POTTAWATOMIE v. EARLS (2002)

DIRECTIONS

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

Case Background

While the Court has long held that students "do not shed their constitutional rights … at the schoolhouse gate," it has also emphasized that students in public school have less of an expectation of privacy than adults. Therefore, what would be considered an unreasonable search if performed by a police officer on an adult, may or may not be considered unreasonable if performed by a public school offical on a student.

In *New Jersey v. T.L.O.* (1985), the Court held that because of the special needs of the school environment, public school officials were not subject to the Fourth Amendment's warrant requirement. They were, however, bound by the amendment's requirement that searches be "reasonable."

In *Skinner v. Railway Labor Executives Association* (1989), the Court held that drug tests were "searches" subject to Fourth Amendment considerations. The Court was asked to consider the constitutionality of random drug-testing of student athletes in *Vernonia School District v. Acton* (1995). Citing the diminished expectation of privacy of student athletes, along with the danger of serious injuries when competitors were on drugs, the Court upheld the policy as reasonable.

When the Board of Education of Pottawatomie instituted a policy requiring random drug tests of all students involved in any extra-curricular activity, Lindsay Earls and two other students challenged the policy as unconstitutional.

KEY QUESTION

Assess the Court's evolving definition of "reasonable" searches with respect to public school students.

Documents you will examine:

A The Fourth Amendment, 1791
B "Nancy Reagan Addressing Conference on Drugs," 1982
C *New Jersey v. T.L.O.,* 1985
D Majority Opinion, *Skinner v. Railway Labor Executives Association*, 1989
E Dissenting Opinion, *Skinner v. Railway Labor Executives Association*, 1989
F *Vernonia School District v. Acton*, 1995
G Oral Argument, Pottawatomie School Board's Case, 2002
H Oral Argument, Lindsay Earls's Case, 2002
I Majority Opinion (5-4), *Board of Education of Pottawatomie v. Earls*, 2002
J Concurring Opinion, *Board of Education of Pottawatomie v. Earls,* 2002
K Dissenting Opinion, *Board of Education of Pottawatomie v. Earls,* 2002
L "One Nation, Under Surveillance," 2002
M Office of National Drug Control Policy, "Drug Testing in Schools," 2002

STUDENTS AND THE CONSTITUTION

by Warner Winborne, Ph.D.

"It can hardly be argued that students or teachers shed their constitutional rights … at the schoolhouse gates. This has been the unmistakable holding of this Court for almost 50 years." So wrote Justice Fortas for the Court in *Tinker v. Des Moines* (1969). Students certainly enjoy their constitutional rights to speech, press, free exercise of religion and privacy that all other citizens enjoy. But the Court has never found that any of these rights are absolute. Rather, they might yield in the face of compelling state interests. As such, the Court sometimes finds that the compelling interest of a peaceable and orderly educational environment is sufficiently compelling to trump the exercise of students' rights.

In *Tinker*, the Court considered whether the students had a right to expressive speech in school. The Court had previously found that some actions were so expressive in their nature as to warrant protection as speech. Nevertheless, because the message was conveyed through an action, the state might have a less than compelling reason to regulate the act and still satisfy the Constitution. In *Tinker*, a few students wore armbands to school in protest of the Vietnam War. The students were suspended, and the Court was asked whether this constituted a violation of the students' right to free speech. The Court ruled in favor of the students, finding no cause for alarm regarding the students' desire to wear the armbands. In the absence of any uproar or outcry, and with no disturbance resulting from the wearing of the armbands, the majority found the action to be close to "pure speech." The dissenters either disagreed with the finding of negligible disturbance at the school, or they would give the widest latitude to the discretion of the school authorities.

In a concurring opinion in *Tinker*, Justice Stewart noted that, "Although I agree with much of what is said in the Court's opinion, and with its judgment in this case, I cannot share the Court's uncritical assumption that, school discipline aside, the First Amendment rights of children are co-extensive with those of adults." This question, of whether the free speech rights of students were the equal of those of adults was raised in *Hazelwood v. Kuhlmeier*. Here, a student newspaper, published as part of a journalism class, was to run an article on student pregnancy and another on the impact of divorce on students. Consistent with school practice, the article proofs were submitted to the school principal prior to publication. He withheld the articles, finding the first inappropriate for a young audience, and the latter unfair to those parents criticized by their

children. The student authors and editors sued, claiming that the prior restraint violated their rights to free speech and press. The Court, however, found that the school had acted reasonably.

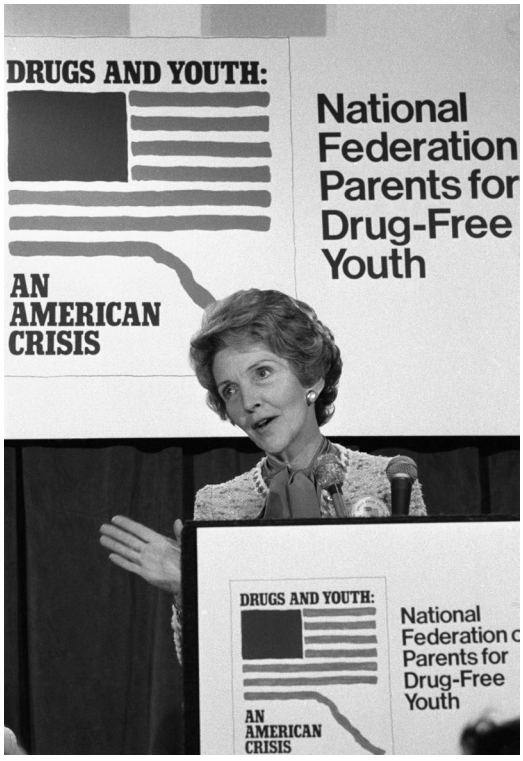
The first question before the Court was whether the free speech rights of students were the same as those of adults. The Court determined that since the student is engaged in an instructive exercise, the school may reasonably limit speech and expression to the extent that those limitations serve a pedagogical function, even if those limitations would be impermissible for adults. The second question before the Court was whether the student newspaper constituted an "open forum" for expression, in which case, free speech rights should be given the widest latitude. Newspapers are commonly considered an "open forum" for expression, and schools frequently make their grounds freely available to student groups and community groups for meetings. But in this case, the newspaper was produced as a class assignment, and intended for student consumption. The expenses of publishing the newspaper were almost entirely borne by the school. Thus the Court determined a public forum did not exist, and the students could not expect the same level of free speech that they might had this been an independent, daily newspaper.

Dissenters on the Court objected because the majority distinguished this case from *Tinker*. In *Tinker*, the Court found that only speech which "materially disrupts classwork or involves substantial disorder or invasion of the rights of others" can be censored. Yet here the majority claims that any speech inconsistent with the educational mission of the school might be restricted.

Apart from First Amendment rights, students have also found that their rights to privacy are also conditioned by their status as students. In *New Jersey v. T.L.O.* (1985), the Court found that a warrantless search of a student's purse was reasonable and hence constitutional, given probable cause. That is, because the school authority had probable cause to believe that the student had violated school policy (in this case smoking in the bathroom), a search of the student's purse was reasonable. In *Vernonia School District v. Acton* (1995), the Court found that drug testing of student-athletes was permissible given the minimal nature of the intrusion (athletes must submit to physicals) and the determination of the existence of a drug problem in the school district in general, and among the student-athletes in particular.

In *Tinker*, the Court found that only speech which "materially disrupts classwork or involves substantial disorder or invasion of the rights of others" can be censored.

But in *Pottowatomie v. Earls* (2002) the Tecumseh, Oklahoma school district required drug-testing of all middle and high school students engaging in any competitive extra-curricular activity. The respondent in this case, Lindsay Earls, was a member of the marching band, show choir and Academic Team. There was no evidence that she used drugs, nor was there evidence that drug use was a problem in the school district. But the Court found that the state's interest in discouraging drug use among its students was sufficiently compelling to justify the intrusion on students' privacy. Indeed, students could avoid the invasion of privacy, the Court noted, by choosing not to participate in competitive activities.



Dissenting in *Earls* was Justice Ruth Bader Ginsburg, who concurred with the Court opinion in *Vernonia*. Yet in *Earls*, Justice Ginsburg believes that the Court has gone too far in limiting students' privacy rights. Searches must be reasonable, and she finds the testing of those not inclined to drug use, and absent any finding of a drug problem to be unreasonable. Further, the danger of drug use to student athletes is quite substantial, posing severe health risks associated with their sports. Yet there seem to be no equivalent health risk to those engaged in non-athletic competition such as Future Homemakers, Future Farmers, or marching band. Tongue firmly in cheek, Ginsburg writes, "Notwithstanding nightmarish images of out-of-control flatware, livestock run amok, and colliding tubas disturbing the peace and quiet of *Tecumseh*, the great majority of students the School District seeks to test in truth are engaged in activities that are not safety sensitive to an unusual degree." Lastly, while athletes might share a diminished sense of privacy given the nature of a locker room, there is no locker room for the Academic Team, hence a greater expectation of privacy.

As is the case in its First and Fourth Amendment jurisprudence elsewhere, in the case of students, the Court attempts to balance the exercise of these freedoms with compelling state interests. And maintaining an orderly classroom environment, or teaching a particular lesson, or preventing drug use have on occasion proven to be sufficiently compelling interests to limit students' rights to speech, press and privacy.

Dr. Warner Winborne is Assistant Professor of Political Science at Hampden-Sydney College in Virginia, where his particular areas of interest include Aristotle, Adam Smith, and Thomas Hobbes. The Executive Director for the Center for the Study of the Constitution, he specializes in the Fourth, Ninth, and Fourteenth Amendments. He has presented papers at the Midwest Political Science Association's annual conferences, chaired a roundtable discussion of Lani Guinier's and Gerald Torres' The Miner's Canary *at the American Political Science Association conference, and is the author of* Modernization and Modernity: Thomas Hobbes, Adam Smith and Political Development.

DOCUMENT A

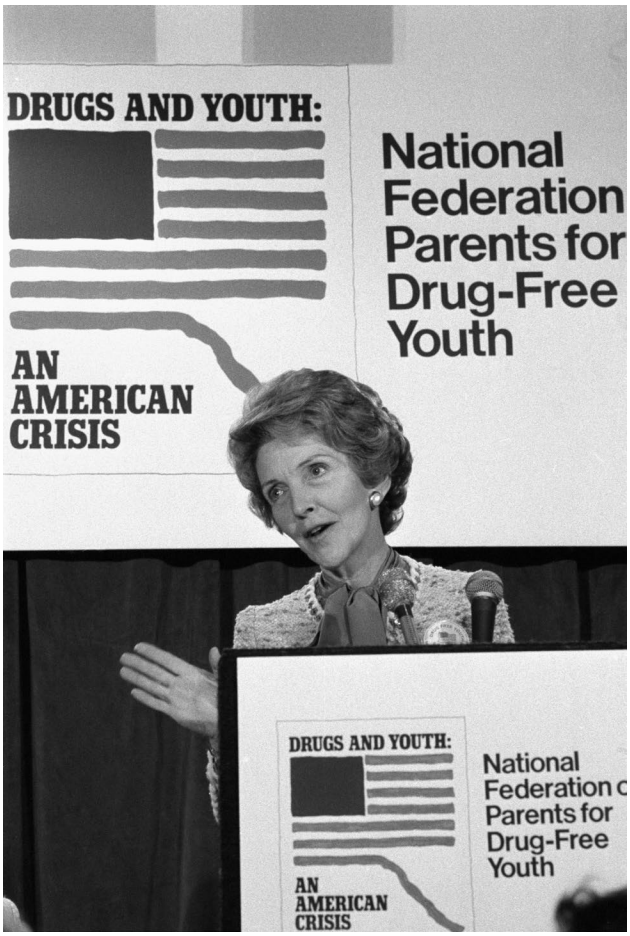
The Fourth Amendment, 1791

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

- **What kind of searches does the Fourth Amendment prevent?**

DOCUMENT B

"Nancy Reagan Addressing Conference on Drugs," 1982



- **What is this group's position on the drug problem in America?**

DOCUMENT C

***New Jersey v. T.L.O.*, 1985**

Against the [public school student's] interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds. ...[I]n recent years ... drug use and violent crime in the schools have become major social problems....

Even in schools that have been spared the most severe disciplinary problems, the preservation of order and a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult.

The warrant requirement, in particular, is unsuited to the school environment. ...[W]e hold today that school officials need not obtain a warrant before searching a student who is under their authority....

The fundamental command of the Fourth Amendment is that searches and seizures be reasonable....

- **What did the Court rule about public school officials and search warrants?**
- **According to this document, what is the Fourth Amendment's "fundamental command"?**

DOCUMENT D

***Skinner v. Railway Labor Executives Association*, 1989**

The Fourth Amendment is applicable to the drug and alcohol testing mandated or authorized by [the Federal Railroad Administration]. ...This Court has long recognized that a compelled intrusion into the body for blood to be tested for alcohol content and the ensuing chemical analysis constitute searches. ...Moreover, although the collection and testing of urine under the regulations do not entail any intrusion into the body, they nevertheless constitute searches, since they intrude upon expectations of privacy as to medical information and the act of urination that society has long recognized as reasonable.

- **In this case, what was the Court's ruling about the Fourth Amendment and drug tests?**
- **Did this case about railroad workers apply to children or adults?**

DOCUMENT E

Dissenting Opinion, *Skinner v. Railway Labor Executives Association*, 1989

The issue in this case is not whether declaring a war on illegal drugs is good public policy. ...In widening the "special needs" exception to probable cause to authorize searches of the human body unsupported by any evidence of wrongdoing, the majority today completes the process begun in *T.L.O.* of eliminating altogether the probable-cause requirement for civil searches. ...There is no drug exception to the Constitution.

- **What did this Justice mean by "There is no drug exception to the Constitution"?**
- **Are the arguments in this document relevant to the issues in this case?**

DOCUMENT F

***Vernonia School District v. Acton*, 1995**

The Student Athlete Drug Policy adopted by … the town of Vernonia, Oregon, authorizes random urinalysis drug testing of students who participate in the [School] District's school athletics programs. …Not only were student athletes included among the drug users but … athletes were the leaders of the drug culture….

Central, in our view, to the present case is the fact that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster. *New Jersey v. T.L.O.* … emphasized that the nature of that power … permit[s] a degree of supervision and control that could not be exercised over free adults….

School sports are not for the bashful. …Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford. …No individual dressing rooms are provided; shower heads are lined up along a wall, unseparated by any sort of partition … not even all the toilet stalls have doors….

Deterring drug use by our Nation's schoolchildren is at least as important as … deterring drug use by engineers and trainmen, which was the governmental concern in *Skinner.* …Finally, it must not be lost sight of that this program is directed more narrowly to drug use by school athletes, where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high.

- **Why did the Court uphold the Vernonia School District's policy of randomly drug-testing public school student athletes?**

DOCUMENT G

Oral Argument, Pottawatomie School Board's Case, 2002

Question: If we look at what people might expect in the real world, where people know that athletes, professional athletes, Olympic athletes, athletes are tested for drugs, but people who are just everyday people aren't. So, *Vernonia* could be regarded as all the students who are athletes—they will be treated as athletes are generally. But that's not true of the large population of high school students.

Mr. Clement: I think one fact is that I think it is increasingly becoming true that these sorts of policies are in society as a whole. And one of the petitioners in this case who didn't want to be drug tested at school had to go get drug tested for the job at the Kmart, at the McDonald's. And I do think that probably does have some influence on the reasonable expectations of privacy in this area.

- **Why does Clement say that students' expectation of privacy is lowered?**
- **What is the difference between Kmart or McDonald's requiring drug tests of employees, and public schools requiring drug tests of students in extra-curricular activities?**

DOCUMENT H

Oral Argument, Lindsay Earls's Case, 2002

Mr. Boyd: It does need to turn in the end on some kind of reasonable line drawing. I think it was reasonable for the Court to say in *Vernonia*, the line that was drawn by *Vernonia* among athletes, the vast majority of whom are doing things that, if not involving physical contact, certainly involve exertion that in the opinion of the Court could cause death. Death was the word that was used by this Court. Also, in *Skinner*, death from train accidents. ...Those were the stakes in those cases. Here you've got a choir....

Question: What do you say just frankly to the argument: We're standing *in loco parentis* [in place of the parent] and if we think it's reasonable to do it, we can do it. What's the answer to that argument?

Boyd: I think the answer to the argument is the Fourth Amendment turns on reasonableness. It's not a majority rules standard. And I think you have to look at the incremental intrusion here....

- **How does Boyd argue that the *Pottawatomie* case differs from the *Vernonia* case?**
- **What does Boyd mean by "the incremental intrusion"?**

DOCUMENT I

MAJORITY OPINION

Majority Opinion (5-4), *Board of Education of Pottawatomie v. Earls*, 2002

Searches by public school officials, such as the collection of urine samples, implicate Fourth Amendment interests. We must therefore review the School District's Policy for "reasonableness," which is the touchstone of the constitutionality of a governmental search....

While schoolchildren do not shed their constitutional rights when they enter the schoolhouse...Fourth Amendment rights ... are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children.

Applying the principles of *Vernonia* to the somewhat different facts of this case, we conclude that [Pottawatomie's] Policy is also constitutional....

A student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety. ...Securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults....

[S]tudents who participate in competitive extracurricular activities voluntarily subject themselves to many of the same intrusions on their privacy as do athletes. Some of these clubs and activities require occasional off-campus travel and communal undress. All of them have their own rules and requirements for participating students that do not apply to the student body as a whole. ...This regulation of extracurricular activities further diminishes the expectation of privacy among schoolchildren....

Given the minimally intrusive nature of the [urine] sample collection and the limited uses to which the test results are put, we conclude that the invasion of students' privacy is not significant....

The drug abuse problem among our Nation's youth has hardly abated since *Vernonia* was decided in 1995. In fact, evidence suggests that it has only grown worse....

In upholding the constitutionality of the Policy, we express no opinion as to its wisdom. Rather, we hold only that [Pottawatomie's] Policy is a reasonable means of furthering the School District's important interest in preventing and deterring drug use among its schoolchildren.

- **According to the opinion, why do the Fourth Amendment rights of public school students differ from those of adults?**
- **Why does the opinion assert that public school children in extra-curricular activities have less of an expectation of privacy?**

DOCUMENT J

Concurring Opinion, *Board of Education of Pottawatomie v. Earls,* 2002

[T]he program at issue here seeks to discourage demand for drugs by changing the school's environment in order to combat the single most important factor leading school children to take drugs, namely, peer pressure. ...It offers the adolescent a nonthreatening reason to decline his friend's drug-use invitations, namely, that he intends to play baseball, participate in debate, join the band, or engage in any one of half a dozen useful, interesting, and important activities....

I cannot know whether the school's drug testing program will work. But, in my view, the Constitution does not prohibit the effort.

- **How does this Justice believe the Pottawatomie policy will "change the school's environment"?**

DOCUMENT K

Dissenting Opinion, *Board of Education of Pottawatomie v. Earls*, 2002

Seven years ago, in *Vernonia School Dist. v. Acton*, (1995), this Court determined that a school district's policy of randomly testing the urine of its student athletes for illicit drugs did not violate the Fourth Amendment. In so ruling, the Court emphasized that drug use "increase[d] the risk of sports-related injury" and that Vernonia's athletes were the "leaders" of an aggressive local "drug culture" that had reached "epidemic proportions."

Today, the Court relies upon *Vernonia* to permit a school district with a drug problem its superintendent repeatedly described as "not ... major," to test the urine of an academic team member solely by reason of her participation in a nonathletic, competitive extracurricular activity—participation associated with neither special dangers from, nor particular predilections for, drug use....

The particular testing program upheld today is not reasonable, it is capricious, even perverse: Petitioners' policy targets for testing a student population least likely to be at risk from illicit drugs and their damaging effects. I therefore dissent....

(continued on next page)

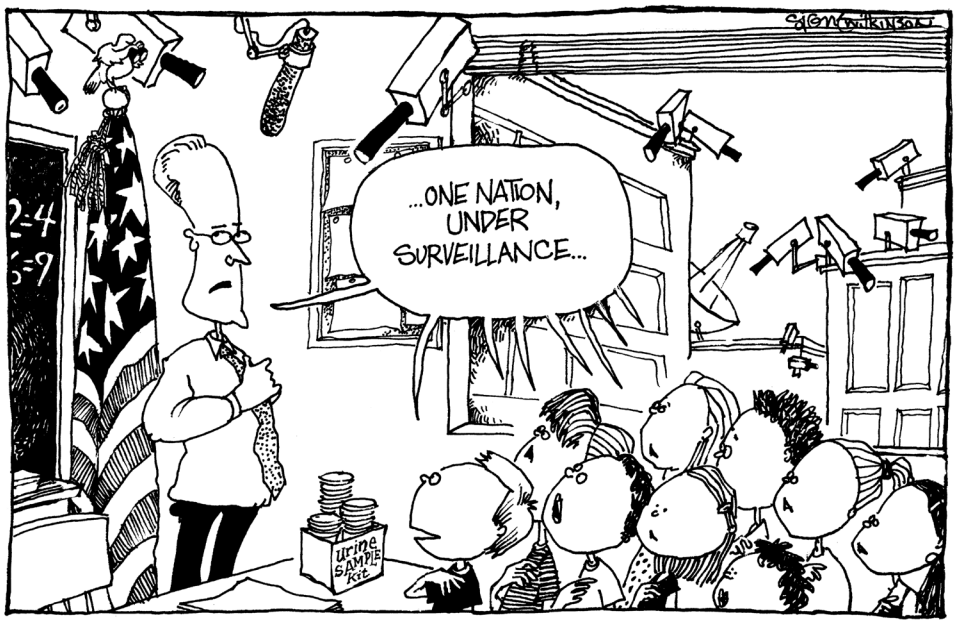
While extracurricular activities are "voluntary" in the sense that they are not required for graduation, they are part of the school's educational program… Participation in such activities is a key component of school life, essential in reality for students applying to college, and, for all participants, a significant contributor to the breadth and quality of the educational experience.

Interscholastic athletics similarly require close safety and health regulation; a school's choir, band, and academic team do not….

- **Why do the dissenting Justices believe the Court has wrongly applied *Vernonia*?**

DOCUMENT L

"One Nation, Under Surveillance," 2002



- **What is the cartoonist's point of view regarding public school students' privacy?**

DOCUMENT M

Office of National Drug Control Policy, "Drug Testing in Schools," 2002

As a deterrent, few methods work better or deliver clearer results [than drug testing]. Drug testing of airline pilots and school bus drivers, for example, has made our skies and roads safer for travel....

[F]ailure to protect our children from drug use and addiction is unacceptable. We cannot responsibly withhold tools as effective as drug testing from communities that believe such measures are appropriate and will save young lives....

Experience has taught us that people at the local level often know best how to deal with drug problems in their communities. But to combat this insidious threat, they need good information and the best resources available. The Supreme Court's ruling will help schools meet these needs. This is good news for students, parents, and teachers. And it is good news for America....

- **What does the Office of National Drug Control Policy believe will be the outcome of the Supreme Court's ruling in *Board of Education of Pottawatomie v. Earls*, 2002?**

DIRECTIONS

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

KEY QUESTION

Assess the Court's evolving definition of "reasonable" searches with respect to public school students.

THE ISSUE ENDURES

El Dorado, Kansas drug testing policy requires that all students in extracurricular activities be tested

Legal Clips, September 2006

El Dorado, Kansas has implemented a drug testing policy for middle and high school students that requires all students participating in extracurricular activities and even those attending any extracurricular activity, including sports, clubs, field trips, driver's education, and school plays, to consent to random drug testing. Unless a student signs the consent, the student will not be allowed to participate in or even attend the activity. School district officials insist they do not have a drug problem, but they say the policy is aimed at keeping it that way. "We see this in the best interest of our students, "says Superintendent Tom Biggs. "We don't see this is a punitive measure." Since the policy was adopted, at least 425 students out of 600 high schoolers, and 215 of the 315 middle school students, have signed consent forms. However, Brett Shirk, executive director of the American Civil Liberties Union of Kansas and Western Missouri, questions the constitutionality of the practice. "That policy invades the privacy of students that need deterrence and risks steering those students to a greater risk of substance abuse that makes the drug problems worse," he charges. Since the U.S. Supreme Court upheld a school district's random testing of high school athletes, the federal government has promoted drug testing, awarding $7.5 million in grants last year to help schools start such programs. The White House drug-policy office (ONDCP) estimates 2,000 public and private districts conduct drug tests. Jennifer Kern, a researcher for the Drug Policy Alliance, contends drug testing is a rural and suburban policy issue. "Almost no major school districts have implemented random drug testing programs in major cities and urban areas," she says.

- **How does the El Dorado, Kansas drug testing policy differ from the one at issue in *Pottawatomie v. Earls*?**
- **Do you believe this policy violates the Fourth Amendment rights of students? Why or why not?**

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

By Diana E. Hess

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

My colleagues in science and math tell me that discussing students' preconceptions and misconceptions is a typical part of the discourse about teaching in their fields. By contrast, I rarely hear social studies teachers talk about this—perhaps because so much of the content in social studies is or could be contested and we therefore shy away from labeling students' ideas as "pre" or "mis" conceptions.[1]

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

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

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

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

1. THE CONSTITUTION APPLIES TO EVERYONE AND EVERYTHING

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

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

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

2. THE LIBERATION GENERALIZATION

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

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

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

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

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

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

3. THE BELIEF IN ERROR CORRECTION

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

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

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

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

4. THE *GIDEON* EFFECT

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

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

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

5. A RULING IS A "RIGHT" ANSWER

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

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

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

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

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

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

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

THE EFFECT OF CORRECTING MISCONCEPTIONS

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

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

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

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

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

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

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

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

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

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

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

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

CLASSROOM APPLICATIONS

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

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

DBQ Strategies:

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

ONLINE RESOURCES

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

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

CASE BRIEFING SHEET

Case Name and Year: _____

Facts of the Case: _____

_____

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

_____

_____

What constitutional principles are indicated in the case? _____

_____

Summary of one side's arguments:

_____

_____

_____

Summary of the other side's arguments:

_____

_____

_____

How would you decide the case and why? _____

_____

_____

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

_____

_____

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

_____

_____

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

_____

_____

CONSTITUTIONAL ISSUE EVIDENCE FORM

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

Case Name and Year:

Constitutional Issue:

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

DOCUMENTS SUMMARY

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

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

ATTORNEY DOCUMENT ANALYSIS

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

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

MOOT COURT PROCEDURES

Preparation

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

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

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

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

> "Oyez! Oyez! Oyez! All persons having business before the Honorable, the Supreme Court of the United States, are admonished to draw near and give their attention, for the Court is now sitting. God save the United States and this Honorable Court!"
>
> The Chief Justice will begin the oral argument phase by saying, "Petitioner, you may begin."
>
> The petitioner's attorney says, "Mr. Chief Justice, and may it please the Court…"

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

TIPS FOR THESIS STATEMENTS AND ESSAYS

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

A good thesis statement—

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

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

DBQ Do and Don't

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

Steps	Do	Don't
3. Check the documents to see how you can use them as tools.	Strive to use all the documents; but be sure you accurately understand their main ideas.	Take quotes or ideas out of context to use them in a manner other than the author intended.
4. Ask yourself when writing every paragraph: "How does this help to prove my thesis?"	Analyze to prove the position asserted in the thesis statement. Analysis is not the same thing as description or narrative. Merely making a series of true statements is not analysis. Key to analysis—is the essay answering the "So what?" question?	Use 1st-or 2nd-person pronouns "I think the Supreme Court has the authority to use judicial review because..." "Have you ever wondered how the Supreme Court got the authority to overturn federal laws?"
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	Slights 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

school. 2. *Tinker* held that speech must be disruptive to be censored; shielding a high school audience from objectionable viewpoints is not a legitimate end; less oppressive means were available for the school to disassociate its name from the student speech.

Document J: The first disapproves of the ruling and believes it will cause students to believe the First Amendment only protects the views held by those in power. The second approves of it, believing it will restore local control to education.

Document K: 1. Kids are more likely to believe professional newspapers should seek approval before publishing. They are equally as likely as adults to believe school papers should have to do the same. 2. Answers will vary.

Pottawatomie v. Earls

Document A: Unreasonable searches.

Document B: It is a national crisis worthy of the First Lady's attention, and parents have a role in combating it.

Document C: 1. They do not need them. 2. That searches be reasonable.

Document D: 1. They are searches. 2. Adults.

Document E: 1. The war on drugs does not justify ignoring the probable cause requirement. 2. Yes, because this case is about the definition of reasonable searches in the war on drugs.

Document F: Athletes were leaders of the school drug culture; they have lowered expectations of privacy; their risk of injury is great; deterring drug use is a substantial state interest.

Document G: 1. In general, drug tests are common. 2. Government action versus private action. The Fourth Amendment does not apply to private actors.

Document H: 1. Students in all extra curricular activities do not face the same injury risk as do athletes. 2. The expansion of the definition of reasonableness and the increasing invasion of privacy.

Document I: Because of the school's need to maintain discipline, health and safety. 2. Extra-curricular activities may require off-campus travel and communal undress. Further, these clubs have their own rules that don't apply to the school as a whole.

Document J: By alleviating peer pressure.

Document K: In *Vernonia*, the drug culture was led by athletes, was pervasive, and drug testing was limited to athletes, who face particular risk from drugs; in *Pottawatomie*, the drug problem was not major, and all participants in extracurricular activities had to submit to drug tests.

Document L: They have very little.

Document M: The ruling will allow communities to drug test public school students as a way to combat drug problems.

[redacted]

Schenck v. United States

Document A: The First Amendment protects the right to speak and publish one's ideas, associate with others, practice the religion of their choice, and lobby for change.

Document B: 1. World War I. 2. To pass laws that suppress the voices and actions of those opposed and disloyal to the United States in the interest of "national peace and safety" and against those who "preach and practice disloyalty."

Document C: 1. Publishing or saying things that are not true about the government; writing letters to enemy leaders suggesting how they could gain advantage in the war; publishing