the late Supreme Court nominee Robert Bork as an “inkblot,” the amendment served in the Founding era, and was intended to serve for all time, as a reminder that the list of individual rights and due process protections in the Bill of Rights was not exhaustive. Madison wrote later in 1792, “As a man is said to have a right to his property, he may be equally said to have a property in his rights.”

## The Supreme Court and Liberty

Congress approved twelve amendments and sent them to the states for ratification. Of those 12, the states ratified ten, which became the Bill of Rights in 1791. Because the limits on government applied only at the federal level and the scope of federal power was relatively small, federal lawmaking faced few constitutional challenges for several decades. The states, however, were not subject to the federal Bill of Rights and condoned numerous violations — slavery being the most egregious.

Not until the 14th Amendment, ratified 77 years later in 1868, were the states prevented from making or enforcing “any law which shall abridge the privileges or immunities of citizens of the United States; ... deprive any person of life, liberty, or property, without due process of law; [or] deny to any person within its jurisdiction the equal protection of the laws.”

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Through a series of cases involving rights, the Supreme Court identified the particular rights that would be “incorporated,” i.e., applied to limit state power.

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But which rights would be protected from unjust abrogation by state governments? Through a series of cases involving rights ranging from freedom of religion to protection against cruel and unusual punishment, the Supreme Court identified the rights that would be “incorporated,” i.e., applied to limit state power. Generally, the Court asked whether claimed rights were “fundamental,” which depended in turn on whether they were “implicit in the concept of ordered liberty” or “rooted in the traditions and conscience of our people.” Not all rights qualified, and that meant some rights would be less vigorously protected than others.

In cases like *Meyer v. Nebraska* (1923) and *Pierce v. Society of Sisters* (1925) the right to liberty was interpreted broadly. Under the 14<sup>th</sup> Amendment’s Due Process Clause, the Court protected the right to educate one’s children in a private school (*Pierce*) and the right to teach young children a foreign language (*Meyer*). Further, the Court held in *Meyer*, if government wanted to bring about an outcome in society, no matter how noble, it could not go about reaching that goal via unconstitutional means. “That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected....a desirable end cannot be promoted by prohibited means.”

In *Lochner v. New York* (1905), the Court struck down a state law limiting the number of hours bakers could work. The Court held that a law of this scope was outside of the legislature’s constitutional power, and that citizens’ liberty included the right to earn an honest living, as well as the right for employers and employees to enter into contracts. This case began what is now called the “*Lochner* Era” during which the Court interpreted the Due Process Clause of the Fourteenth Amendment as protecting economic rights to the same degree as other personal rights. For this reason, and because the Court’s rulings came into direct conflict with Congress’s attempts to intervene in the marketplace and redistribute wealth, many regard *Lochner* Era rulings as examples of judicial activism.

### **The New Deal and the Switch in Time that Saved Nine**

After several economic regulations advanced by President Franklin D. Roosevelt’s administration were struck down by the Court’s conservative bloc, Roosevelt proposed the Judicial Procedures Reform Bill of 1937, giving the President the power to appoint a new justice to the high Court for each current justice over the age of 70-1/2. This would have resulted in six new justices at that time. In what is now called “the switch in time that saved nine,” Justice Owen Roberts, who often sided with the conservatives, voted to uphold a Washington state minimum wage law for women. That case, *West Coast Hotel v. Parrish* (1937) marked the end of the *Lochner* Era. The new Court majority held that “deprivation of liberty to contract is forbidden by the Constitution if without due process of law, but restraint or regulation of this liberty, if reasonable in relation to its subject and if adopted for the protection of the community against evils menacing the health, safety, morals and welfare of the people, is due process.”

While the Supreme Court had previously treated individual economic freedom as fundamental to “ordered liberty” under the Due Process Clause, after 1937 these rights were to be subordinated. Moreover, another part of the 14th Amendment, the Privileges or Immunities clause, offered no further protection. Decades earlier in the *Slaughterhouse Cases* (1873), the Court had limited the scope of “privileges or immunities” to activities such as petitioning government, access to navigable waters, and the writ of *habeas corpus*. Economic rights were not included.

#### Footnote 4

In *U.S. v. Carolene Products Company* (1938), the Court held that Congress could ban “filled milk” as a health hazard (a charge for which there was no evidence, but which protected large corporate milk producers from smaller competitors selling a lower-cost product). “Filled milk” refers to skim milk to which some form of fat other than milk fat has been added. Often vegetable oil was used. The result resembled cream, but was less expensive. *Carolene* might have been just another case upholding Congress’s power to regulate economic activity, but a single footnote supplied a rationale for elevating some rights over others.

In Footnote 4, the Court established a hierarchy of rights. In the top tier, entitled to the highest level of protection, are “fundamental” rights such as some of those secured by the first ten amendments to the Constitution, access to key political processes such as voting, and equal treatment of “discrete and insular minorities.” Government restrictions on those rights are rigorously scrutinized to determine their necessity and effectiveness. To be upheld, a restriction must be narrowly tailored to serve a compelling government interest. By contrast, in the bottom tier, are “non-fundamental” economic liberties such as the right to own property and earn an honest living. Government regulation of economic liberties is subject only to a “rational basis” test: The regulation is presumed to be constitutional; the burden is on the citizen to prove it is not; and the regulation will be upheld if it is reasonably related to a legitimate government purpose.

The history of the Court’s treatment of various rights suggests that certain types of activities — the ones we think of today as implicating “civil rights” — receive the greatest constitutional protection. The question whether other rights just as fundamental to our nature have been “den[ie]d or disparage[d]” should be the subject of searching inquiry.

#### Critical Thinking Questions

1. How did the Founding generation understand “property”?
2. What was a chief reason that Federalists opposed a listing of specific liberties (a bill of rights)?
3. Which branch of government do you believe is best suited to determine which rights government cannot infringe? Why?
4. Was the Court right in *Carolene Products* to distinguish between types of rights? Explain.
5. Are civil and economic liberties different? If so, why? If not, why not?
6. Does Footnote 4 of *Carolene Products* prove the Federalists right about the dangers of listing certain rights at the end of the Constitution, or was the footnote consistent with the Constitution and the goal of protecting liberty?

## AGREE OR DISAGREE?

**Directions:** Mark each statement with an “A” if you agree or a “D” if you disagree.

- \_\_\_\_\_ 1. Government should be able to punish the Sierra Club if it were to run an ad immediately before a general election, trying to convince voters to disapprove of a Congressman who favors logging in national forests.
- \_\_\_\_\_ 2. Government should be able to punish the National Rifle Association if it were to publish a book urging the public to vote for the challenger because the incumbent U. S. Senator supports a handgun ban.
- \_\_\_\_\_ 3. Government should be able to punish the American Civil Liberties Union if it creates a website telling the public to vote for a presidential candidate in light of that candidate’s defense of free speech.
- \_\_\_\_\_ 4. “The First Amendment protects speech and speaker, and the ideas that flow from each.”
- \_\_\_\_\_ 5. “If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech.”
- \_\_\_\_\_ 6. “When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.”



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

Since the rise of modern “big business” in the Industrial Age, Americans have expressed concerns about the influence of corporations and other “special interests” in our political system. In 1910 President Theodore Roosevelt called for laws to “prohibit the use of corporate funds directly or indirectly for political purposes ... [as they supply] one of the principal sources of corruption in our political affairs.” Although Congress had already made such corporate contributions illegal with the Tillman Act (1907), Roosevelt’s speech nonetheless prompted Congress to amend this law to add enforcement mechanisms with the 1910 Federal Corrupt Practices Act. Future Congresses would enlarge the sphere of “special interests” barred from direct campaign contributions through — among others — the Hatch Act (1939), restricting the political campaign activities of federal employees, and the Taft-Hartley Act (1947), prohibiting labor unions from expenditures that supported or opposed particular federal candidates.

Collectively, these laws formed the backbone of America’s campaign finance laws until they were replaced by the Federal Elections Campaign Acts (FECA) of 1971 and 1974. FECA of 1971 strengthened public reporting requirements of campaign financing for candidates, political parties and political committees (PACs). The FECA of 1974 added specific limits to the amount of money that could be donated to candidates by individuals, political parties, and PACs, and also what could be independently spent by people who want to talk about candidates. It provided for the creation of the Federal Election Commission, an independent agency designed to monitor campaigns and enforce the nation’s political finance laws. Significantly, FECA left members of the media, including corporations, free to comment about candidates without limitation, even though such commentary involved spending money and posed the same risk of quid pro quo corruption as other independent spending.

In *Buckley v. Valeo* (1976), however, portions of the FECA of 1974 were struck down by the Supreme Court. The Court deemed that restricting independent spending by individuals and groups to support or defeat a candidate interfered with speech protected by the First Amendment, so long as those funds were independent of a candidate or his/her campaign. Such restrictions, the Court held, unconstitutionally interfered with the speakers’ ability to convey their message to as many people as possible. Limits on direct campaign contributions, however, were permissible and remained in place. The Court’s rationale for protecting independent spending was not, as is sometimes stated, that the Court equated spending money with speech. Rather, restrictions on spending money for the purpose of engaging in political speech unconstitutionally interfered with the First Amendment-protected right to free speech. (The Court did mention that direct contributions to candidates could be seen as symbolic expression, but concluded that they were generally restrictable despite that.)

The decades following *Buckley* would see a great proliferation of campaign spending. By 2002, Congress felt pressure to address this spending and passed the Bipartisan Campaign Finance Reform Act (BCRA). A key provision of the BCRA was a ban on speech that was deemed “electioneering communications” — speech that named a federal candidate within 30 days of a primary election or 60 days of a general election that was paid for out of a “special interest’s” general fund (PACs were left untouched by this prohibition). An immediate First Amendment challenge to this provision — in light of the precedent set in *Buckley* — was mounted in *McConnell v. F.E.C.* (2003). But the Supreme Court upheld it as a restriction justified by the need to prevent both “actual corruption...and the appearance of corruption.”



Another constitutional challenge to the BCRA would be mounted by the time of the next general election. Citizens United, a nonprofit organization, was primarily funded by individual donations, with relatively small amounts donated by for-profit corporations as well. In the heat of the 2008 primary season, Citizens United released a full-length film critical of then-Senator Hillary Clinton entitled *Hillary: the Movie*. The film was originally released in a limited number of theaters and on DVD, but Citizens United wanted it broadcast to a wider audience and approached a major cable company to make it available through their “On-Demand” service. The cable company agreed and accepted a \$1.2 million payment from Citizens United in addition to purchased advertising time, making it free for cable subscribers to view.

Since the film named candidate Hillary Clinton and its On-Demand showing would fall within the 30-days-before-a-primary window, Citizens United feared it would be deemed an “electioneering communications” under the BCRA. The group mounted a preemptive

legal challenge to this aspect of the law in late 2007, arguing that the application of the provision to *Hillary* was unconstitutional and violated the First Amendment in their circumstance. A lower federal court disagreed, and the case went to the Supreme Court in early 2010.

In a 5-4 decision, the Supreme Court ruled in *Citizens United v. F.E.C.* that: 1) the BCRA’s “electioneering communication” provision did indeed apply to *Hillary* and that 2) the law’s ban on corporate and union independent expenditures was unconstitutional under the First Amendment’s speech clause. “Were the Court to uphold these restrictions,” the Court reasoned, “the Government could repress speech by silencing certain voices at any of the various points in the speech process.” *Citizens United v. F.E.C.* extended the principle, set 34 years earlier in *Buckley*, that restrictions on spending money for the purpose of engaging in political speech unconstitutionally burdened the right to free speech protected by the First Amendment.

### Comprehension and Critical Thinking Questions

1. Summarize the ways in which various campaign finance laws have restricted the political activities of groups, including corporations and unions.
2. What was the main idea of the ruling in *Buckley v. Valeo*?
3. What political activity did the group Citizens United engage in during the 2008 primary election? How was this activity potentially illegal under the BCRA?
4. How did the Supreme Court rule in *Citizens United v. F.E.C.*? In what way is it connected to the ruling in *Buckley*?
5. Do you believe that the First Amendment should protect collective speech (i.e. groups, including “special interests”) to the same extent it protects individual speech? Why or why not?
6. What if the government set strict limits on people spending money to get the assistance of counsel, or to educate their children, or to have abortions? Or what if the government banned candidates from traveling in order to give speeches? Would these hypothetical laws be unconstitutional under the reasoning the Court applied in *Buckley* and *Citizens United*? Why or why not?

## TIMELINE OF CAMPAIGN FINANCE REFORM INITIATIVES

DATE	LAW/SUPREME COURT CASE	MAIN EFFECT
1907	Tillman Act	
1910	Federal Corrupt Practices Act	
1939	Hatch Act	
1947	Taft-Hartley Act	
1971	Federal Elections Campaign Acts	
1974	Federal Elections Campaign Acts	
1976	<i>Buckley v. Valeo</i>	
2002	Bipartisan Campaign Finance Reform Act (BCRA)	
2003	<i>McConnell v. F.E.C.</i>	
2010	<i>Citizens United v. F.E.C.</i>	

# CITIZENS UNITED V. F.E.C.

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## CONSTITUTIONAL PRINCIPLES

Republican government  
Freedom of speech  
Property rights

### KEY QUESTION

Assess whether the Supreme Court ruled correctly in *Citizens United v. F.E.C.* (2010), in light of constitutional principles including republican government, freedom of speech, and property rights.

- A *Federalist #10* by James Madison (1787)
- B Thomas Jefferson to Edward Carrington (1787)
- C The First Amendment (1791)
- D *Dartmouth College v. Woodward* (1819)
- E “The Bosses of the Senate,” Joseph Keppler (1889)
- F New Nationalism Speech, Theodore Roosevelt (1910)
- G *Buckley v. Valeo* (1976)
- H Citizens United Mission Statement (1988)
- I *McConnell v. F.E.C.* (2003)
- J *Citizens United v. F.E.C.* (2010), Majority Opinion
- K *Citizens United v. F.E.C.* (2010), Dissenting Opinion
- L *Citizens United v. F.E.C.* (2010), Concurring Opinion
- M “Another Dam Breaks,” Matt Wuerker (2010)

## DOCUMENT A

### ***Federalist #10* by James Madison (1787)**

By a faction, I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adversed to the rights of other citizens, or to the permanent and aggregate interests of the community.

There are two methods of curing the mischiefs of faction: the one, by removing its causes; the other, by controlling its effects.

There are again two methods of removing the causes of faction: the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests.

It could never be more truly said than of the first remedy, that it was worse than the disease. Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.

[Because] the *causes* of faction cannot be removed ... relief is only to be sought in the means of controlling its *effects*. ...If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote.

*(Italics are Madison's)*

- 1. How does James Madison define a faction?**
- 2. What does Madison argue serves as a “check” on the influence various factions may have on society?**
- 3. Would the *Federalist Papers* have been legal under the BCRA?**

## DOCUMENT B

### Thomas Jefferson to Edward Carrington (1787)

I am persuaded myself that the good sense of the people will always be found to be the best army. They may be led astray for a moment, but will soon correct themselves. The people are the only censors of their governors: and even their errors will tend to keep these to the true principles of their institution. To punish these errors too severely would be to suppress the only safeguard of the public liberty. ...The basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter. But I should mean that every man should receive those papers and be capable of reading them....

If once they become inattentive to the public affairs, you and I, and Congress, and Assemblies, judges and governors shall all become wolves.

1. What does Jefferson believe is “the basis of our governments”?
2. What does Jefferson believe is “the only safeguard of the public liberty”?
3. What does Jefferson seem to believe is a possible disadvantage of press freedom? Why does he find it acceptable?
4. What does Jefferson predict will happen if the people become inattentive to public affairs?

## DOCUMENT C

### The First Amendment (1791)

Congress shall make no law ... abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

1. Why did the Founders deem speech and assembly so vital to self-government?
2. List a variety of ways you see Americans “speak” and “assemble” in political life.

## DOCUMENT D

### ***Dartmouth College v. Woodward (1819), Majority Opinion***

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs and to hold property... It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities that corporations were invented and are in use...

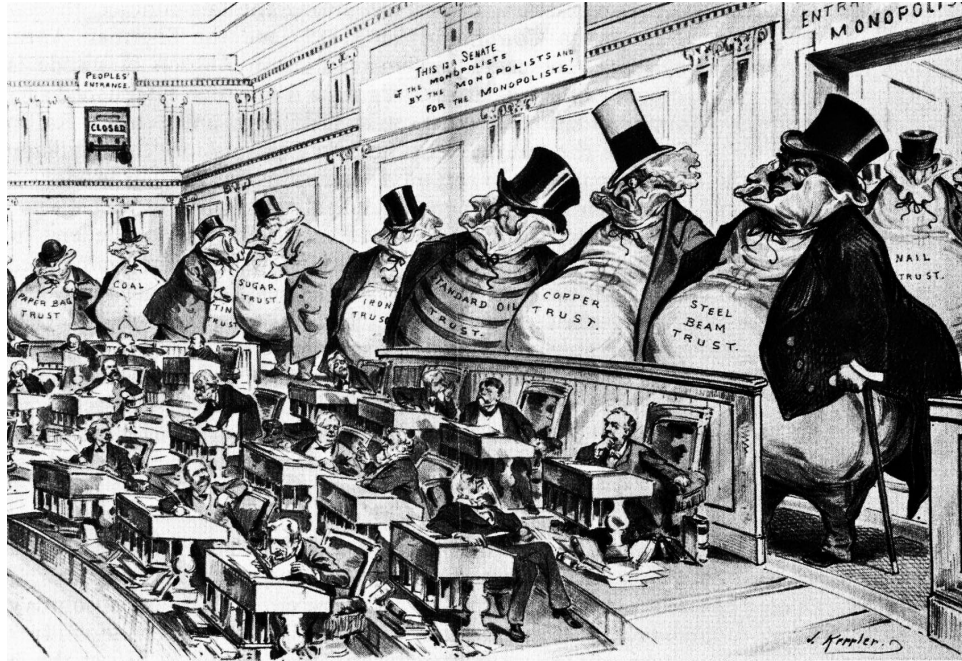
The opinion of the Court, after mature deliberation, is that this is a contract the obligation of which cannot be impaired without violating the Constitution of the United States. This opinion appears to us to be equally supported by reason and by the former decisions of this Court.

- 1. According to this unanimous opinion by Chief Justice John Marshall, what properties does a corporation possess?**
- 2. In what actions may a corporation engage?**
- 3. How would you explain the reasoning behind the decision that a corporation has an enforceable right to enter into contracts?**



## DOCUMENT E

**“The Bosses of the Senate,” Joseph Keppler (1889)**



1. How does this cartoon express the concern of “quid pro quo” corruption?
2. What is the significance of the closed door with the sign above it in the upper left hand corner of the cartoon?
3. Did Madison’s assertion in *Federalist 10* (Document A) — that the republican principle will serve as a check on the influence of factions — apply in the cartoon’s time period? Does it apply today?

## DOCUMENT F

### **New Nationalism Speech, Theodore Roosevelt (1910)**

[O]ur government, National and State, must be freed from the sinister influence or control of special interests. Exactly as the special interests of cotton and slavery threatened our political integrity before the Civil War, so now the great special business interests too often control and corrupt the men and methods of government for their own profit. We must drive the special interests out of politics. ... [E]very special interest is entitled to justice, but not one is entitled to a vote in Congress, to a voice on the bench, or to representation in any public office. The Constitution guarantees protection to property, and we must make that promise good. But it does not give the right of suffrage to any corporation.

1. What does Roosevelt mean by “special interests”?
2. Does this concept relate to Madison’s definition of “faction”?  
If so, how?

## DOCUMENT G

### ***Buckley v. Valeo* (1976), Majority Opinion**

Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation. ...Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest possible protection to such political expression in order to assure unfettered exchange of ideas for the bringing about of political and social changes desired by the people. ...A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today’s mass society requires the expenditure of money.

1. Restate this excerpt from the *Buckley* ruling in your own words.

## DOCUMENT H

### **Citizens United Mission Statement (1988)**

Citizens United is an organization dedicated to restoring our government to citizens' control. Through a combination of education, advocacy, and grass roots organization, Citizens United seeks to reassert the traditional American values of limited government, freedom of enterprise, strong families, and national sovereignty and security. Citizens United's goal is to restore the founding fathers' vision of a free nation, guided by the honesty, common sense, and good will of its citizens. ...Citizens United has a variety of different projects that help it uniquely and successfully fulfill its mission. Citizens United is well known for producing high-impact, sometimes controversial, but always fact-based documentaries filled with interviews of experts and leaders in their fields.

1. **Do you believe James Madison would consider Citizens United a faction? Why or why not?**
2. **Is Citizens United an “assembly” of people seeking to engage in political “speech?” Why or why not?**

## DOCUMENT I

### ***McConnell v. F.E.C.* (2003), Majority Opinion**

Because corporations can still fund electioneering communications with PAC money, it is ‘simply wrong’ to view the [BCRA] provision as a ‘complete ban’ on expression...

We have repeatedly sustained legislation aimed at ‘the corrosive effects of immense aggregations of wealth that are accumulated with the help of the corporate form.’ ...[T]he government has a compelling interest in regulating advertisements that expressly advocate the election or defeat of a candidate for federal office ... corporations and unions may finance genuine issue ads during those time frames by simply avoiding any specific reference to federal candidates, or ... by paying for the ad from a segregated fund [PAC].

1. **Restate the *McConnell* opinion in your own words.**
2. **In your opinion, is the *McConnell* ruling consistent with the ruling in *Buckley* (Document G) in its interpretation of the First Amendment?**

## DOCUMENT J

### MAJORITY OPINION



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

The F.E.C. has adopted 568 pages of regulations, 1,278 pages of explanations and justifications for those regulations, and 1,771 advisory opinions since 1975. ...[G]iven the complexity of the regulations and the deference courts show to administrative determinations, a speaker who wants to avoid threats of criminal liability and the heavy costs of defending against F.E.C. enforcement must ask a governmental agency for prior permission to speak.

If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech. All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech.

At the founding, speech was open, comprehensive, and vital to society's definition of itself; there were no limits on the sources of speech and knowledge. ...By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests. Factions will necessarily form in our Republic, but the remedy of 'destroying the liberty' of some factions is 'worse than the disease' [*Federalist 10*]. Factions should be checked by permitting them all to speak, and by entrusting the people to judge what is true and what is false....

When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.

The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy. By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate. The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials.

Rapid changes in technology — and the creative dynamic inherent in the concept of free expression — counsel against upholding a law that restricts political speech in certain media or by certain speakers. Today, 30-second television ads may be the most effective way to convey a political message. Soon, however, it may be that Internet sources ... will provide citizens with significant information about political candidates and issues. Yet, [the BCRA] would seem to ban a blog post expressly advocating the election or defeat of a candidate if that blog were created with corporate funds. The First Amendment does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker and the content of the political speech.

- 1. How would you summarize the Court’s interpretation of the First Amendment?**
- 2. How would you evaluate the Court’s analysis of *Federalist 10*?**
- 3. The Court reasoned, “The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy.” Do you agree? What effect, if any, does this ruling have on the republican principle of the United States government?**

## DOCUMENT K

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

[In] a variety of contexts, we have held that speech can be regulated differentially on account of the speaker's identity, when identity is understood in categorical or institutional terms. The Government routinely places special restrictions on the speech rights of students, prisoners, members of the Armed Forces, foreigners, and its own employees.

Unlike our colleagues, the Framers had little trouble distinguishing corporations from human beings, and when they constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind. ...[M]embers of the founding generation held a cautious view of corporate power and a narrow view of corporate rights ... [and] they conceptualized speech in individualistic terms. If no prominent Framers bothered to articulate that corporate speech would have lesser status than individual speech, that may well be because the contrary proposition — if not also the very notion of “corporate speech” — was inconceivable.

On numerous occasions we have recognized Congress's legitimate interest in preventing the money that is spent on elections from exerting an ‘undue influence on an officeholder's judgment’ and from creating ‘the appearance of such influence.’ Corruption operates along a spectrum, and the majority's apparent belief that quid pro quo arrangements can be neatly demarcated from other improper influences does not accord with the theory or reality of politics. ...A democracy cannot function effectively when its constituent members believe laws are being bought and sold.

A regulation such as BCRA may affect the way in which individuals disseminate certain messages through the corporate form, but it does not prevent anyone from speaking in his or her own voice.

At bottom, the Court's opinion is thus a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt. It is a strange time to repudiate that common sense. While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics.

- 1. How does the reasoning in the dissenting opinion differ from that of the Majority (Document J)?**
- 2. How would you evaluate the dissenters' statement, “A democracy cannot function effectively when its constituent members believe laws are being bought and sold.”**



## DOCUMENT L

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

The Framers didn't like corporations, the dissent concludes, and therefore it follows (as night the day) that corporations had no rights of free speech.

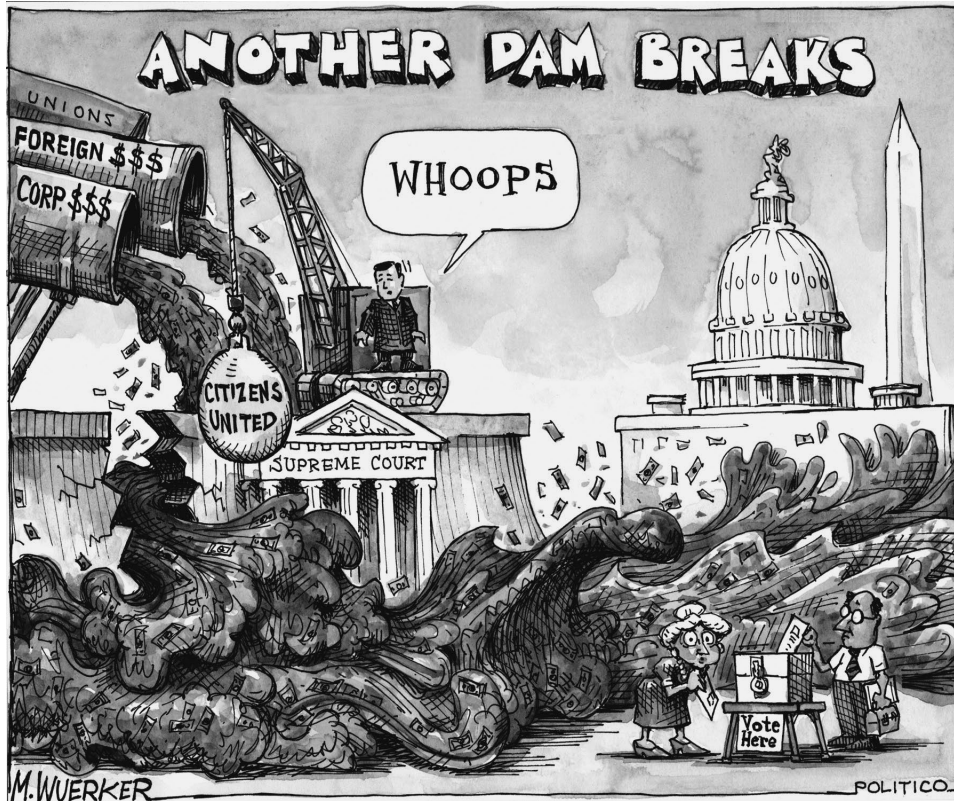
The lack of a textual exception for speech by corporations cannot be explained on the ground that such organizations did not exist or did not speak. To the contrary ... both corporations and voluntary associations actively petitioned the Government and expressed their views in newspapers and pamphlets. For example: An antislavery Quaker corporation petitioned the First Congress, distributed pamphlets, and communicated through the press in 1790. The New York Sons of Liberty sent a circular to colonies farther south in 1766. And the Society for the Relief and Instruction of Poor Germans circulated a biweekly paper from 1755 to 1757.

The dissent says that when the Framers “constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind.” That is no doubt true. All the provisions of the Bill of Rights set forth the rights of individual men and women — not, for example, of trees or polar bears. But the individual person's right to speak includes the right to speak in association with other individual persons. Surely the dissent does not believe that speech by the Republican Party or the Democratic Party can be censored because it is not the speech of “an individual American.” It is the speech of many individual Americans, who have associated in a common cause, giving the leadership of the party the right to speak on their behalf. The association of individuals in a business corporation is no different — or at least it cannot be denied the right to speak on the simplistic ground that it is not “an individual American.”

- 1. Why does this Justice argue that the original understanding of the First Amendment does not allow for limitations on the speech of associations such as corporations and unions? Do you agree?**

## DOCUMENT M

“Another Dam Breaks,” Matt Wuerker (2010)



1. What does the cartoonist predict will be the effect of the *Citizens United* ruling?
2. What assumptions does the cartoonist seem to make about voters? Are they valid assumptions? Explain.

### 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

Assess whether the Supreme Court ruled correctly in *Citizens United v. F.E.C.* (2010), in light of constitutional principles including republican government, freedom of speech, and property rights.



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

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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.<sup>1</sup>

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

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

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

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

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

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

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

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

## **2. THE LIBERATION GENERALIZATION**

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

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

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

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

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

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

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

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



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

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

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

#### 4. THE GIDEON EFFECT

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

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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.

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

## 5. A RULING IS A “RIGHT” ANSWER

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

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

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

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

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

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

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

## THE EFFECT OF CORRECTING MISCONCEPTIONS

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

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

*Diana E. Hess is an associate professor of Curriculum and Instruction at the University of Wisconsin-Madison. She is grateful for the helpful feedback on earlier drafts of this article provided by Lee Arbetman, Keith Barton, Jeff Brown, Bebs Chorak, and Simone Schweber.*

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

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

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

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

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

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

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

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

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

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

# CLASSROOM APPLICATIONS

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

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

## **DBQ Strategies:**

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

## ONLINE RESOURCES

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

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



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

Adapted from AP US History guidelines

Score (Grade)	Thesis	Analysis (tends to be the most difficult component)	Entire Prompt	Documents	Outside Info (required for AP class)	Organization & Writing Skill	Errors
8-9 (95-100)	Contains a well-developed thesis which clearly addresses all aspects of the prompt and shows organizational roadmap	Effective analysis which shows & proves relationships; fully answers the "so what?" questions; more analytical than narrative.	Addresses all aspects of the prompt, though coverage may be slightly uneven	Effectively and appropriately uses all (or almost all) documents  "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: *Kelo v. New London* (2005), Dissenting Opinion

1. The Court's prior cases which read "public use" to mean "public purpose."
2. The text of the Constitution, which requires a "public use."
3. Poor communities, i.e., those most likely to be deemed by governments to be in need of economic redevelopment in an attempt to increase such "blighted" neighborhoods' value and the economic benefit to the community and the local government.

### Document K: "A Wreck of a Plan," Charlotte Allen, *Washington Post* (2005)

1. Government entities almost always fail badly at effective urban revitalization, at the expense of lost homes, neighborhoods, businesses and jobs.
2. The free market, i.e. individual consensual transactions

### Document L: *Newspaper Accounts* (2009)

1. Pfizer left the city.
2. Virtually nothing.
3. Accept reasoned answers.

### Document M: *Satellite View of Fort Trumbull* (2010)

1. None

#### The Issue Endures

1. The vast majority of states have responded to the *Kelo* ruling by enacting reforms providing greater protection for property owners than the Court was willing to enforce in its ruling.
2. This label reveals the Institute for Justice's viewpoint that the use of eminent domain for redevelopment is unjust.

## UNIT 3 – CIVIL AND ECONOMIC FREEDOM

### EXPLORING CIVIL AND ECONOMIC FREEDOM

#### Critical Thinking Questions

1. The Founders understood that property is the natural right of all individuals to create, obtain, and control their possessions, beliefs, faculties, and opinions as well as the fruits of their own labor.
2. The Federalists feared that listing certain rights would lead people to think that the rights not listed were less important.
3. Accept reasoned responses.
4. Accept reasoned responses.

5. Accept reasoned responses.
6. Accept reasoned responses.

### Document A: John Locke, *Second Treatise of Civil Government* (1690)

1. lives, liberties and estates; his own person; labor of his body, and the work of his hands
2. for the preservation of their property
3. When we remove something from the state of nature and mix it with it our own labor, we make it our property.

## ANSWER KEY

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

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

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

## ANSWER KEY

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

#### Timeline of Campaign Finance Reform Initiatives

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

## ANSWER KEY

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

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

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

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

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

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

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

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

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

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

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



## ANSWER KEY

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

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

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

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

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

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

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

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

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

2. Accept reasoned answers.

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

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

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

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

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

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

## ANSWER KEY

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

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

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

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

## UNIT 4 – THE PRESIDENCY: CONSTITUTIONAL CONTROVERSIES

### Presidents and the Constitution Introductory Essay

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

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

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