SCHENCK v. UNITED STATES (1919)

DIRECTIONS

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

Case Background

The United States instituted a military draft during World War I. More than 24 million men registered for the draft, and over 2.5 million men were actually drafted into the military. Socialist Party member Charles Schenck opposed the war as well as the military draft.

Schenck distributed leaflets urging recently drafted men to resist the draft. He exhorted draftees to resist the draft because the Thirteenth Amendment prohibited "involuntary servitude" in the United States. He condemned the federal government, the war and the draft with very strong language, but he advocated only peaceful resistance. Schenck was charged with violating the Espionage Act of 1917, which made it a crime to, among other things, "obstruct the recruiting or enlistment service."

Schenck challenged his conviction on First Amendment grounds. His case went to the Supreme Court, which had to consider if freedom of speech is an absolute right and, if not, under what circumstances it may be limited in wartime.

KEY QUESTION

Critique the Supreme Court's limitation of free speech in wartime in *Schenck v. United States*.

Documents you will examine:

A The First Amendment, 1791
B President Woodrow Wilson, State of the Union Address, 1915
C Section 3 of the Espionage Act, 1917
D *Masses Publishing Co. v. Patten*, United States District Court, 1917
E "Policeman Clearing City Hall Park," 1917
F Schenck's Circular, 1917
G "First Number Chosen in World War I Draft Lottery," 1918
H Unanimous Majority Opinion, *Schenck v. United States*, 1919
I "As Gag Rulers Would Have It," *Literary Digest*, 1920

THE EXPANSION OF EXPRESSION

by Ken I. Kersch, Ph.D

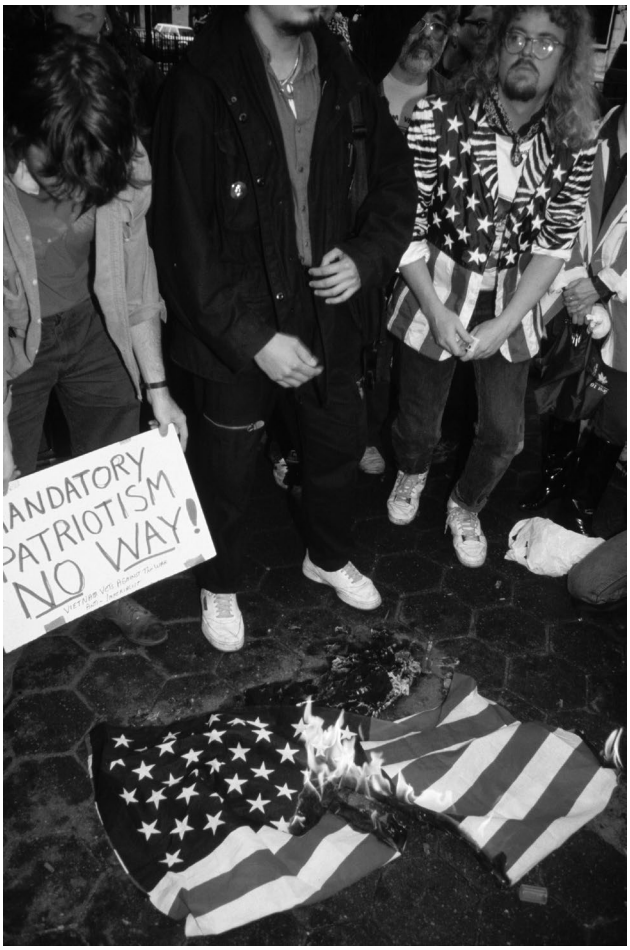
The freedom of expression—the court-defined constitutional right arising out of the First Amendment's explicit protection for the "freedom of speech"—is one of the most familiar, cherished, and distinctive of our constitutional liberties. A unique individualism, suspicion of government power, and commitment to personal liberation have powerfully shaped contemporary American understandings of the freedom of expression.

The commitment to the principle of free speech runs deep in American history, a consequence of the American people's heritage as religious dissenters and political revolutionaries. The Protestant dissenters who were the colonies' initial settlers believed passionately in their freedom of conscience and religious expression, and refused to speak or act on religious matters in ways that, in the Mother Country, with its established church, had been prescribed by law. In the revolutionary era, too, Americans cut a figure as dissenters, zealously criticizing the misguided policies of the powers that be. These experiences convinced many of them that a robust commitment to the practice of self-government entailed an ability and willingness to speak one's mind and to dissent.

Principled commitment to the freedom of speech notwithstanding, Americans from the beginning have disagreed passionately over just how far the freedom of speech extended, and what utterances, in which contexts, should be considered beyond the pale. After all, Americans also believed that the right of self-government entailed the power of the people to advance the collective public good through the passage of "police powers" regulations to preserve and advance the public health, safety, and morals. They further believed, that, in most circumstances, good government entailed according due deference to properly constituted government authorities. Many late eighteenth and nineteenth century Americans thus believed that the First Amendment preserved intact traditional English common law understandings that took into account the need for effective government.

In his *Commentaries on the Constitution* (1833), for instance, the prominent legal scholar and Supreme Court Justice Joseph Story wrote that the very idea that the First Amendment "was intended to secure to every citizen an absolute right to speak, or write, or print, whatever he may please, without any responsibility, public or private … is a supposition to wild to be indulged by any rational man. This would be to allow every citizen a right to destroy, at his pleasure, the reputation, the peace, the property, and even the personal safety of every other citizen. …[The First Amendment is no more or less than an expression of the doctrine that] every man shall be at liberty to publish

what is true, with good motives, and for justifiable ends." Story, that is, drew a firm distinction between permissible "liberty" and impermissible "license." Others, however, including Founder James Madison, argued that, so far as the freedom of speech was concerned, the unique American experiment in democracy warranted an alteration of the traditional common law rules.



These tensions have helped produce a history ripe with intense disagreements over the rightful scope of the freedom of speech. In the eighteenth and nineteenth centuries, however, the Supreme Court was a relatively weak institution, and issued virtually no interpretations of the First Amendment, since it was settled law prior to the end of the nineteenth century that the Bill of Rights were restrictions on the power of the national government only, and not the states. Moreover, many laws that we today would consider as clearly encroaching on basic constitutional freedoms—such as laws against blasphemy and sexually indecent publications—were simply accepted without challenge as essential bulwarks of the public good. Although rarely litigated in this period, however, the First Amendment's free speech protections did play a prominent part in public political debate. Intense disputes between opposition parties in the early republic, and between the defenders and opponents of slavery beginning in the 1830s, entailed major fights over the scope of the protection to be afforded to the freedom of expression. Free speech concerns were prominent during the Civil War as well, which sparked repeated controversies over the right of outspoken individuals to inflame passions and bring the nation's leaders into disrepute at a moment when the nation's very survival was at stake.

With the Union victory, and the adoption of the Civil War Amendments (particularly the Fourteenth, providing that "No state shall … deprive any person of life, liberty, or property, without due process of law"), the national government was newly understood as the primary guarantor of constitutional rights, and the Supreme Court was increasingly taken to be its leading rights-defining and rights-enforcing institution. At the same time, an array of political activists and reformers, and legal theorists, began to make the case for more liberalized understandings of free speech. When, during and in the immediate aftermath of the First World War ("The Red Scare"), the federal government cracked-down hard on anarchists, socialists, and other political radicals, along with other opponents of the war, the stage was set for the germination of modern Supreme Court doctrine concerning the freedom of expression.

The old approach to free speech questions was anchored in the Court's deferential "bad tendency" test, which held there was no constitutional transgression if the law in question was aimed at remedying an evil which the government had a right to prevent. In a series of dissenting opinions in cases involving the prosecution of political radicals opposing U.S. entry into World War I—cases which the radicals invariably lost—Justices Louis D. Brandeis and Oliver Wendell Holmes, Jr. advanced sophisticated pleas for the more expansive protection of speech freedoms. In *Schenck v. United States* (1919), Holmes proposed the that Court's traditional bad tendency test be replaced by a new "clear and present danger" test, holding "the question in every case is whether the words used in such circumstances are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." In his dissent in *Abrams v. United States* (1919), Holmes supplemented this proposed test with a philosophical defense of free speech as a spur to the "free trade in ideas." "The best test of truth," he wrote there, "is the power of the thought to get itself accepted in the competition of the market." Besides joining Holmes in these dissents, Brandeis also mounted his own defense of a broadened freedom of individuals to express their "beliefs, thoughts, emotions, and sensations." *Olmstead v. United States* (1928). In a luminous concurrence in *Whitney v. California* (1927), he wrote that "Those who won our independence believed that the final end of the State was to make men free to develop their faculties. ...They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech ... discussion would be futile. ...That the greatest menace to freedom is an inert people; that public ... should be a fundamental principle of the American government." The Court at this time recognized the emerging status of legal free speech protections by newly holding the First Amendment to be binding on the conduct of the states. *Gitlow v. New York* (1925).

As the twentieth century progressed, a succession of challenges, controversies, and cultural shifts—labor union, civil rights, and anti-Vietnam War protests; the youth rebellion of the 1960s; the sexual revolution and feminism; a late century religious resurgence; the terrorist attacks of 2001; and the rise of the New Right—repeatedly raised novel legal, philosophical, and political questions concerning the proper scope of the Constitution's free speech protections. These questions almost always became questions of the proper constitutional doctrine to be followed by a powerful Supreme Court. In response, the modern Court has fashioned an elaborate architecture of doctrine concerning the freedom of expression.

Today's Supreme Court protects not just "pure speech," but also "expressive conduct"—hence, the contemporary term "freedom of expression."

Today's Supreme Court protects not just "pure speech" (verbal utterances), but also "expressive conduct" (like burning a flag—see *Texas v. Johnson*, 1989), wearing a black armband in protest, or picketing, marching, or erotic dancing)—hence, the contemporary term "freedom of expression." The Court ranks the degree of protection speech has according to its social value. Political, scientific, and artistic speech are considered of

high value. By contrast, libel, "fighting words," criminal speech, and obscenity (see *Reno v. ACLU*, 1997) are considered to be of low value, with little or no legal protections. The Court subjects restrictions on high value speech to "strict scrutiny," permitting it to be barred only if the regulation is narrowly tailored in service of a "compelling government interest." Nevertheless, even high value speech may be regulated in a "content neutral" way (that is, without discrimination based on its message) for purposes of reasonable general regulation, the classic case being "time, place, and manner" regulations (such as those requiring permits for protests in public roads and parks, or barring the use of loudspeakers on public streets in the middle of the night). Broader protections apply in "traditional public forums" (like public parks), and narrower standards for "public properties" like airports, where it seems reasonable to have more rules. Different, more regulation-friendly standards are applied to unique institutional environments where issues of discipline and order are of special importance, like public schools, or in the military. Of course, there is often considerable controversy about the lines between the categories, and the application of the doctrine to particular, concrete cases.

While many disputes over the freedom of expression ostensibly pit claims of individual right against broader claims to regulate to advance the public good, it is important to remember that the individual's right to free expression is guaranteed not just to protect the individual's autonomy (important as that may be), but also to advance a broader public interest. The individual's free expression right has been defended as indispensable as the advancement of truth, to the practice of democratic self-government, and to the protection of minority voices against the potentially overwhelming powers of the majority. Ever-changing contexts perpetually raise new and fascinating free expression questions, with complex legal, philosophical, and practical dimensions. The challenge—and the high responsibility—of preserving the fundamental principle inherent in the First Amendment's text in these altering contexts is one that has faced every generation of Americans, just as it does our own.

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DOCUMENT A

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.

- **Restate the First Amendment in your own words.**

DOCUMENT B

President Woodrow Wilson, State of the Union Address, 1915

I am sorry to say that the gravest threats against our national peace and safety have been uttered within our own borders. There are citizens of the United States, I blush to admit, born under other flags but welcomed under our generous naturalization laws to the full freedom and opportunity of America, who have poured the poison of disloyalty into the very arteries of our national life passion. …[T]he ugly and incredible thing has actually come about and we are without adequate federal laws to deal with it.

I urge [Congress] to enact such laws at the earliest possible moment and feel that in doing so I am urging you to do nothing less than save the honor and self-respect of the nation. Such creatures of passion, disloyalty, and anarchy must be crushed out….

There are some men among us, and many resident abroad who, though born and bred in the United States and calling themselves Americans, have so forgotten themselves and their honor as citizens as to put their passionate sympathy with one or the other side in the great European conflict above their regard for the peace and dignity of the United States. They also preach and practice disloyalty….

- **To what "European conflict" is President Wilson referring?**
- **What does President Wilson ask Congress to do in this speech?**

DOCUMENT C

Section 3 of the Espionage Act, 1917

Whoever, when the United States is at war, shall wilfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever when the United States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny, refusal of duty, in the military or naval forces of the United States, or shall wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both.

- **List some types of actions that could be punished by this law.**
- **Based on Document A, does this law potentially abridge any First Amendment rights?**

DOCUMENT D

***Masses Publishing Co. v. Patten*, United States District Court, 1917**

[Speech is protected by the First Amendment if the speaker] stops short of urging upon others that it is their duty or their interest to resist the law…[D]irect incitement to violent resistance is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government.

- **According to this document, what are the limits of First Amendment protection?**

DOCUMENT E

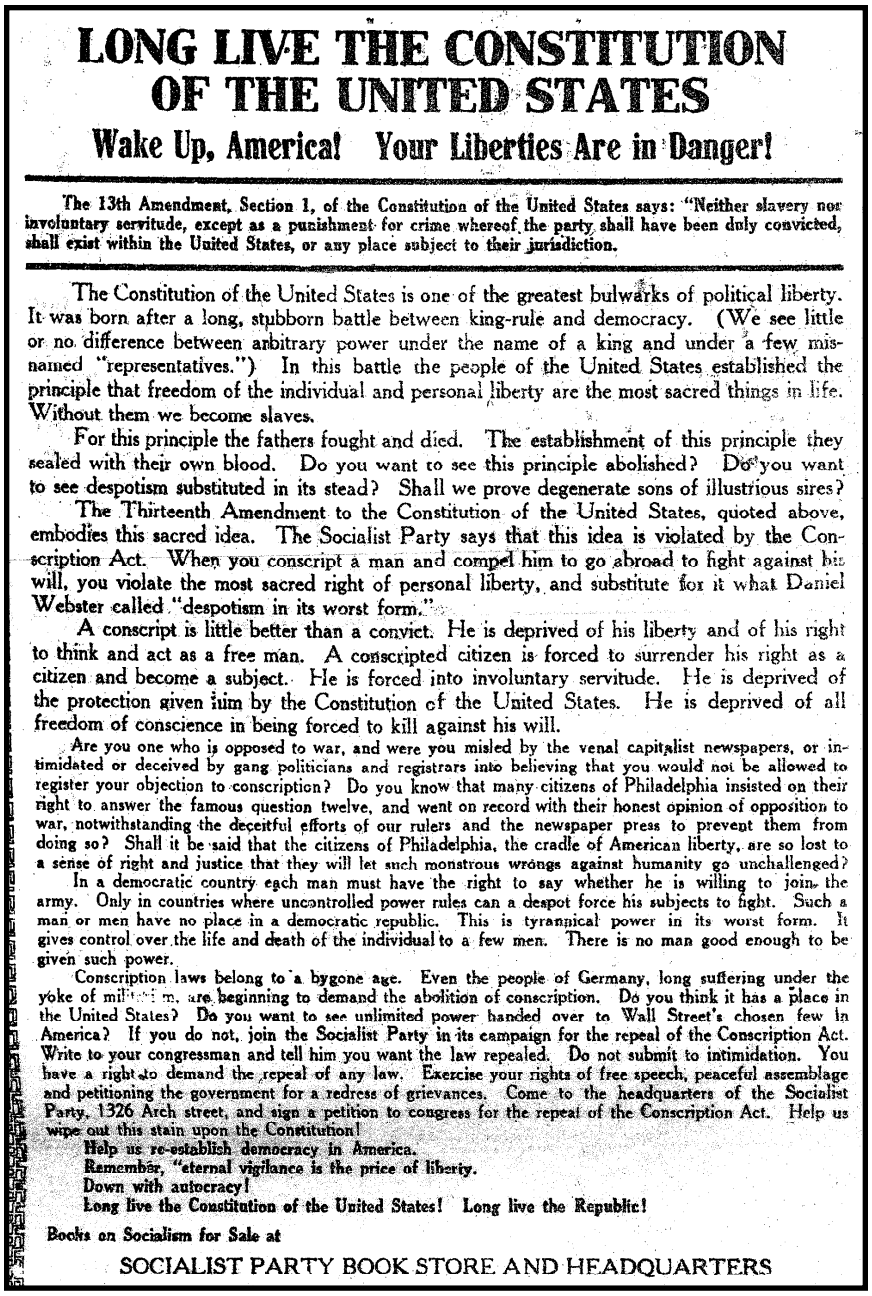
"Policeman Clearing City Hall Park," 1917

Original caption: 6/16/1917—New York, NY—5,000 WOMEN IN CITY HALL REGISTRY RIOT... Photo shows policemen clearing City Hall Park after 5,000 women from the East Side and Harlem had gathered to petition the Mayor against the draft.

- **What do this photograph and its caption reveal about attitudes towards anti-draft protestors in 1917?**
- **Did these women have a First Amendment right to assemble and petition?**

DOCUMENT F

Schenck's Circular, 1917



LONG LIVE THE CONSTITUTION OF THE UNITED STATES

Wake Up, America! Your Liberties Are in Danger!

The 13th Amendment, Section 1, of the Constitution of the United States says: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

The Constitution of the United States is one of the greatest bulwarks of political liberty. It was born after a long, stubborn battle between king-rule and democracy. (We see little or no difference between arbitrary power under the name of a king and under a few misnamed "representatives.") In this battle the people of the United States established the principle that freedom of the individual and personal liberty are the most sacred things in life. Without them we become slaves.

For this principle the fathers fought and died. The establishment of this principle they sealed with their own blood. Do you want to see this principle abolished? Do you want to see despotism substituted in its stead? Shall we prove degenerate sons of illustrious sires?

The Thirteenth Amendment to the Constitution of the United States, quoted above, embodies this sacred idea. The Socialist Party says that this idea is violated by the Conscription Act. When you conscript a man and compel him to go abroad to fight against his will, you violate the most sacred right of personal liberty, and substitute for it what Daniel Webster called "despotism in its worst form."

A conscript is little better than a convict. He is deprived of his liberty and of his right to think and act as a free man. A conscripted citizen is forced to surrender his right as a citizen and become a subject. He is forced into involuntary servitude. He is deprived of the protection given him by the Constitution of the United States. He is deprived of all freedom of conscience in being forced to kill against his will.

Are you one who is opposed to war, and were you misled by the venal capitalist newspapers, or intimidated or deceived by gang politicians and registrars into believing that you would not be allowed to register your objection to conscription? Do you know that many citizens of Philadelphia insisted on their right to answer the famous question twelve, and went on record with their honest opinion of opposition to war, notwithstanding the deceitful efforts of our rulers and the newspaper press to prevent them from doing so? Shall it be said that the citizens of Philadelphia, the cradle of American liberty, are so lost to a sense of right and justice that they will let such monstrous wrongs against humanity go unchallenged?

In a democratic country each man must have the right to say whether he is willing to join the army. Only in countries where uncontrolled power rules can a despot force his subjects to fight. Such a man or men have no place in a democratic republic. This is tyrannical power in its worst form. It gives control over the life and death of the individual to a few men. There is no man good enough to be given such power.

Conscription laws belong to a bygone age. Even the people of Germany, long suffering under the yoke of militarism, are beginning to demand the abolition of conscription. Do you think it has a place in the United States? Do you want to see unlimited power handed over to Wall Street's chosen few in America? If you do not, join the Socialist Party in its campaign for the repeal of the Conscription Act. Write to your congressman and tell him you want the law repealed. Do not submit to intimidation. You have a right to demand the repeal of any law. Exercise your rights of free speech, peaceful assemblage and petitioning the government for a redress of grievances. Come to the headquarters of the Socialist Party, 1326 Arch street, and sign a petition to congress for the repeal of the Conscription Act. Help us wipe out this stain upon the Constitution!

Help us re-establish democracy in America.
Remember, "eternal vigilance is the price of liberty.
Down with autocracy!
Long live the Constitution of the United States! Long live the Republic!

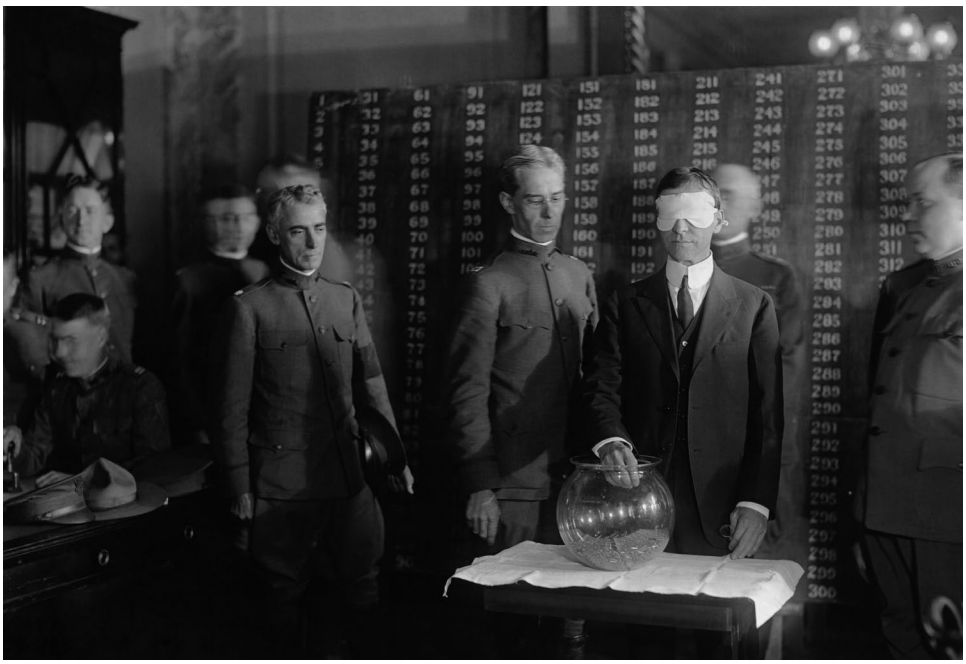
Books on Socialism for Sale at

SOCIALIST PARTY BOOK STORE AND HEADQUARTERS

- **Underline sections which may be in violation of the Espionage Act of 1917.**
- **How did Schenck describe the conscription process?**

DOCUMENT G

“First Number Chosen in World War I Draft Lottery,” 1918



- **Describe the process of drawing numbers for the draft. What do these officials seem most concerned with?**
- **How does this process compare with Schenck’s description of the conscription process (Document F)?**

DOCUMENT H

MAJORITY OPINION

Unanimous Majority Opinion, *Schenck v. United States*, 1919

The document in question upon its first printed side recited the first section of the Thirteenth Amendment, said that the idea embodied in it was violated by the conscription act and that a conscript is little better than a convict.

Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out.

But it is said, suppose that that was the tendency of this circular, it is protected by the First Amendment to the Constitution....

We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right....

- **What reasoning does the Court give for its decision?**
- **Do you think Schenck's circular presented a "clear and present danger" to the United States?**

DOCUMENT I

"As Gag Rulers Would Have It." ***Literary Digest*****, 1920**

Note: The three figures in the lower left are labeled, "Honest Opinion," "Free Speech," and "Free Press." The snake is labeled "Sedition Bills."

- **How does this kind of expression compare with Schenck's?**
- **According to the Espionage Act (Document C), should this cartoonist have received the same punishment as Schenck?**

DIRECTIONS

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

KEY QUESTION

Critique the Supreme Court's limitation of free speech in wartime in *Schenck v. United States*.

THE ISSUE ENDURES

- **What is the cartoonist's point of view of the Patriot Act?**
- **Evaluate the cartoonist's claim.**
- **How would you compare the Patriot Act to the Espionage Act of 1917?**

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.

UNIT FIVE: Expansion of Expression

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

writings critical of the military; blocking access to military recruiters; advising people not to join the military or resist the draft. 2. The Espionage Act could violate the First Amendment because of its broad definitions, such as "attempt to cause insubordination" and "promote the success of its enemies," that could hamper legitimate dissent and speech.

Document D: Speech is protected by the First Amendment as long as it does not directly urge people to break the law or otherwise incite them to "violent resistance" of the law.

Document E: 1. The picture and its caption show a negative and suspicious attitude toward anti-draft protestors in 1917. The caption labels the gathering of women a "registry riot," but the picture shows a rather peaceful gathering of women. 2. Yes, since it appears they were peacefully gathered and petitioning.

Document F: 1. Answer will vary. 2. In Schenck's view, conscription is a "tyrannical power" being exercised arbitrarily by a few men (whom he calls "despots").

Document G: 1. A random drawing of numbers chosen by someone who cannot see the numbers, and is overseen by various military officials. The officials seem most concerned with showing it to be a fair, random process in which everyone has an equal chance of being drafted. 2. Document G depicts a fair and equal process while Schenck views it as tyrannical and arbitrary.

Document H: 1. Schenck's circular was indeed a call to resist the draft, and that in times of war such exercises of speech, speech which in times of peace might be worthy of First Amendment protection, can be limited if it presents a "clear and present danger." Schenck's speech did so and constituted a "hindrance" to the war effort. His conviction under the Sedition Act, therefore, was upheld. 2. Answers will vary. Some will say that it did present a "clear and present danger" since it called upon people to resist the draft, thus hindering the war effort. Others may argue that speech itself is harmless, and this speech did not place the nation in "clear and present danger."

Document I: 1. While Schenck's circular incited people to actively resist the law, the cartoon merely made a commentary. Some may notice that three figures resisting the Sedition Bills with a club could be interpreted as a call to violent resistance. 2. Answers will vary.

Texas v. Johnson

Document A: Spoken words are only an idea and do not harm others in and of themselves; actions may harm others.

Document B: The First Amendment does make a distinction between speech and action, as it protects the actions of assembly and petition separately from speech.

Document C: Society should tolerate unpopular, even revolutionary ideas, combating such ideas with reason and logic instead of suppression.

Document D: The flag is a symbol steeped in history and meaning beyond its physical appearance.

Document E: It compares ideas to products or goods among which consumers can discriminate; the most truthful idea will naturally prevail.

Document F: Determination, pride, courage, liberty, cooperation.

Document G: 1. The flag is a symbol of nationhood and unity. 2. The flag belongs to everyone.

Document H: The American political system under President Reagan's leadership.

Document I: 1. The First Amendment protects more than spoken or written words; government can limit conduct, but it cannot limit conduct just because that conduct expresses an idea; the Texas law