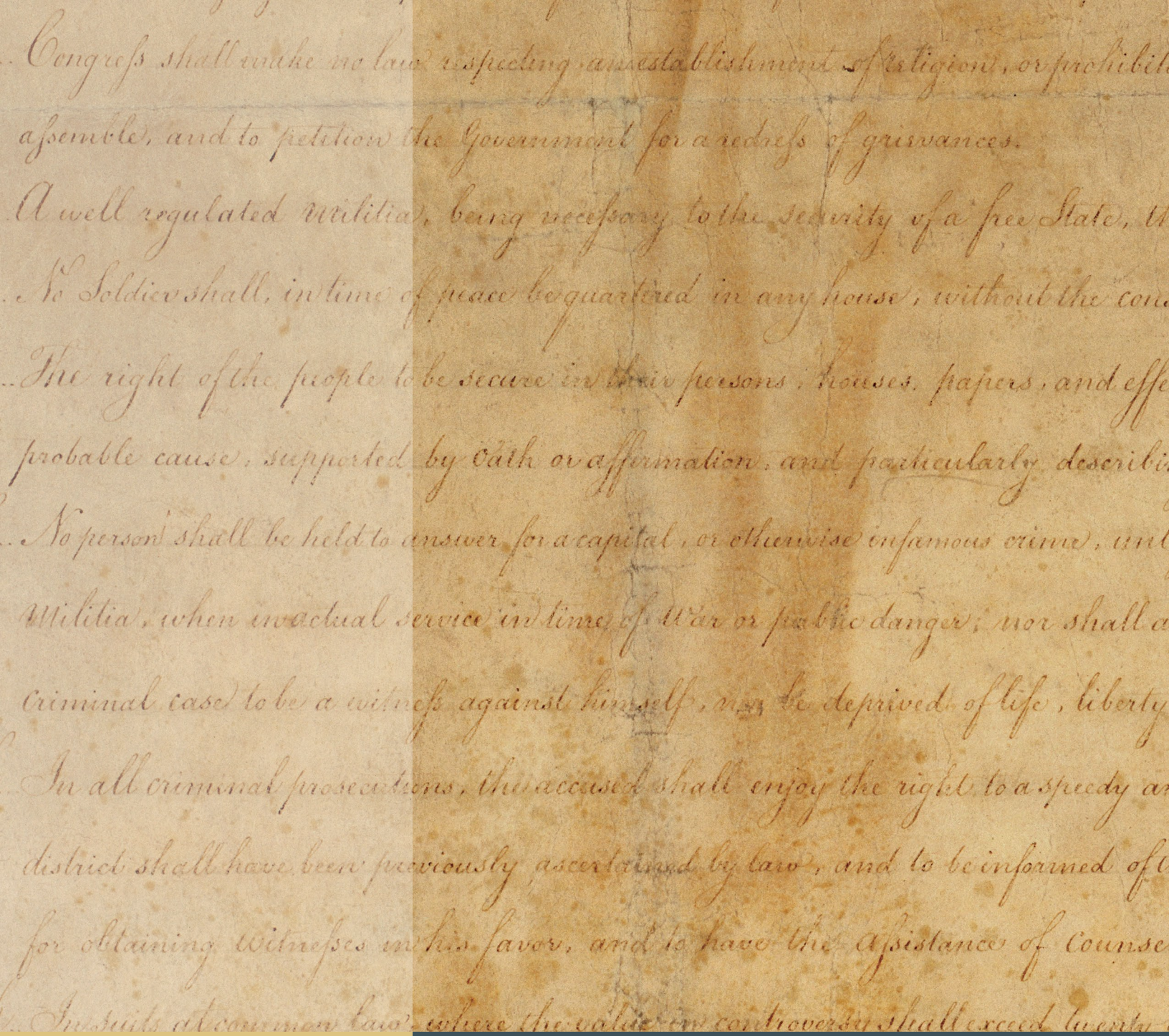
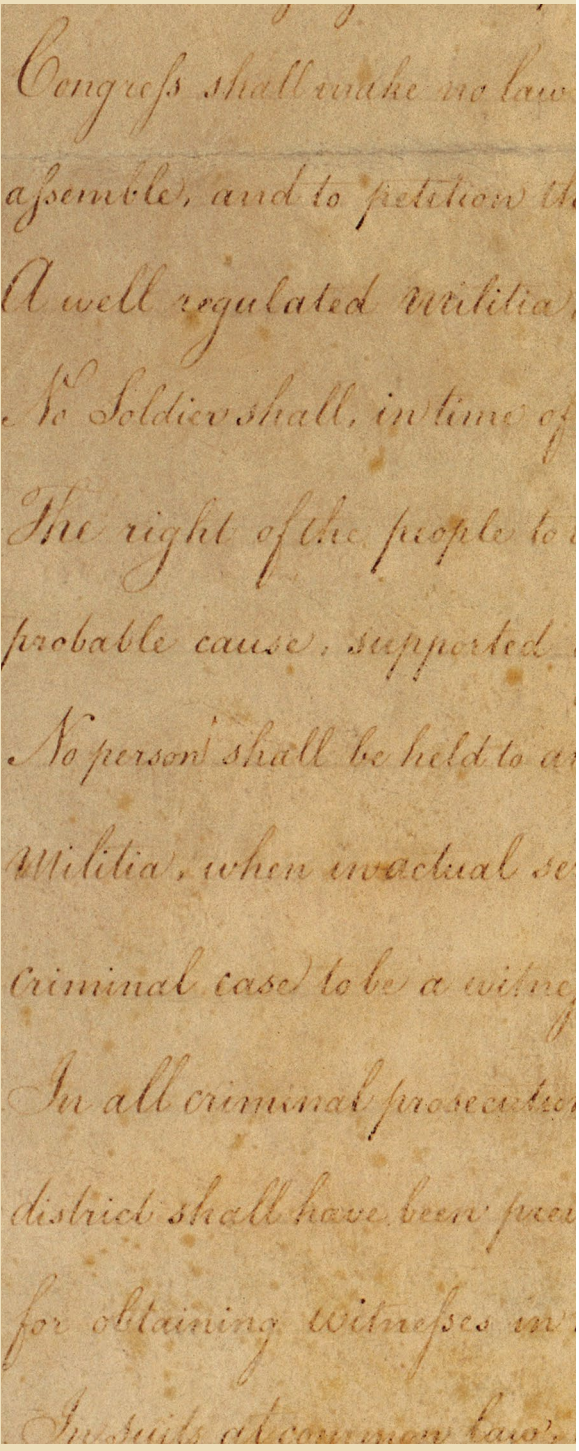


THE EVOLUTION, EXERCISE, AND EXTENT OF FREE SPEECH IN US HISTORY

TEACHING CIVICS THROUGH HISTORY

THE GILDER LEHRMAN INSTITUTE of AMERICAN HISTORY

TEACHING CIVICS THROUGH HISTORY



Cover image: Detail, Bill of Rights, 1789 (National Archives)

THE EVOLUTION, EXERCISE, AND EXTENT OF FREE SPEECH IN US HISTORY

by John McNamara and Ron Nash

Overview

This unit is one of the Gilder Lehrman Institute's Teaching Civics through History (TCTH) resources, designed to align with the Common Core State Standards. These units were developed to provide students with foundational knowledge of the historical roots of current civic and social issues facing their communities and the nation while building their literacy, research, and critical thinking skills. By connecting the past with current events, this unit will 1) enable students to understand that history is made up of individual actions, 2) empower students to develop their civic voices and encourage them to take civic action, and 3) help students recognize their ability to influence history in their communities and nationwide.

Over one to two weeks, students will learn and practice literacy skills that will help them develop knowledgeable and well-reasoned points of view on the history of free speech in the United States. They will read and assess primary and secondary sources, analyze articles written from different perspectives, and develop a civic engagement project that integrates what they have learned.

Students will demonstrate their comprehension through their oral and written assessment of the primary sources and responses to the essential questions, and how they choose, plan, and implement the civic engagement project.

NUMBER OF CLASS PERIODS: 1–2 weeks based on the time available; the student project may require additional time outside of class.

GRADE LEVEL: 9–12

Unit Objectives

Students will be able to

- Demonstrate an understanding of a scholarly essay that outlines the complexity of free speech in US history
- Analyze primary source documents using close-reading strategies
- Draw logical inferences and summarize the essential message of a written document
- Compose summaries of the major points in a document
- Compare and contrast the proposals made by different writers
- Develop a viewpoint, present it, and write a response based on textual and visual evidence
- Collaborate effectively with classmates in small groups
- Distinguish between facts and opinions and identify their proper use in visual and written source materials
- Develop and implement a civic action project

Essential Questions

You may select one or more Essential Questions from the following list to use at different points throughout the unit:

- To what extent should government restrict and regulate free speech?
- To what extent can speech that encourages illegal conduct or lawless action be regulated or restricted by the government?
- To what extent should government regulations and restrictions on speech be neutral toward speech addressing controversial issues and subjects?
- To what extent should free speech be viewed as either an absolute or a limited constitutional (First Amendment) right?
- To what extent should a democratic government tolerate dissent during times of war and other crises?
- Is the suppression of public opinion during times of crisis ever justified?

Common Core State Standards

CCSS.ELA-Literacy.RH.11-12.1: Cite specific textual evidence to support analysis of primary and secondary sources, connecting insights gained from specific details to an understanding of the text as a whole.

CCSS.ELA-Literacy.RH.11-12.2: Determine the central ideas or information of a primary or secondary source; provide an accurate summary that makes clear the relationships among the key details and ideas.

CCSS.ELA-Literacy.RH.11-12.7: Integrate and evaluate multiple sources of information presented in diverse formats and media (e.g., visually, quantitatively, as well as in words) in order to address a question or solve a problem.

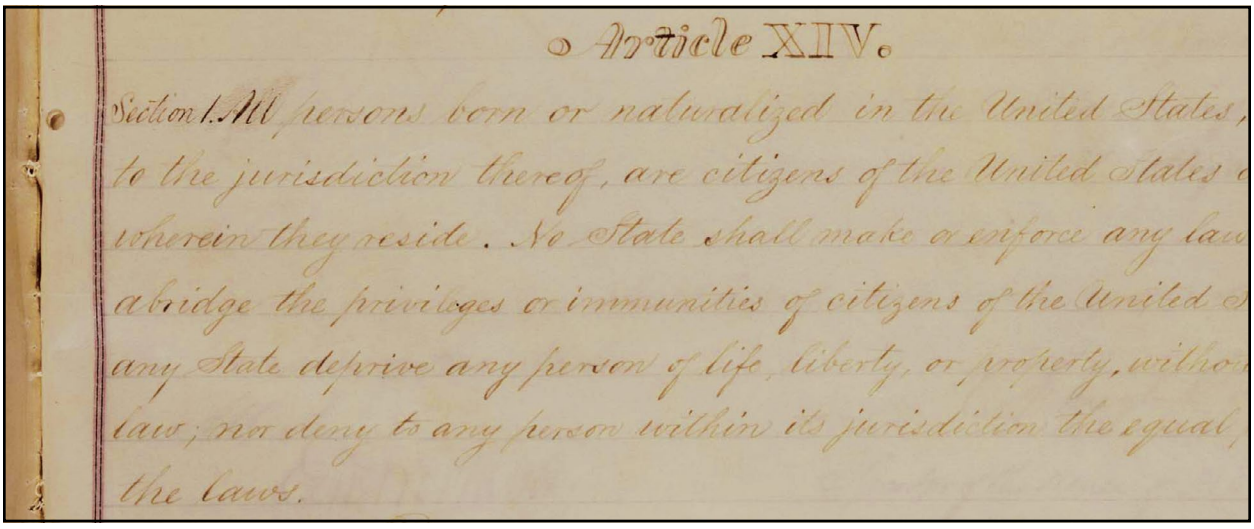
CCSS.ELA-Literacy.RL.9-10.4: Determine the meaning of words and phrases as they are used in the text, including figurative and connotative meanings; analyze the cumulative impact of specific word choices on meaning and tone (e.g., how the language evokes a sense of time and place; how it sets a formal or informal tone).

CCSS.ELA-Literacy.RL.11-12.1: Cite strong and thorough textual evidence to support analysis of what the text says explicitly as well as inferences drawn from the text, including determining where the text leaves matters uncertain.

CCSS.ELA-Literacy.SL.9-10.1.C: Propel conversations by posing and responding to questions that relate the current discussion to broader themes or larger ideas; actively incorporate others into the discussion; and clarify, verify, or challenge ideas and conclusions.

CCSS.ELA-Literacy.SL.11-12.1: Initiate and participate effectively in a range of collaborative discussions (one-on-one, in groups, and teacher-led) with diverse partners on grade-level topics, texts, and issues, building on others' ideas and expressing their own clearly and persuasively.

CCSS.ELA-Literacy.W.9-10.1 and 11-12.1: Write arguments to support claims in an analysis of substantive topics or texts, using valid reasoning and relevant and sufficient evidence.


Article XIV.

Section 1. All persons born or naturalized in the United States, to the jurisdiction thereof, are citizens of the United States wherein they reside. No State shall make or enforce any law abridge the privileges or immunities of citizens of the United any State deprive any person of life, liberty, or property, witho laws; nor deny to any person within its jurisdiction the equal the laws.

Fourteenth Amendment, US Constitution (National Archives)

LESSON 1

Overview

In this lesson, the students will read and engage with an array of primary sources from the Bill of Rights to several twentieth-century US Supreme Court decisions that address the evolution of the right to free speech in the United States. You may choose to supplement the primary sources with an introductory essay written by the historian Bruce Allen Murphy to provide context for and perspective on freedom of speech from the adoption of the Constitution to the early twentieth century. The students will demonstrate their comprehension through class discussion, close reading of texts, completed activity sheets, and a response to one of the essential questions.

Historical Background

See in the students' handouts, p. 16: "A History of Free Speech in the United States, Part 1: From the Bill of Rights to Civil Rights," by Bruce Allen Murphy, Fred Morgan Kirby Professor of Civil Rights, Lafayette College

Materials

- The First Amendment and the Fourteenth Amendment, Section One, of the US Constitution, *Interactive Constitution,* National Constitution Center, constitutioncenter.org
- Optional: Document Analysis: Free Speech Situations and Statements with Answer Key and Guide to Free Speech Court Cases
- Optional: Historical Background 1
  - "A History of Free Speech in the United States, Part 1: From the Bill of Rights to Civil Rights," by Bruce Allen Murphy, Fred Morgan Kirby Professor of Civil Rights, Lafayette College
  - Analyzing an Essay: Historical Background 1 activity sheet
- Documents and Corresponding Activity Sheets
  - Document 1: Excerpts from the Sedition Act (1798), "An Act in Addition to the Act, Entitled 'An Act for the Punishment of Certain Crimes against the United States,'" *Our Documents,* ourdocuments.gov
  - Document 2a: Excerpts from the Espionage Act (1917), Act of June 15, 1917, Public Law 24, "An Act to Punish Acts of Interference with the Foreign Relations, the Neutrality, and the Foreign Commerce of the United States, to Punish Espionage, and Better to Enforce, the Criminal Laws of the United States, and for Other Purposes," Enrolled Acts and Resolutions of Congress, 1789–2013, National Archives and Records Administration, catalog.archives.gov/id/5721240
  - Document 2b: Excerpts from the Sedition Act (1918), "An Act to Amend Section Three, Title One, of the Act Entitled, 'An Act to Punish Acts of Interference with the Foreign Relations, the Neutrality, and the Foreign Commerce of the United States, to Punish Espionage, and Better to Enforce, the Criminal Laws of the United States, and for Other Purposes,' May 16, 1918," Statutes at Large, 65th Congress, loc.gov/law/help/statutes-at-large
  - Document 3a: Excerpts from the US Supreme Court Ruling in *Schenck v. United States*, 249 US 47 (1919), *US Reports*, p. 52, Library of Congress, cdn.loc.gov/service/ll/usrep/usrep249/usrep249047/usrep249047.pdf
  - Document 3b: Excerpts from the US Supreme Court Decision in *Abrams v. United States*, 250 US 616 (1919), *US Reports*, pp. 624 and 630–631, Library of Congress, cdn.loc.gov/service/ll/usrep/usrep250/usrep250616/usrep250616.pdf
  - Document 4: Excerpts from the US Supreme Court Decision in *Whitney v. California*, 274 US 357 (1927), *US Reports*, pp. 374–378, Library of Congress, cdn.loc.gov/service/ll/usrep/usrep274/usrep274357/usrep274357.pdf
  - Document 5: Excerpts from the US Supreme Court Decision in *Brandenburg v. Ohio*, 395 US 444 (1969), *US Reports*, pp. 445–449, Library of Congress, cdn.loc.gov/service/ll/usrep/usrep395/usrep395444/usrep395444.pdf

Procedure

1. Display the Essential Question(s) for the class as the framework for the lesson. You may choose to focus on one question or several.
   - To what extent should government restrict and regulate free speech?
   - To what extent can speech that encourages illegal conduct or lawless action be regulated or restricted by the government?
   - To what extent should government regulations and restrictions on speech be neutral toward speech addressing controversial issues and subjects?
   - To what extent should free speech be viewed as either an absolute or a limited constitutional (First Amendment) right?
   - To what extent should a democratic government tolerate dissent during times of war and other crises?
   - Is the suppression of public opinion during times of crisis ever justified?
2. Display and distribute the text of the First Amendment and Section 1 of the Fourteenth Amendment, which prohibit the federal government from abridging American citizens' right to freedom of expression, including free speech, and prohibit any state from depriving citizens of their right to life, liberty, and property as well as due process of law and equal protection of the laws.

   You may choose to have the students read the amendments to themselves or "share read" the text with the class. If you choose to share read the text, have the students follow along silently while you begin to read aloud, modeling prosody, inflection, and punctuation. Then ask the class to join in with the reading after a few sentences while you continue to read aloud, still serving as the model for the class. This technique will support struggling readers as well as English language learners (ELL).
3. Ask the students to explain how the US Constitution addresses citizens' right to free speech and other related modes of expression.
4. Introductory Motivational Activity (optional): Display and distribute the list of statements and situations that highlight controversies surrounding the Constitution and citizens' lawful exercise of free speech in American society today. The students may work as individuals or collaborate in pairs or small groups to discuss the situations and statements and determine the accuracy of each by indicating that it is True or Untrue. The students can then share their viewpoints on these situations and statements, which can serve as a springboard for a brief class discussion.

   An answer key and a list of the Supreme Court cases that support each answer are provided. You may choose to share these materials with the class.
5. Historical Background (optional): Distribute Part 1 of Bruce Allen Murphy's essay "A History of Free Speech in the United States" and the accompanying activity sheet. You may assign the reading and the activity sheet as homework before starting the lesson. The students can complete the activity sheet to prepare for the class discussion or complete it in class.

   Before the students work on the activity sheet, you may also choose to share read the essay in class as described above.

   NOTE: Depending on the time available and the experience of your students, you may choose to discuss the historical background with your class rather than assigning the reading.
6. Depending on the students' experience with examining texts, you may choose to complete the Document Analysis as a whole-class activity or model the selection and analysis of the first phrase and, when the class is ready, the answer to the first critical thinking question. For the rest of the activity sheet, you may choose to have the students work individually, as partners, or in small groups of three or four.
7. After giving the students enough time to complete the activity, reconvene the class and discuss different responses and interpretations developed by individual students or groups to the essay.
8. The students will go on to explore the evolution and exercise of free speech and landmark federal legislation restricting free speech in times of crisis from the early national period and World War I. Throughout this part of the lesson, students may work individually or collaboratively. Distribute the following resource materials:
   - Document 1: Excerpts from the Sedition Act (1798) with the accompanying Document Analysis activity sheet
   - Documents 2a: Excerpts from the Espionage Act (1917) and 2b: Excerpts from the Sedition Act (1918) with the accompanying Document Analysis activity sheet
9. The students should read and discuss the texts and complete the activity sheets. Upon completion, the students should share and discuss their responses to the

critical thinking questions, leading to a teacher-facilitated class discussion, ensuring that the class stays focused on evidence-based responses.

The following question could be used to focus and sustain the discussion:

To what extent were these sedition and espionage laws necessary constitutional measures to protect public safety and national security or unconstitutional violations of citizens' First Amendment right to freedom of speech and expression?

10. Students will now read, analyze, and assess the decisions in four landmark US Supreme Court cases addressing the extent of free speech in the United States. Distribute the following materials:
    - Documents 3a: Excerpts from the US Supreme Court Decision in *Schenck v. United States* (1919) and 3b: Excerpts from the US Supreme Court Decision in *Abrams v. United States* (1919) with their accompanying Document Analysis activity sheet
    - Document 4: Excerpts from the US Supreme Court Decision in *Whitney v. California* (1927) with the accompanying Document Analysis activity sheet
    - Document 5: Excerpts from the US Supreme Court Decision in *Brandenburg v. Ohio* (1969) with the accompanying Document Analysis activity sheet

    Each document contains a brief background of the case and text excerpted from the US Supreme Court's ruling. The students should read and discuss the case background and ruling and complete the three document analysis worksheets as they learn how the Court defined free (protected) speech in each case and developed legal standards to determine its proper exercise and extent. They should share and discuss their responses to the critical thinking questions as you facilitate class discussion on this topic.

11. Examples of questions you could use to direct the conversation and elicit student responses:
    - How did the Supreme Court's clear and present danger test define the extent of free speech for American citizens?
    - To what extent should Americans have the "freedom to think as you will and to speak as you think" in a democratic society?
    - To what extent should the "opportunity for full discussion," level of "serious evil," and degree of "imminent danger" be balanced and prioritized to determine the appropriate exercise and extent of free (protected) speech?
    - How does the Supreme Court's two-pronged "imminent lawless action" standard determine the extent to which free speech is protected under the First and Fourteenth Amendments?
    - How did the Supreme Court's ruling in *Brandenburg v. Ohio* compare to and affect its previous decision in *Whitney v. California* concerning free speech?
    - Based on the First and Fourteenth Amendments to the US Constitution, which of the four rulings—*Schenck v. United States, Abrams v. United States, Whitney v. California*, or *Brandenburg v. Ohio*—establishes the most appropriate and effective standard for determining the proper exercise and extent of free (protected) speech for Americans?

    Students responses and viewpoints should be based on evidence in the documents.

12. Lesson Closure and Summary Activity: Students will develop a position and express a viewpoint, based on the evidence from the documents, on one of the essential questions for this unit.
    - To what extent should government restrict and regulate free speech?
    - To what extent can speech that encourages illegal conduct or lawless action be regulated or restricted by the government?
    - To what extent should government regulations and restrictions on speech be neutral toward speech addressing controversial issues and subjects?
    - To what extent should free speech be viewed as either an absolute or a limited constitutional (First Amendment) right?
    - To what extent should a democratic government tolerate dissent during times of war and other crises?
    - Is the suppression of public opinion during times of crisis ever justified?

    Students will express their viewpoints, orally and/or in writing using the evidence presented in class, to elucidate and support their arguments.

LESSON 2

Overview

In this lesson, students will read, discuss, and assess three landmark US Supreme Court rulings that have been specifically applied to freedom of expression for students in schools: W*est Virginia State Board of Education v. Barnett* (1943), *Tinker v. Des Moines Independent Community School District* (1969), and *Hazelwood School District et al. v. Kuhlmeier et al.* (1988). An optional fourth court case, *The New York Times Co. v. United States*, directly focuses on the First Amendment issue of freedom of the press. You may choose to supplement the primary sources with a reading or class discussion of an introductory essay written by the historian Bruce Allen Murphy to provide context for and perspective on standards that are used to evaluate the limits of free speech. The students will also examine modern cartoons that address free speech in America today. The students' comprehension will be evaluated through class discussion, close reading of texts, analysis of visual materials, completed activity sheets, and responses to an essential question.

Historical Background

See in the students' handouts, p. 37: "A History of Free Speech in the United States, Part 2: Three Levels of Judicial Scrutiny," by Bruce Allen Murphy, Fred Morgan Kirby Professor of Civil Rights, Lafayette College

Materials

- The First Amendment and the Fourteenth Amendment, Section 1 (from Lesson 1)
- Historical Background 2 (optional)
  - "A History of Free Speech in the United States, Part 2: Three Levels of Judicial Scrutiny," by Bruce Allen Murphy, Fred Morgan Kirby Professor of Civil Rights, Lafayette College
  - Analyzing an Essay: Historical Background 2 activity sheet
- Documents and Corresponding Activity Sheets
  - Document 1: Excerpts from the US Supreme Court Decision in *West Virginia State Board of Education et al. v. Barnette et al.*, 319 US 624 (1943), *US Reports*, pp. 633–642 and 646–655, Library of Congress, cdn.loc.gov/service/ll/usrep/usrep319/usrep319624/usrep319624.pdf
  - Document 2: Excerpts from the US Supreme Court Decision in *Tinker v. Des Moines Independent Community School District*, 393 US 503 (1969), *US Reports*, pp. 505–526, Library of Congress, cdn.loc.gov/service/ll/usrep/usrep393/usrep393503/usrep393503.pdf
  - Document 3: Excerpts from the US Supreme Court Decision in *Hazelwood School District et al. v. Kuhlmeier et al.*, 484 US 260 (1988), *US Reports*, pp. 260–261 and 277–291, Library of Congress, cdn.loc.gov/service/ll/usrep/usrep484/usrep484260/usrep484260.pdf
  - Document 4 (Optional): Excerpts from the US Supreme Court Decision in *The New York Times Co. v. United States*, 43 US 713 (1971), *US Reports*, pp. 714–713, 725–730, and 761–763, Library of Congress, cdn.loc.gov/service/ll/usrep/usrep403/usrep403713/usrep403713.pdf
- Analyzing a Cartoon activity sheet
- Cartoons
  - Cartoon 1: "Free Speech," by Signe Wilkinson, August 18, 2017, with the permission of the artist
  - Cartoon 2: "Get Up Kaepernick!!" by Ed Hall, August 30, 2016, with the permission of the artist
  - Cartoon 3: "Pillars," by Jimmy Margulies, 2018, with the permission of the artist
  - Cartoon 4: "Wanted: Journalists," by Matt Wuerker, August 15, 2019, with the permission of the artist
  - Cartoon 5: "The Fall Always Comes before the Winter," by Adam Zyglis, January 16, 2017, with the permission of the artist
  - Cartoon 6: "If Speech Is Free, Why Can't I Afford It?" by Adam Zyglis, April 7, 2014, with the permission of the artist
  - Cartoon 7: "The People Have Spoken," by Matt Wuerker, November 11, 2014, with the permission of the artist
  - Cartoon 8: "SATIRE," by Ed Hall, July 6, 2019, with the permission of the artist
  - Cartoon 9: Uncle Sam Bound and Gagged, by Angelo Lopez, October 1, 2017, with the permission of the artist

Procedure

1. Select, introduce, and display one or two of the unit's essential questions.
   - To what extent should government restrict and regulate free speech?
   - To what extent can speech that encourages illegal conduct or lawless action be regulated or restricted by the government?
   - To what extent should government regulations and restrictions on speech be neutral toward speech addressing controversial issues and subjects?
   - To what extent should free speech be viewed as either an absolute or a limited constitutional (First Amendment) right?
   - To what extent should a democratic government tolerate dissent during times of war and other crises?
   - Is the suppression of public opinion during times of crisis ever justified?
2. Alternatively, you may wish to display one or two questions that directly address the issues presented in each of the three (or four) court cases under consideration in this lesson. For example,
   - For *West Virginia v. Barnett*: Should saluting and pledging allegiance to the American flag be compulsory for students in school?
   - For *Tinker v. Des Moines*: To what extent should administrators and faculty be empowered to censor or restrict students' symbolic speech and expression in schools?
   - For *Hazelwood v. Kuhlmeier*: To what extent should administrators and faculty be empowered to censor or limit students' oral and written viewpoints in a school setting?
   - For *The New York Times Co. v. United States* (optional): To what extent (under what circumstances) should the constitutional guarantee of freedom of the press supersede the government's need to protect classified information?
3. Display and review the First Amendment and Section 1 of the Fourteenth Amendment. As mentioned in Lesson 1, these two amendments refer to actions by the government to guarantee citizens' free speech and other related modes of expression and to determine the extent of permissible restrictions on free speech and expression to protect public interest and security.
4. As in Lesson 1, you have several options for using the Historical Background Part 2 and the accompanying Analyzing an Essay activity sheet: Assign the essay for homework, share read it in class, or discuss the content with the class. Follow up with the activity sheet for homework, completion in class, or discussion. If you work on the activity sheet in class, you may model selecting a phrase and answering the first critical thinking question. Convene the whole class and discuss the students' or groups' responses to the activity sheet.
5. Explain to the students that the landmark US Supreme Court cases they will examine in this lesson have all affected students' free speech and freedom of expression in a school setting, including requiring students to salute the flag and participate in the pledge or restricting students' symbolic speech and expression, and limiting administrator and faculty authority to censor students' oral and written viewpoints.
6. Students may work individually or collaboratively in pairs or small groups of three. Depending on the length of the instructional period, you can assign each pair or group a specific court case and the accompanying Document Analysis activity sheet for completion or, in groups with three students, assign each student within the group one case and activity sheet that they will then share within the group.
7. Distribute the resource materials to the students in their respective pairs or small groups:
   - Document 1: US Supreme Court Majority and Dissenting Opinions in *West Virginia State Board of Education et al. v. Barnett et al.* (1943) with the accompanying Document Analysis activity sheet
   - Document 2: US Supreme Court Majority and Minority Opinions in *Tinker v. Des Moines Independent Community School District* (1969) with the accompanying Document Analysis activity sheet
   - Document 3: US Supreme Court Majority and Dissenting Opinions for *Hazelwood School District et al. v. Kuhlmeier et al.* (1988) with the accompanying Document Analysis activity sheet

   Once the students have completed the readings and activity sheets, reconvene the class and facilitate a discussion on this topic.
8. You may use one or more of the essential questions for the unit or one or more of the specific case-related questions introduced in Procedure 2 above as a focus for the discussion.

9. If you choose, you may distribute Document 4 on *The New York Times Co. v. United States* along with the Document Analysis, selected essential questions from the unit, or the case-specific question provided in Procedure 2 above.
10. Students will now look at a selection of recent cartoons that address free speech and freedom of expression in American society today. The students may work individually or in pairs or small groups for this activity, and you have several options for directing student work. You may use all or some of the cartoons or assign a selection of one or more cartoons to different groups. Distribute the Analyzing a Cartoon activity sheets and use them as the basis for class discussion following the activity. Alternatively, you may pair a cartoon with a related Supreme Court case featured in Lessons 1 and 2 and challenge the students to assess the extent to which the artist's message in the cartoon reflects or refutes the majority, minority, and/or dissenting opinions in the Supreme Court's ruling.
11. To conclude the lesson, students will develop a position and express a viewpoint on one of the essential questions for this unit based on the evidence from the texts.
    - To what extent should government restrict and regulate free speech?
    - To what extent can speech that encourages illegal conduct or lawless action be regulated or restricted by the government?
    - To what extent should government regulations and restrictions on speech be neutral toward speech addressing controversial issues and subjects?
    - To what extent should free speech be viewed as either an absolute or a limited constitutional (First Amendment) right?
    - To what extent should a democratic government tolerate dissent during times of war and other crises?
    - Is the suppression of public opinion during times of crisis ever justified?
12. Students will express their viewpoints orally and/or in writing using the evidence presented in class to elucidate and support their arguments.

LESSONS 3–4

Overview

In these two lessons, students will read, analyze, and assess current news articles on free speech issues facing American society today building on the historical knowledge gained in the previous two lessons. They will learn how to use the AllSides widget on the Gilder Lehrman Institute's Teaching Civics through History webpage. AllSides.com is a website that identifies articles written from right, center, and left viewpoints. The students will engage in group discussions that emphasize civil discourse and distinguishing facts from opinions.

Materials

- Articles from AllSides.com on the Gilder Lehrman Institute's Teaching Civics through History webpage, gilderlehrman.org/tcth
- Analyzing a News Article activity sheet
- Optional: Teacher's Resource: Civil Discourse Guidelines. The guidelines provided here are adapted from "Managing Difficult Classroom Discussions," Center for Innovative Teaching and Learning, Indiana University Bloomington, citl.indiana.edu/teaching-resources.

Procedure

1. Introduce the scope and purpose of the next two days. A demonstration of the AllSides resources will allow students to comfortably begin to research materials that reflect a spectrum of right, center, and left on the political scale.
2. Students will then explore (either in groups or individually) some of the articles on free speech and freedom of expression.
3. You may assign three articles from AllSides representing different points on the political spectrum (right, center, left) or allow students to select their own three articles.
4. Students will read the three articles and complete an Analyzing a News Article activity sheet for each.
5. Facilitate a class discussion among the students about their responses to the questions in the activity sheet. To help maintain civil discourse throughout the discussion, you may ask the students to develop guidelines to follow as they discuss potentially divisive issues that affect them and their families or communities. We have provided examples of such guidelines on the Teacher's Resource in the handouts. Student input is important, and helping them create the rules for civil discourse themselves will give them greater commitment to follow those rules.
6. As a summary activity, students will develop an oral or written response to the following question: "How do the important issues presented in the articles about free speech and freedom of expression reflect, refute, and/or compare with the historical development and evolution of free speech and freedom of expression in the United States?" Make sure that the students cite evidence from the articles and use their historical knowledge to support their viewpoints.

LESSON 5

Overview

The final component of the unit is the design, development, and evaluation of a student civic engagement project. The projects will be supported by the historical background presented in Lessons 1 and 2; the ability to discuss, analyze, and assess articles on current issues; and the students' interest in issues that affect their communities. They will choose engagement activities, formulate action steps for implementation, and present on the effectiveness of their projects.

Materials

- Civic Engagement Project Proposal activity sheet

Procedure

1. Based on the knowledge and understanding of the historical roots of current civic and social issues facing their communities and the nation; their literacy, research, and critical thinking skills; and their experience discussing, analyzing, and assessing present-day articles written from different perspectives, the students will design and develop civics projects on topics that interest them.
2. The students may work collaboratively or independently to plan, implement, and present civic engagement projects that relate to free speech and freedom of expression in modern American society. The students will work collaboratively with you to develop a list of projects related to freedom of speech and freedom of expression that have an impact in their school and/or community. For example,
   - Collaborate with school administration on the development/revision of editorial and censorship guidelines (digital and print) for student-run school publications, such as the newspaper, yearbook, literary magazine, website, etc.
   - Collaborate with school administration on the development/revision of the school dress code and guidelines on student artistic, cultural, and musical expression and symbolic speech such as student attire.
   - Create a "Free Speech Wall" on the school campus that features a new issue, question, or topic each month and invites classmates throughout the school to post (write, draw, etc.) their views and publicly share their ideas and opinions. Students from various school clubs could collaborate on this initiative.
   - Create a "Free Speech Wall" at a centralized community location (library, town hall, community center, etc.) that features a new issue, question, or topic each month and invites residents to post (write, draw, etc.) their views and publicly share their ideas and opinions. The monthly results could be published on the community/town website, in a local newspaper, at the community center, etc.
3. Distribute the Project Proposal activity sheet to each student or student group. The student or group will complete the proposal and submit it to you for evaluation and approval. You may return it to them with suggestions and request revisions before signing off.
4. Guidelines for student civic action projects:
   - Identify issues related to the First Amendment right of free speech and freedom of expression that are important to the students' lives and community.
   - Select an issue to address.
   - Research the chosen issue and discuss what specific actions could improve the situation.
   - Plan an action that could effect change, keeping in mind what the specific goal is; who or what body has power to make the change; how that person or body can be approached; and what action steps to take to accomplish the goal.
   - Carry out the action (write letters, convene meetings with community members or officials, create flyers/exhibitions/websites, etc.) depending on the specific goals of the project.
   - Assess the effort when it is completed in order to understand their successes, challenges, and ways to continue learning in the future.
5. Based on the time available and your students' experience, establish a schedule of due dates for implementation and presentation of the projects. Discuss what the challenges were and how the students addressed those challenges; how successful their civic engagement projects were; what they could do to be more effective in the future.

The First Amendment and the Fourteenth Amendment, Section 1

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or 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.

Fourteenth Amendment

Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Source: *Interactive Constitution,* National Constitution Center, constitutioncenter.org

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Document Analysis: Free Speech Situations and Statements

Determine whether each statement describing the exercise of free speech is **True (T)** or **Untrue (U)** based on the interpretation of the First Amendment and Fourteenth Amendment in American society today.

1. Freedom of speech includes the right not to speak (specifically, the right not to salute the flag).
2. Freedom of speech includes the right to burn draft cards as an anti-war protest.
3. Freedom of speech includes the right to engage in symbolic speech (e.g., burning the flag in protest).
4. Freedom of speech includes the right of students to advocate illegal drug use at a school-sponsored event.
5. Freedom of speech includes the right to make or distribute obscene materials.
6. Freedom of speech includes the right to use certain offensive words and phrases to convey political messages.
7. Freedom of speech includes the right to contribute money (under certain circumstances) to political campaigns.
8. Freedom of speech includes the right of students to wear black armbands to school to protest a war.
9. Freedom of speech includes the right to incite actions that would harm others.
10. Freedom of speech includes the right to advertise commercial products and professional services (with some restrictions).
11. Freedom of speech includes the right of students to make an obscene speech at a school-sponsored event.
12. Freedom of speech includes the right to permit students to print articles in a school newspaper over the objections of the school administration.

Answer Key for Document Analysis: Free Speech Situations and Statements

TRUE	1.	Freedom of speech includes the right not to speak (specifically, the right not to salute the flag).
UNTRUE	2.	Freedom of speech includes the right to burn draft cards as an anti-war protest.
TRUE	3.	Freedom of speech includes the right to engage in symbolic speech (e.g., burning the flag in protest).
UNTRUE	4.	Freedom of speech includes the right of students to advocate illegal drug use at a school-sponsored event.
UNTRUE	5.	Freedom of speech includes the right to make or distribute obscene materials.
TRUE	6.	Freedom of speech includes the right to use certain offensive words and phrases to convey political messages.
TRUE	7.	Freedom of speech includes the right to contribute money (under certain circumstances) to political campaigns.
TRUE	8.	Freedom of speech includes the right of students to wear black armbands to school to protest a war.
UNTRUE	9.	Freedom of speech includes the right to incite actions that would harm others.
TRUE	10.	Freedom of speech includes the right to advertise commercial products and professional services (with some restrictions).
UNTRUE	11.	Freedom of speech includes the right of students to make an obscene speech at a school-sponsored event.
UNTRUE	12	Freedom of speech includes the right to permit students to print articles in a school newspaper over the objections of the school administration.

Guide to Free Speech Court Cases

Freedom of speech includes the right

- Not to speak (specifically, the right not to salute the flag)

  West Virginia Board of Education v. Barnette, 319 US 624 (1943)

- Of students to wear black armbands to school to protest a war ("Students do not shed their constitutional rights at the schoolhouse gate.")

  Tinker v. Des Moines, 393 US 503 (1969)

- To use certain offensive words and phrases to convey political messages

  Cohen v. California, 403 US 15 (1971)

- To contribute money (under certain circumstances) to political campaigns

  Buckley v. Valeo, 424 US 1 (1976)

- To advertise commercial products and professional services (with some restrictions)

  Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 US 748 (1976); *Bates v. State Bar of Arizona*, 433 US 350 (1977)

- To engage in symbolic speech (e.g., burning the flag in protest)

  Texas v. Johnson, 491 US 397 (1989); *United States v. Eichman*, 496 US 310 (1990)

Freedom of speech does not include the right

- To incite actions that would harm others (e.g., "[S]hout[ing] 'fire' in a crowded theater.")

  Schenck v. United States, 249 US 47 (1919)

- To make or distribute obscene materials

  Roth v. United States, 354 US 476 (1957)

- To burn draft cards as an anti-war protest

  United States v. O'Brien, 391 US 367 (1968)

- To permit students to print articles in a school newspaper over the objections of the school administration

  Hazelwood School District v. Kuhlmeier, 484 US 260 (1988)

- Of students to make an obscene speech at a school-sponsored event

  Bethel School District No. 403 v. Fraser, 478 US 675 (1986)

- Of students to advocate illegal drug use at a school-sponsored event

  Morse v. Frederick, 551 US 393 (2007)

Historical Background 1

A History of Free Speech in the United States, Part 1: From the Bill of Rights to Civil Rights

by Bruce Allen Murphy, Fred Morgan Kirby Professor of Civil Rights, Lafayette College

Although the First Amendment to the United States Constitution was ratified in 1791, it took generations of Supreme Court justices to reshape the meaning of those rights into the protections that we know today. Originally, the text was not only meant to prevent "prior restraint," or censorship, of speech and writing, but also to allow for punishment after the fact, called "subsequent punishment," for any harmful actions that resulted from those words. In its first decade of existence, the amendment was undermined by the passage of the 1798 Sedition Act, which punished opponents of President John Adams and the Federalist Party majority in Congress for speaking or writing critically about the government. Only after Thomas Jefferson became president in 1801, and his supporters were freed from prison, had their fines repaid, and were pardoned, were people free to criticize the federal government once again. But they still had no protections at the state level because the First Amendment did not apply to those jurisdictions until the early 1900s.

During World War I, the government arrested people who protested against the military draft and the government's war policy. In 1919, when appeals from those cases came to the Supreme Court, Justices Oliver Wendell Holmes and Louis D. Brandeis created the "clear and present danger" test, limiting the government's ability to regulate or ban speech to cases where the actions resulting from the speech presented "a clear and present danger of a substantive evil that Congress had a right to prevent." This meant that the danger to the government and society had to be immediate and real. In those early cases, the emergency of being at war permitted regulation. Later that year, Holmes argued that dissenting views should be tolerated to create a "free marketplace of ideas" that functioned without interference from the government.

By 1928, Holmes and Brandeis expanded their protective reach by arguing that in order for government to limit speech, "the evil apprehended [must be] so imminent that it may befall before there is opportunity for full discussion." In 1951, the Court abandoned the clear and present danger test to allow for the punishment of the leaders of the American Communist Party, who were seen as threatening to overthrow the government of the United States. In a balancing test called the "gravity of the evil" test, the justices ruled that the government needed to prove "whether the gravity of the 'evil,' discounted by its improbability," justified limiting free speech in order to "avoid the danger." Since the Communist Party was seen by the Court as a dire governmental threat, the government would only have to prove that there was the smallest likelihood of their success to justify censorship and imprisonment. It was not until 1969, in a case called *Brandenburg v. Ohio* dealing with a Ku Klux Klan rally where members brought guns and burned a cross, that the Court created the modern, nearly total, protection for free speech. Now speech can only be punished "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

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Analyzing an Essay: Historical Background 1

IMPORTANT PHRASES

In this scholarly essay which phrases or sentences related to free speech in the United States are the most important or informative? Choose three and give the reason for each choice.

Phrase 1:

Why is this phrase important or informative?

Phrase 2:

Why is this phrase important or informative?

Phrase 3:

Why is this phrase important or informative?

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CRITICAL THINKING QUESTIONS

Cite evidence from the text in your answers.

1. Briefly explain the original purpose of the First Amendment.

2. Briefly explain how the Sedition Act (1798) weakened and undermined the First Amendment.

3. Briefly explain how the Supreme Court's "clear and present danger" test in 1919 affected citizens' right to freedom of speech and expression.

4. Briefly explain how the Supreme Court's "gravity of the evil" test in 1951 affected citizens' right to freedom of speech and expression.

Document 1: Excerpts from the Sedition Act (1798)

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled* That if any persons shall unlawfully combine or conspire together, with intent to oppose any measure or measures of the government of the United States, which are or shall be directed by proper authority, or to impede the operation of any law of the United States, or to intimidate or prevent any person, holding a place or office in or under the government of the United States, from undertaking, performing or executing his trust or duty; and if any person or persons, with intent as aforesaid, shall counsel, advise or attempt to procure any insurrection, riot, unlawful assembly, or combination, whether such conspiracy, threatening, counsel, advice, or attempt shall have the proposed effect or not, he or they shall be deemed guilty of a high misdemeanor, and on conviction, before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding five thousand dollars, and by imprisonment during a term of not less than six months nor exceeding five years; and further, at the discretion of the court, may be holden to find sureties for his good behaviour in such sum, and for such time, as the said court may direct.

SECT. 2. *And be it further enacted,* That if any person shall write, print, utter or publish, or shall cause or procure to be written, printed, uttered, or published, or shall knowingly and willingly assist or aid in writing, printing, uttering, or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either House of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either House of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States, or to stir up sedition within the United States; or to excite any unlawful combinations therein, for opposing or resisting any law of the United States, or any act of the President of the United States, done in pursuance of any such law, or of the powers in him vested by the Constitution of the United States; or to resist, oppose, or defeat any such law or act; or to aid, encourage or abet any hostile designs of any foreign nation against the United States, their people or government, then such person, being thereof convicted before any Court of the United States, having jurisdiction thereof, shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years. . . .

SECT. 4. *And be it further enacted,* That this act shall continue and be in force until the third day of March, one thousand eight hundred and one, and no longer. . . .

Source: "An Act in Addition to the Act, Entitled "An Act for the Punishment of Certain Crimes against the United States, '" *Our Documents,* ourdocuments.gov

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Document Analysis 1: Sedition Act (1798)

IMPORTANT PHRASES

In this law, which phrases or sentences related to free speech in the United States are the most important or powerful? Choose three and give the reason for each choice.

Phrase 1:

Why is this phrase important or powerful?

Phrase 2:

Why is this phrase important or powerful?

Phrase 3:

Why is this phrase important or powerful?

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CRITICAL THINKING QUESTIONS

Cite evidence from the text in your answers.

1. Briefly explain how the Sedition Act of 1798 affected citizens' right to freedom of speech and expression.

2. To what extent was this law a necessary measure to protect national security or an unconstitutional violation of citizens' First Amendment right to freedom of speech and expression. Briefly explain your viewpoint.

Document 2a: Excerpts from the Espionage Act (1917)

Section 1 That: (a) whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation, goes upon, enters, flies over, or otherwise obtains information concerning any vessel, aircraft, work of defense, navy yard, naval station, submarine base, coaling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building, office, or other place connected with the national defense, owned or constructed, or in progress of construction by the United States or under the control of the United States, or of any of its officers or agents, or within the exclusive jurisdiction of the United States, or any place in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war are being made, prepared, repaired. or stored, under any contract or agreement with the United States, or with any person on behalf of the United States, or otherwise on behalf of the United States, . . .

Sec 2 (a) Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to, or aids or induces another to, communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by imprisonment for not more than twenty years: *Provided*, That whoever shall violate the provisions of subsection (a) of this section in time of war shall be punished by death or by imprisonment for not more than thirty years . . .

Sec. 3. 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 willfully cause or attempt to cause insubordination, disloyalty, mutiny, refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service 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. . . .

Source: Act of June 15, 1917, Public Law 24 (Espionage Act), "An Act to Punish Acts of Interference with the Foreign Relations, the Neutrality, and the Foreign Commerce of the United States, to Punish Espionage, and Better to Enforce, the Criminal Laws of the United States, and for Other Purposes," Enrolled Acts and Resolutions of Congress, 1789–2013, National Archives and Records Administration, catalog.archives.gov/id/5721240.

Document 2b: Excerpts from the Sedition Act (1918)

Sec. 3. Whoever, when the United States is at war, shall willfully 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, or shall willfully make or convey false reports, or false statements, . . . or incite or attempt to incite, insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct or attempt to obstruct the recruiting or enlistment service of the United States, and whoever, when the United States is at war, shall willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States . . . or shall willfully display the flag of any foreign enemy, or shall willfully . . . urge, incite, or advocate any curtailment of production . . . [or] advocate, teach, defend, or suggest the doing of any of the acts or things in this section enumerated, and whoever shall by word or act support or favor the cause of any country with which the United States is at war or by word or act oppose the cause of the United States therein, shall be punished by a fine of not more than $10,000 or imprisonment for not more than 20 years, or both. . . .

Source: "An Act to Amend Section Three, Title One, of the Act Entitled, 'An Act to Punish Acts of Interference with the Foreign Relations, the Neutrality, and the Foreign Commerce of the United States, to Punish Espionage, and Better to Enforce, the Criminal Laws of the United States, and for Other Purposes,' May 16, 1918," Statutes at Large, 65th Congress, loc.gov/law/help/statutes-at-large/65th-congress/session-2/c65s2ch75.pdf

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Document Analysis 2: The Espionage Act (1917) and the Sedition Act (1918)

IMPORTANT PHRASES

In these laws, which phrases or sentences related to free speech in the United States are the most important or powerful? Choose three and give the reason for each choice.

Phrase 1:

Why is this phrase important or powerful?

Phrase 2:

Why is this phrase important or powerful?

Phrase 3:

Why is this phrase important or powerful?

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CRITICAL THINKING QUESTIONS

Cite evidence from the text in your answers.

1. Briefly explain how the Espionage Act of 1917 and the Sedition Act of 1918 affected the lives and activities of American pacifists, socialists, and anti-war activists who criticized the involvement of the United States in World War I.

2. To what extent were the Espionage Act of 1917 and the Sedition Act of 1918 either necessary to ensure national security and the military success of the United States in World War I or unconstitutional laws prohibiting legitimate political dissent? Briefly explain your viewpoint.

3. To what extent did the Sedition Acts of 1798 and 1918 violate the First Amendment's protection against any law "abridging the freedom of speech, or of the press"? Briefly explain your viewpoint.

Document 3a: Excerpts from the US Supreme Court Decision in *Schenck v. United States* (1919)

Background

Shortly after the United States entered World War I, Congress enacted the Espionage Act (1917), which prohibited interfering with military operations or the recruitment of soldiers, promoting insubordination in the military, and supporting foes during wartime. Charles Schenck organized the distribution to prospective military draftees of 15,000 circulars or leaflets that encouraged them to resist the draft.

Justice Oliver Wendell Holmes's Majority Opinion

. . . 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. . . . 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. . . . It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced. The statute [Espionage Act] of 1917 punishes conspiracies to obstruct as well as actual obstruction. If the act, (speaking, or circulating a paper,) its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime.

Source: *Schenck v. United States,* 249 US 47 (1919), *US Reports,* p. 52, Library of Congress, cdn.loc.gov/service/ll/usrep/usrep249/usrep249047/usrep249047.pdf.

Document 3b: Excerpts from the US Supreme Court Decision in *Abrams v. United States* (1919)

Background

The defendants in this case were charged with and convicted of inciting resistance to the war effort and urging curtailment of the production of essential war materials on the basis of two leaflets that were thrown from the windows of a building in New York City. These leaflets, signed "revolutionists," denounced sending US troops to Russia and producing weapons to be used against Russia. The Supreme Court decision upheld the Sedition Act of 1918, which criminalized advocating the curtailment of the production of military materials to be used against enemies.

Justice Oliver Wendell Holmes's Dissenting Opinion/Revision of his "clear and present danger" test

. . . I never have seen any reason to doubt that the questions of law that alone were before this Court in the cases of *Schenck*, *Frohwerk* and *Debs* were rightly decided. I do not doubt for a moment that . . . the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that will bring about . . . certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times.

But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country. . . .

. . . The ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed. Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, "Congress shall make no law . . . abridging the freedom of speech." Of course I am speaking only of expressions of opinion and exhortations, which were all that were uttered here, but I regret that I cannot put into more impressive words my belief that in their conviction upon this indictment the defendants were deprived of their rights under the Constitution of the United States.

Source: *Abrams v. United States*, 250 US 616 (1919), US Reports, pp. 624 and 630–631, Library of Congress, cdn.loc.gov/service/ll/usrep/usrep250/usrep250616/usrep250616.pdf.

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Document Analysis 3: *Schenck v. United States* and *Abrams v. United States*

IMPORTANT PHRASES

In these US Supreme Court decisions, which phrases or sentences related to free speech in the United States are the most important or powerful? Choose two from each case and give the reason for each choice.

Phrase 1:

Why is this phrase important or powerful?

Phrase 2:

Why is this phrase important or powerful?

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Phrase 3:

Why is this phrase important or powerful?

Phrase 4:

Why is this phrase important or powerful?

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CRITICAL THINKING QUESTIONS

Cite evidence from the texts in your answers.

1. In his discussion of the clear and present danger test in *Schenck v. United States* (1919), how did Justice Oliver Wendell Holmes define the extent and meaning of free speech for American citizens?

2. According to his dissenting opinion in *Abrams v. United States* (1919), how did Justice Holmes redefine the clear and present danger test and advocate a stricter standard?

Document 4: Excerpts from the US Supreme Court Decision in *Whitney v. California* (1927)

Background

Criminal syndicalism has been defined as a doctrine that "advocates crime, sabotage, violence, or other unlawful methods of terrorism as a means of accomplishing industrial or political reform." In this case the Supreme Court unanimously upheld the conviction of Charlotte Anita Whitney for violating the 1919 California Criminal Syndicalism Act and engaging in speech that promoted the establishment of the Communist Labor Party of America which, according to the State of California, allegedly raised the threat of the violent overthrow of the state and US governments. The primary issue before the Court was whether the 1919 California Criminal Syndicalism Act violated the Fourteenth Amendment's due process and equal protection clauses. Did Whitney's speeches and activities constitute "a clear and present danger of substantive evil." The Supreme Court ruled that freedom of speech is not an absolute right, and this state law violated neither the due process nor the equal protection clauses of the Fourteenth Amendment. Justice Louis Brandeis's concurring opinion established a connection between free speech and the opportunity and need for public discussion in a democratic society.

Justice Louis Brandeis's Concurring Opinion and the "Public Discussion," "Serious Evil," and "Imminent Danger" Tests

. . . This Court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present; and what degree of evil shall be deemed sufficiently substantial to justify resort to abridgement of free speech and assembly as the means of protection. . . .

Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. 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 and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. . . .

Fear of serious injury cannot alone justify suppression of free speech and assembly. . . . To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. . . . Advocacy of law-breaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.

. . . No danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. . . .

Moreover, even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious. Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society. A police measure may be unconstitutional merely because the remedy, although effective as means of protection, is unduly harsh or oppressive. . . .

. . . The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State. Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly. . . .

Source: *Whitney v. California*, 274 US 357 (1927), *US Reports*, pp. 374–378, Library of Congress, cdn.loc.gov/service/ll/usrep/usrep274/usrep274357/usrep274357.pdf.

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Document Analysis 4: *Whitney v. California* (1927)

IMPORTANT PHRASES

In the US Supreme Court decision, which phrases or sentences related to free speech in the United States are the most important or powerful? Choose three and give the reason for each choice.

Phrase 1:

Why is this phrase important or powerful?

Phrase 2:

Why is this phrase important or powerful?

Phrase 3:

Why is this phrase important or powerful?

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CRITICAL THINKING QUESTIONS

Cite evidence from the text in your answers.

1. Why did Justice Brandeis believe that it was "indispensable" that Americans have the "freedom to think as you will and to speak as you think"?

2. According to Justice Brandeis, on what grounds could the suppression of free speech be justified?

3. Why did Justice Brandeis believe that it was important for Americans to have the "opportunity for full discussion" to determine the appropriate extent of freedom of speech in specific circumstances?

Document 5: Excerpts from the US Supreme Court Decision in *Brandenburg v. Ohio* (1969)

Background

In summer 1964, Clarence Brandenburg, a Ku Klux Klan leader in Ohio, delivered a televised speech at a Klan rally in Cincinnati in which he accused the US government of suppressing the "Caucasian race." Subsequently, he was convicted of violating the Ohio Criminal Syndicalism Statute, which prohibited public speech that advocated and incited illegal actions and activities. The primary issue before the Supreme Court was whether Ohio's criminal syndicalism law violated the defendant's right to free speech.

In its ruling the Supreme Court modified the clear and present danger test and introduced a two-pronged "imminent lawless action" standard to evaluate laws affecting speech acts: 1) speech can be prohibited if its purpose is to incite or produce "imminent lawless action" and 2) doing so is likely to incite or produce such an action. Additionally, the Court found that abstract discussions are not the same as actually preparing or inciting individuals to engage in illegal acts. Therefore, Ohio could only limit speech that would incite "imminent unlawful action." The Supreme Court stipulated that the government cannot punish inflammatory speech unless that speech is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." As a result, the Ohio criminal syndicalism law was declared unconstitutional because that statute broadly prohibited the mere advocacy of violence. In the process, *Whitney v. California* (1927) was explicitly overruled. This imminent unlawful action standard is still applied by the Supreme Court in cases that involve the advocacy of violence.

The US Supreme Court's Per Curiam[1] Decision in *Whitney v. California* is overturned

. . . The prosecution's case rested on the films and on testimony identifying the appellant as the person who . . . spoke at the rally. . . .

One film showed 12 hooded figures, some of whom carried firearms. They were gathered around a large wooden cross, which they burned. No one was present other than the participants and the newsmen who made the film. Most of the words uttered during the scene were incomprehensible when the film was projected, but scattered phrases could be understood that were derogatory of Negroes and, in one instance, of Jews. Another scene on the same film showed the appellant, in Klan regalia, making a speech. The speech . . . was as follows:

"This is an organizers' meeting. We have had quite a few members here today which are—we have hundreds, hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from . . . five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organization. We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken.

"We are marching on Congress July the Fourth, four hundred thousand strong. From there, we are dividing into two groups, one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you."

The second film showed six hooded figures one of whom, later identified as the appellant, repeated a speech very similar to that recorded on the first film. The reference to the possibility of "revengeance" was omitted, and one sentence was added: "Personally, I believe the n—— should be returned to Africa, the Jew returned to Israel." Though some of the figures in the films carried weapons, the speaker did not.

. . . In 1927, this Court sustained the constitutionality of California's Criminal Syndicalism Act [in] *Whitney v. California*. The Court upheld the statute on the ground that, without more, "advocating" violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it. But *Whitney* has been thoroughly discredited by later decisions. These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. . . . A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control.

[1] Per Curiam: A unanimous ruling that is issued collectively by the group of judges and published as a decision of the Court without identifying the authorship of a specific judge.

Measured by this test, Ohio's Criminal Syndicalism Act cannot be sustained. The Act punishes persons who "advocate or teach the duty, necessity, or propriety" of violence "as a means of accomplishing industrial or political reform"; or who publish or circulate or display any book or paper containing such advocacy; or who "justify" the commission of violent acts "with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism"; or who "voluntarily assemble" with a group formed "to teach or advocate the doctrines of criminal syndicalism." Neither the indictment nor the trial judge's instructions to the jury in any way refined the statute's bald definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action.

Accordingly, we are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. . . . Such a statute falls within the condemnation of the First and Fourteenth Amendments. The contrary teaching of *Whitney v. California*, supra, cannot be supported, and that decision is therefore overruled.

Source: *Brandenburg v. Ohio,* 395 U.S. 444 (1969), *US Reports,* pp. 445–449, Library of Congress, cdn.loc.gov/service/ll/usrep/usrep395/usrep395444/usrep395444.pdf

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Document Analysis 5: *Brandenburg v. Ohio* (1969)

IMPORTANT PHRASES

In this Supreme Court decision, which phrases or sentences related to free speech in the United States are the most important or powerful? Choose three and give the reason for each choice.

Phrase 1:

Why is this phrase important or powerful?

Phrase 2:

Why is this phrase important or powerful?

Phrase 3:

Why is this phrase important or powerful?

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CRITICAL THINKING QUESTIONS

Cite evidence from the text in your answers.

1. Based on its ruling in *Brandenburg v. Ohio* (1969), briefly explain the Supreme Court's two-pronged "imminent lawless action" standard to determine the extent to which free speech is protected under the First Amendment.

2. Why did the Supreme Court declare the Ohio Criminal Syndicalism Act unconstitutional?

3. How did the Supreme Court's ruling in *Brandenburg v. Ohio* affect and compare to its previous decision in *Whitney v. California* (1927) concerning free speech?

Historical Background 2

A History of Free Speech in the United States, Part 2: Three Levels of Judicial Scrutiny

by Bruce Allen Murphy, Fred Morgan Kirby Professor of Civil Rights, Lafayette College

The Supreme Court created other tests for judging the limits governing freedom of assembly and symbolic speech rights. In 1942, in the case of *Chaplinsky v. New Hampshire*, a man distributing religious literature on a public sidewalk shouted such horrible and libelous words at a police officer that he was arrested for using "offensive, derisive or annoying word(s)." While the Court at this time was normally very protective of citizens' rights, here it created a two-level test defining the difference between "speech" and "conduct." For the justices, speech was normally in a "preferred position," meaning that it could not be regulated because it had social worth. But the state could ban lewd, obscene, profane, libelous, insulting, or "fighting" words because "by their very utterance, [they] inflict injury or tend to incite an immediate breach of the peace." In short, they are not a discussion of ideas, but become regulatable conduct. Using this test, speech meant to offend, intimidate, or threaten people, sometimes called "hate speech," can be banned.

In the last half century, the Supreme Court has created three levels of judicial scrutiny for protecting speech. At the lowest level, if the state's regulation is "reasonable" or has a "rational basis," meaning that a "reasonable person," specifically the judge, would allow it, the Court will nearly always permit state regulation. However, the state's power to regulate speech is much weaker if the speech is offered by someone in a "suspect classification," such as being a member of a "discrete or insular minorit(y)," or if the speech involves a "fundamental interest," such as being part of the election process or the discussion of a public issue in a public place. In these cases, the Court will judge the regulation using "strict scrutiny," asking whether it is the only possible means for the state to achieve that law's purpose, and whether the law was "closely tailored" to restrict only conduct and not speech. Under this test, the individual almost always wins.

In between these two levels, the justices use an intermediate balancing technique by evaluating the importance of the state's regulatory interests and asking whether the law was "substantially related" to those interests, weighed against the individual's speech interests. Using this approach, the Court has upheld a law preventing the burning of draft cards to protest a war but has overturned state or federal regulations against burning the American flag in protest. In a public-school setting, the Court allowed students to silently protest the Vietnam War by wearing black armbands, so long as they did not "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."

The current Roberts Court has been one of the most protective of First Amendment rights in our history. It will be left to future justices, though, to determine what those rights will be in the digital age.

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Analyzing an Essay: Historical Background 2

IMPORTANT PHRASES

In this scholarly essay, which phrases or sentences related to free speech in the United States are the most important and informative? Choose three and give the reason for each choice.

Phrase 1:

Why is this phrase important or powerful?

Phrase 2:

Why is this phrase important or powerful?

Phrase 3:

Why is this phrase important or powerful?

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CRITICAL THINKING QUESTIONS

Cite evidence from the text in your answers.

1. Briefly explain how the Supreme Court defined the difference between "speech" and "conduct" in the case of *Chaplinsky v. New Hampshire* (1942).

2. Briefly explain how the Supreme Court and lower courts have attempted to balance states' regulatory interests and individuals' speech interests in determining one's constitutional right to free speech?

Document 1: Excerpts from the US Supreme Court Decision in *West Virginia State Board of Education et al. v. Barnette et al.* (1943)

Background

In January 1942, the West Virginia State Board of Education required all public school students and teachers to participate in a daily flag salute as a school activity. For teachers, refusing to participate was grounds for dismissal, and reemployment was denied until there was assurance of compliance. For students, the punishment for noncompliance was expulsion from school, and their parents would be liable for prosecution on grounds of fostering "unlawful absence" and juvenile delinquency. In this case, the salute also included reciting the pledge of allegiance. Two sisters, Marie and Gathie Barnette, who were Jehovah's Witnesses and attended Slip Hill Grade School in Charleston, West Virginia, were instructed by their father not to salute the American flag and recite the pledge on the grounds that it denied their First Amendment right to freedom of religion and freedom of speech and the Fourteenth Amendment's due process and equal protection clauses.

In a 6-3 split decision, the US Supreme Court concluded that a compulsory flag salute and pledge of allegiance for public school children violated their First Amendment and Fourteenth Amendment rights. Justice Robert H. Jackson, in writing the majority opinion, asserted that national symbols like the American flag should not receive a level of deference that transcends an individual's constitutional right to freedom of expression and speech. Moreover, he contended that curtailing or eliminating dissent was an improper and ineffective way to generate national patriotism, unity, and popular opinion. In this decision the Supreme Court overturned its prior ruling in *Minersville School District v. Gobitis* (1940), which had stated that saluting and pledging allegiance to the American flag were appropriate and effective ways to promote patriotism and national unity.

Justice Robert H. Jackson's Majority Opinion

. . . It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind. It is not clear whether the regulation contemplates that pupils forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony or whether it will be acceptable if they simulate assent by words without belief and by a gesture barren of meaning. It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish. It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence. But here the power of compulsion is invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression. To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.

Whether the First Amendment to the Constitution will permit officials to order observance of ritual of this nature does not depend upon whether as a voluntary exercise we would think it to be good, bad or merely innocuous. Any credo of nationalism is likely to include what some disapprove or to omit what others think essential. . . . Hence validity of the asserted power to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one, presents questions of power that must be considered independently of any idea we may have as to the utility of the ceremony in question.

Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held. While religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual. It is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty.

. . . The question which underlies the flag salute controversy is whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution. . . .

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes. . . .

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

In weighing arguments of the parties, it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. . . . Freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case. . . .

. . . The very heart of the *[Minersville School District v.] Gobitis* opinion . . . reasons that "National unity is the basis of national security," that the authorities have "the right to select appropriate means for its attainment," and hence reaches the conclusion that such compulsory measures toward "national unity" are constitutional. Upon the verity of this assumption depends our answer in this case.

National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement.

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil, men. . . . As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, . . . down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

. . . The First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. . . . We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.

. . . We apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. . . . Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.

The decision of this Court in *Minersville School District v. Gobitis* [is] overruled, and the judgment enjoining enforcement of the West Virginia Regulation is *affirmed*.

Justice Felix Frankfurter's Dissenting Opinion

. . . I cannot bring my mind to believe that the "liberty" secured by the Due Process Clause gives this Court authority to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely, the promotion of good citizenship, by employment of the means here chosen. . . .

The precise scope of the question before us defines the limits of the constitutional power that is in issue. The State of West Virginia requires all pupils to share in the salute to the flag as part of school training in citizenship. . . . All that is in question is the right of the State to compel participation in this exercise by those who choose to attend the public schools.

. . . The flag salute requirement in this case comes before us with the full authority of the State of West Virginia. We are in fact passing judgment on "the power of the State as a whole." Practically we are passing upon the political power of each of the forty-eight states. Moreover, since the First Amendment has been read into the Fourteenth, our problem is precisely the same as it would be if we had before us an Act of Congress for the District of Columbia. To suggest that we are here concerned with the heedless action of some village tyrants is to distort the augustness of the constitutional issue and the reach of the consequences of our decision.

Under our constitutional system the legislature is charged solely with civil concerns of society. If the avowed or intrinsic legislative purpose is either to promote or to discourage some religious community or creed, it is clearly within the constitutional restrictions imposed on legislatures and cannot stand. But it by no means follows that legislative power is wanting whenever a general non-discriminatory civil regulation in fact touches conscientious scruples or religious beliefs of an individual or a group. Regard for such scruples or beliefs undoubtedly presents one of the most reasonable claims for the exertion of legislative accommodation. It is, of course, beyond our power to rewrite the State's requirement, by providing exemptions for those who do not wish to participate in the flag salute or by making some other accommodations to meet their scruples. That wisdom might suggest the making of such accommodations and that school administration would not find it too difficult to make them and yet maintain the ceremony for those not refusing to conform, is outside our province to suggest. Tact, respect, and generosity toward variant views will always commend themselves to those charged with the duties of legislation so as to achieve a maximum of good will and to require a minimum of unwilling submission to a general law. But the real question is, who is to make such accommodations, the courts or the legislature?

. . . It cuts deep into one's conception of the democratic process—it concerns no less the practical differences between the means for making these accommodations that are open to courts and to legislatures. A court can only strike down. It can only say "This or that law is void." It cannot modify or qualify, it cannot make exceptions to a general requirement. . . . When we are dealing with the Constitution of the United States, and, more particularly with the great safeguards of the Bill of Rights, we are dealing with principles of liberty and justice "so rooted in the traditions and conscience of our people as to be ranked as fundamental"—something without which "a fair and enlightened system of justice would be impossible." If the function of this Court is to be essentially no different from that of a legislature, if the considerations governing constitutional construction are to be substantially those that underlie legislation, then indeed judges should not have life tenure and they should be made directly responsible to the electorate. . . .

The constitutional protection of religious freedom . . . did not create new privileges. It gave religious equality, not civil immunity. Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma. Religious loyalties may be exercised without hindrance from the state, not the state may not exercise that which except by leave of religious loyalties is within the domain of temporal power. Otherwise, each individual could set up his own censor against obedience to laws conscientiously deemed for the public good by those whose business it is to make laws.

. . . Any person may therefore believe or disbelieve what he pleases. He may practice what he will in his own house of worship or publicly within the limits of public order. But the lawmaking authority is not circumscribed by the variety of religious beliefs, otherwise the constitutional guaranty would be not a protection of the free exercise of religion, but a denial of the exercise of legislation.

The essence of the religious freedom guaranteed by our Constitution is therefore this: no religion shall either receive the state's support or incur its hostility. Religion is outside the sphere of political government. This does not mean that all matters on which religious organizations or beliefs may pronounce are outside the sphere of government. Were this so, instead of the separation of church and state, there would be the subordination of the state on any matter deemed within the sovereignty of the religious conscience. Much that is the concern of temporal authority affects the spiritual interests of men. But it is not enough to strike down a non-discriminatory law that it may hurt or offend some dissident view. It would be too easy to cite numerous prohibitions and injunctions to

which laws run counter if the variant interpretations of the Bible were made the tests of obedience to law. The validity of secular laws cannot be measured by their conformity to religious doctrines. It is only in a theocratic state that ecclesiastical doctrines measure legal right or wrong.

An act compelling profession of allegiance to a religion, no matter how subtly or tenuously promoted, is bad. But an act promoting good citizenship and national allegiance is within the domain of governmental authority and is therefore to be judged by the same considerations of power and of constitutionality as those involved in the many claims of immunity from civil obedience because of religious scruples.

That claims are pressed on behalf of sincere religious convictions does not of itself establish their constitutional validity. Nor does waving the banner of religious freedom relieve us from examining into the power we are asked to deny the states. Otherwise the doctrine of separation of church and state, so cardinal in the history of this nation and for the liberty of our people, would mean not the disestablishment of a state church but the establishment of all churches and of all religious groups.

The subjection of dissidents to the general requirement of saluting the flag, as a measure conducive to the training of children in good citizenship, is very far from being the first instance of exacting obedience to general laws that have offended deep religious scruples.

Source: *West Virginia State Board of Education v. Barnette*, 319 US 624 (1943), *US Reports*, pp. 633–642 and 646–655, Library of Congress, cdn.loc.gov/service/ll/usrep/usrep319/usrep319624/usrep319624.pdf.

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Document Analysis 1: *West Virginia State Bd. of Education v. Barnette* (1943)

IMPORTANT PHRASES

In this US Supreme Court decision, which phrases or sentences related to free speech in the United States are the most important and powerful? Choose three and give the reason for each choice.

Phrase 1:

Why is this phrase important or powerful?

Phrase 2:

Why is this phrase important or powerful?

Phrase 3:

Why is this phrase important or powerful?

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CRITICAL THINKING QUESTIONS

Cite evidence from the text in your answers.

1. Based on its ruling in *West Virginia State Bd. of Ed. v. Barnette* (1969), briefly explain the Supreme Court's decision on the issue of compulsory flag salute and pledge of allegiance by students in public schools.

2. Based on the majority opinion of Justice Robert H. Jackson, briefly explain how the Supreme Court justified its ruling on this issue.

3. How does the Supreme Court's ruling in *West Virginia State Board of Education v. Barnette* (1943) compare to its earlier decision in *Minersville School District v. Gobitis* (1940) concerning a compulsory flag salute and pledge of allegiance by students in public schools?

Document 2: Excerpts from the US Supreme Court Decision in *Tinker v. Des Moines Independent Community School District* (1969)

Background

In December 1965, a small group of students (including Christopher Eckhardt, Mary Beth Tinker, John Tinker, Hope Tinker, and Paul Tinker) planned to wear black armbands to their schools in the Des Moines (Iowa) Independent Community School District as a silent protest against the Vietnam War. When the principals became aware of the plan, the students were warned that they would be suspended if they wore the armbands to school because the protest might cause a disruption in the schools' learning environment. Despite the warnings, some students wore the armbands, were suspended, and were told that they could not return to school until they agreed to remove their armbands. The students returned after the Christmas/winter recess without armbands, but as a protest wore black attire for the remainder of the school year.

Subsequently, the students through their parents sued the school district for violating their right to free speech and freedom of expression. The US District Court for the Southern District of Iowa sided with the school's position, ruling that wearing the armbands could disrupt learning. The students then appealed the ruling to the US Court of Appeals for the Eighth Circuit but lost and finally appealed their case to the Supreme Court of the United States.

In a 7-2 decision, the Supreme Court ruled, in a majority opinion by Justice Abe Fortas, that the constitutional protections of the First Amendment applied to public schools and neither students nor teachers "shed their constitutional right to freedom of speech or expression at the schoolhouse gate." The Court took the position that school officials could not censor student speech unless it disrupted the educational process, and wearing black armbands did not disrupt the learning environment of the schools.

The dissenting opinion, written by Justice Hugo Black, argued that the First Amendment does not grant the right to express any opinion at any time. Students attend school to learn, not teach. The armbands were a distraction to the educational process and learning environment. Therefore, school officials, acting on a legitimate interest in school order, should have broad authority to maintain a productive learning environment.

Justice Abe Fortas's Majority Opinion

. . . The District Court recognized that the wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment. . . . The wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to "pure speech" which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment. . . .

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years. . . .

In *West Virginia v. Barnette, supra*, this Court held that . . . "they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." . . . Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities. . . .

The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students. . . .

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the

State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. . . .

. . . A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others. . . .

Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. . . .

As we have discussed, the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred. These petitioners merely went about their ordained rounds in school. Their deviation consisted only in wearing on their sleeve a band of black cloth, not more than two inches wide. They wore it to exhibit their disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them. They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder. In the circumstances, our Constitution does not permit officials of the State to deny their form of expression. . . .

Justice Hugo Black's Minority Opinion

The Court's holding in this case ushers in what I deem to be an entirely new era in which the power to control pupils by the elected "officials of state supported public schools . . ." in the United States is in ultimate effect transferred to the Supreme Court . . . whether students and teachers may use the schools at their whim as a platform for the exercise of free speech—"symbolic" or "pure"—and whether the courts will allocate to themselves the function of deciding how the pupils' school day will be spent. . . . I have never believed that any person has a right to give speeches or engage in demonstrations where he pleases and when he pleases. This Court has already rejected such a notion. In *Cox v. Louisiana*, 379 US 536, 554 (1965), for example, the Court clearly stated that the rights of free speech and assembly "do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time." . . .

. . . Detailed testimony by some of them shows their armbands caused comments, warnings by other students, the poking of fun at them, and a warning by an older football player that other, nonprotesting students had better let them alone. There is also evidence that a teacher of mathematics had his lesson period practically "wrecked" chiefly by disputes with Mary Beth Tinker, who wore her armband for her "demonstration." Even a casual reading of the record shows that this armband did divert students' minds from their regular lessons, and that talk, comments, etc., made John Tinker "self-conscious" in attending school with his armband. While the absence of obscene remarks or boisterous and loud disorder perhaps justifies the Court's statement that the few armband students did not actually "disrupt" the classwork, I think the record overwhelmingly shows that the armbands did exactly what the elected school officials and principals foresaw they would, that is, took the students' minds off their classwork and diverted them to thoughts about the highly emotional subject of the Vietnam war. And I repeat that if the time has come when pupils of state-supported schools, kindergartens, grammar schools, or high schools, can defy and flout orders of school officials to keep their minds on their own schoolwork, it is the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary. . . .

. . . The truth is that a teacher of kindergarten, grammar school, or high school pupils no more carries into a school with him a complete right to freedom of speech and expression than an anti-Catholic or anti-Semite carries with him a complete freedom of speech and religion into a Catholic church or Jewish synagogue. Nor does a person carry with him into the United States Senate or House, or into the Supreme Court, or any other court, a complete constitutional right to go into those places contrary to their rules and speak his mind on any subject he pleases. It is a myth to say that any person has a constitutional right to say what he pleases, where he pleases, and when he pleases. . . .

. . . Of course students, like other people, cannot concentrate on lesser issues when black armbands are being ostentatiously displayed in their presence to call attention

to the wounded and dead of the war, some of the wounded and the dead being their friends and neighbors. It was, of course, to distract the attention of other students that some students insisted up to the very point of their own suspension from school that they were determined to sit in school with their symbolic armbands.

. . . The schools of this Nation have undoubtedly contributed to giving us tranquility and to making us a more law-abiding people. Uncontrolled and uncontrollable liberty is an enemy to domestic peace. We cannot close our eyes to the fact that some of the country's greatest problems are crimes committed by the youth, too many of school age. School discipline, like parental discipline, is an integral and important part of training our children to be good citizens—to be better citizens. Here a very small number of students have crisply and summarily refused to obey a school order designed to give pupils who want to learn the opportunity to do so. . . . It is no answer to say that the particular students here have not yet reached such high points in their demands to attend classes in order to exercise their political pressures. Turned loose with lawsuits for damages and injunctions against their teachers as they are here, it is nothing but wishful thinking to imagine that young, immature students will not soon believe it is their right to control the schools rather than the right of the States that collect the taxes to hire the teachers for the benefit of the pupils. This case, therefore, wholly without constitutional reasons in my judgment, subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students. I, for one, am not fully persuaded that school pupils are wise enough, even with this Court's expert help from Washington, to run the 23,390 public school systems in our 50 States. . . .

Source: *Tinker et al. v. Des Moines Independent Community School District et al.*, 393 US 503 (1969), *US Reports*, pp. 505–526, Library of Congress, cdn.loc.gov/service/ll/usrep/usrep393/usrep393503/usrep393503.pdf.

TEACHING CIVICS THROUGH HISTORY

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Document Analysis 2: *Tinker v. Des Moines Independ. Com. Sch. District* (1969)

Important Phrases

In this US Supreme Court decision, which phrases or sentences related to free speech in the United States are the most important and powerful? Choose three and give the reason for each choice.

Phrase 1:

Why is this phrase important or powerful?

Phrase 2:

Why is this phrase important or powerful?

Phrase 3:

Why is this phrase important or powerful?

TEACHING CIVICS THROUGH HISTORY

NAME

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CRITICAL THINKING QUESTIONS

Cite evidence from the text in your answers.

1. Briefly explain the question about students' First Amendment rights that was presented before the Supreme Court in *Tinker v. Des Moines Independent Community School District* (1969).

2. Based on the majority opinion of Justice Abe Fortas, briefly explain how the Supreme Court justified and supported its ruling on this issue.

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3. Based on his minority opinion, how did Justice Hugo Black justify his disagreement with this ruling?

4. In your view, to what extent should schools be able to restrict students' freedom of speech and expression on campus?

Document 3: Excerpts from the US Supreme Court Decision in *Hazelwood School District et al. v. Kuhlmeier et al.* (1988)

Background

In a 5-3 decision, the Supreme Court in its majority opinion, written by Justice Byron White, upheld the authority of public high school administrators, in this case a high school principal, to censor and remove two articles that were to be published in the *Spectrum*, the school-sponsored student newspaper of Hazelwood East High School in suburban St. Louis, Missouri. The articles concerned teen pregnancy and the effects of divorce on children. Justice White asserted that the rights of students in public schools are not identical to those of adults in other settings. A student's First Amendment rights within a school setting are contingent on the type, location, and circumstances of the expression. At Hazelwood High School the student newspaper was published as part of a journalism class and consequently subject to curriculum standards.

Therefore, the Supreme Court deemed that this publication in these circumstances was not a "public forum" for student expression and not aligned to the legal standards that were previously established in *Tinker v. Des Moines Independent Community School District* (1969). Although the student journalists claimed that their First Amendment rights of freedom of speech and freedom of the press had been violated, the Supreme Court ruled that the high school principal had acted appropriately and legally in censoring the school newspaper. The First Amendment offers weaker protections to curriculum-based and school-sponsored publications (school newspapers, yearbooks, assembly and graduation speeches, etc.) that are not viewed as forums for public expression.

Justice Byron White's Majority Opinion

Held: Respondents' First Amendment rights were not violated.

(a) First Amendment rights of students in the public schools are not automatically coextensive with the rights of adults in other settings, and must be applied in light of the special characteristics of the school environment. A school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school.

(b) The school newspaper here cannot be characterized as a forum for public expression. School facilities may be deemed to be public forums only if school authorities have by policy or by practice opened the facilities for indiscriminate use by the general public, or by some segment of the public, such as student organizations. If the facilities have instead been reserved for other intended purposes, communicative or otherwise, then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community. The school officials in this case did not deviate from their policy that the newspaper's production was to be part of the educational curriculum and a regular classroom activity under the journalism teacher's control as to almost every aspect of publication. The officials did not evince any intent to open the paper's pages to indiscriminate use by its student reporters and editors, or by the student body generally. Accordingly, school officials were entitled to regulate the paper's contents in any reasonable manner.

(c) The standard for determining when a school may punish student expression that happens to occur on school premises is not the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression. Educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.

(d) The school principal acted reasonably in this case in requiring the deletion of the pregnancy article, the divorce article, and the other articles that were to appear on the same pages of the newspaper.

Justice William J. Brennan's Dissenting Opinion

When the young men and women of Hazelwood East High School registered for Journalism II, they expected a civics lesson. *Spectrum*, the newspaper they were to publish, "was not just a class exercise in which students learned to prepare papers and hone writing skills, it was a . . . forum established to give students an opportunity to express their views while

gaining an appreciation of their rights and responsibilities under the First Amendment to the United States Constitution. . . . [At] the beginning of each school year," the student journalists published a Statement of Policy—tacitly approved each year by school authorities—announcing their expectation that "*Spectrum*, as a student-press publication, accepts all rights implied by the First Amendment. . . . Only speech that 'materially and substantially interferes with the requirements of appropriate discipline' can be found unacceptable and therefore prohibited." The school board itself affirmatively guaranteed the students of Journalism II an atmosphere conducive to fostering such an appreciation and exercising the full panoply of rights associated with a free student press. "School sponsored student publications," it vowed, "will not restrict free expression or diverse viewpoints within the rules of responsible journalism."

This case arose when the Hazelwood East administration breached its own promise, dashing its students' expectations. The school principal, without prior consultation or explanation, excised six articles—comprising two full pages—of the May 13, 1983, issue of Spectrum. He did so not because any of the articles would "materially and substantially interfere with the requirements of appropriate discipline," but simply because he considered two of the six "inappropriate, personal, sensitive, and unsuitable" for student consumption.

In my view, the principal broke more than just a promise. He violated the First Amendment's prohibitions against censorship of any student expression that neither disrupts classwork nor invades the rights of others, and against any censorship that is not narrowly tailored to serve its purpose.

Public education serves vital national interests in preparing the Nation's youth for life in our increasingly complex society and for the duties of citizenship in our democratic Republic. The public school conveys to our young the information and tools required not merely to survive in, but to contribute to, civilized society. It also inculcates in tomorrow's leaders the "fundamental values necessary to the maintenance of a democratic political system." All the while, the public educator nurtures students' social and moral development by transmitting to them an official dogma of "'community values.'"

The public educator's task is weighty and delicate indeed. It demands particularized and supremely subjective choices among diverse curricula, moral values, and political stances to teach or inculcate in students, and among various methodologies for doing so. Accordingly, we have traditionally reserved the "daily operation of school systems" to the States and their local school boards. We have not, however, hesitated to intervene where their decisions run afoul of the Constitution.

Free student expression undoubtedly sometimes interferes with the effectiveness of the school's pedagogical functions. . . .

If mere incompatibility with the school's pedagogical message were a constitutionally sufficient justification for the suppression of student speech, school officials could censor each of the students or student organizations . . . converting our public schools into "enclaves of totalitarianism," that "strangle the free mind at its source." The First Amendment permits no such blanket censorship authority. While the "constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," students in the public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," . . . public educators must accommodate some student expression even if it offends them or offers views or values that contradict those the school wishes to inculcate. . . .

Finally, even if the majority were correct that the principal could constitutionally have censored the objectionable material, I would emphatically object to the brutal manner in which he did so. . . . The principal used a paper shredder. He objected to some material in two articles, but excised six entire articles. He did not so much as inquire into obvious alternatives, such as precise deletions or additions (one of which had already been made), rearranging the layout, or delaying publication. Such unthinking contempt for individual rights is intolerable from any state official. It is particularly insidious from one to whom the public entrusts the task of inculcating in its youth an appreciation for the cherished democratic liberties that our Constitution guarantees. . . .

The Court['s] . . . analysis in this case . . . denudes high school students of much of the First Amendment protection that *Tinker* itself prescribed. Instead of "teach[ing] children to respect the diversity of ideas that is fundamental to the American system," and "that our Constitution is a living reality, not parchment preserved under glass," the Court today "teach[es] youth to discount important principles of our government as mere platitudes." The young men and women of Hazelwood East expected a civics lesson, but not the one the Court teaches them today.

I dissent.

Source: *Hazelwood School District et al v. Kuhlmeier et al,* 484 US 260 (1988), *US Reports,* pp. 260–261 and 277–291, Library of Congress, cdn.loc.gov/service/ll/usrep/usrep484/usrep484260/usrep484260.pdf.

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Document Analysis 3: *Hazelwood School District et al. v. Kuhlmeier et al.* (1988)

IMPORTANT PHRASES

In this US Supreme Court decision, which phrases or sentences related to free speech in the United States are the most important and powerful? Choose three and give the reason for each choice.

Phrase 1:

Why is this phrase important or powerful?

Phrase 2:

Why is this phrase important or powerful?

Phrase 3:

Why is this phrase important or powerful?

TEACHING CIVICS THROUGH HISTORY

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DATE PERIOD

CRITICAL THINKING QUESTIONS

Cite evidence from the text in your answers.

1. In *Hazelwood School District et al. v. Kuhlmeier et al.* (1988), briefly explain the issue concerning students' First Amendment rights in school that was presented before the Supreme Court.

2. Based on the majority opinion of Justice Byron White, briefly explain how the Supreme Court justified and supported its ruling on this issue.

3. Based on his minority opinion, how did Justice William Brennan justify his dissent from this ruling?

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4. How did the Supreme Court's ruling in *Hazelwood School District et al. v. Kuhlmeier et al.* (1988) compare to its earlier decision in *Tinker v. Des Moines Independent Community School District* (1969) on students' First Amendment rights to freedom of speech and expression?

5. In your view, to what extent should schools be able to restrict students' freedom of speech and expression on campus?

Document 4: Excerpts from the US Supreme Court Decision in *The New York Times Co. v. United States* (1971)

Background

During the late 1960s and early 1970s, an increasing number of Americans became critical of the US military involvement in the war in Vietnam. For nearly six years the United States had been engaged in intense military conflict against Communist North Vietnam and its aligned guerrilla groups in an effort liberate South Vietnam from the threat of Communism. By 1971, approximately 58,000 American soldiers had been killed, and there were growing protests and widespread dissent against government policies that escalated American participation in the war.

In 1967, Secretary of Defense Robert McNamara had commissioned a classified study of American involvement in Vietnam. Upon its completion in 1968, this project comprised 47 volumes (more than 7,000 pages). In early 1971, Daniel Elsberg, a RAND Corporation employee who had done work on this project, secretly made copies of the documents, known as the "Pentagon Papers," and shared them with editors and reporters at the *New York Times*, who began publishing them on June 13, 1971. President Richard Nixon obtained a legal restraining order on the grounds of national security, which suspended subsequent publication of these classified documents.

When this order was sustained by the Second Circuit Court of Appeals, the *New York Times* filed an appeal with the Supreme Court, claiming that the constitutional guarantee to freedom of the press superseded the need of the executive branch of the federal government to protect and maintain the secrecy of this information. The Supreme Court issued its ruling in a 6-3 decision on June 30, 1971, which dissolved the executive restraining order and permitted the *New York Times* and the *Washington Post* to resume publication of this classified information, claiming that the First Amendment protected the right of the newspapers to print the classified information.

Justice Hugo Black's Majority Opinion with Concurrence from Justice William O. Douglas

. . . I believe that every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment. . . . [I]t is unfortunate that some of my Brethren are apparently willing to hold that the publication of news may sometimes be enjoined. Such a holding would make a shambles of the First Amendment. . . .

. . . The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. . . .

. . . To find that the President has "inherent power" to halt the publication of news by resort to the courts would wipe out the First Amendment. . . .

. . . The word "security" is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. . . .

Justice William J. Brennan's Concurrence with the Majority Opinion

. . . The entire thrust of the Government's claim throughout these cases has been that publication of the material sought to be enjoined "could," or "might," or "may" prejudice the national interest in various ways. But the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result. . . . [T]here is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden. . . . Such cases may arise only when the Nation "is at war," during which times "no one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number or location of troops." . . . "The chief purpose of [the First Amendment's] guaranty [is] to prevent previous restraints upon publication." Thus, only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of transport already at sea can support even the issuance of an interim restraining order. . . .

Justice Potter Stewart Concurring with the Majority Opinion

In the governmental structure created by our Constitution, the Executive is endowed with enormous power in the two related areas of national defense and international relations. This power, largely unchecked by the Legislative and Judicial branches, has been pressed to the very hilt since the advent of the nuclear missile age. For better or for worse, the simple fact is that a President of the United States possesses vastly greater constitutional independence in these two vital areas of power than does, say, a prime minister of a country with a parliamentary form of government.

In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press, there cannot be an enlightened people. . . .

. . . Under the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully. It is an awesome responsibility, requiring judgment and wisdom of a high order. I should suppose that moral, political, and practical considerations would dictate that a very first principle of that wisdom would be an insistence upon avoiding secrecy for its own sake. For when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion. I should suppose, in short, that the hallmark of a truly effective internal security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained. But be that as it may, it is clear to me that it is the constitutional duty of the Executive . . . to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense. . . .

But in the cases before us, . . . we are asked, quite simply, to prevent the publication by two newspapers of material that the Executive Branch insists should not, in the national interest, be published. I am convinced that the Executive is correct with respect to some of the documents involved. But I cannot say that disclosure of any of them will surely result in direct, immediate, and irreparable damage to our Nation or its people. That being so, there can under the First Amendment be but one judicial resolution of the issues before us. I join the judgments of the Court.

Justice Harry Blackmun's Dissenting Opinion

. . . The First Amendment, after all, is only one part of an entire Constitution. . . . First Amendment absolutism has never commanded a majority of this Court. What is needed here is a weighing, upon properly developed standards, of the broad right of the press to print and of the very narrow right of the Government to prevent. . . . Judge [Malcolm] Wilkey, dissenting in the District of Columbia case, . . . concluded that there were a number of examples of documents that, . . . if published, "could clearly result in great harm to the nation," and he defined "harm" to mean "the death of soldiers, the destruction of alliances, the greatly increased difficulty of negotiation with our enemies, the inability of our diplomats to negotiate." I . . . share his concern. I hope that damage has not already been done. If, however, damage has been done, and if, with the Court's action today, these newspapers proceed to publish the critical documents and there results therefrom "the death of soldiers, . . ." then the Nation's people will know where the responsibility for these sad consequences rests.

Source: *New York Times Co. v. United States,* 43 US 713 (1971), *US Reports,* pp. 714–713, 725–730, and 761–763, Library of Congress, cdn.loc.gov/service/ll/usrep/usrep403/usrep403713/usrep403713.pdf

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Document Analysis 4: *The New York Times Co. v. United States* (1971)

IMPORTANT PHRASES

In this US Supreme Court case, which phrases or sentences related to the First Amendment are the most important and powerful? Choose three and give the reason for each choice.

Phrase 1:

Why is this phrase important or powerful?

Phrase 2:

Why is this phrase important or powerful?

Phrase 3:

Why is this phrase important or powerful?

TEACHING CIVICS THROUGH HISTORY

NAME

DATE PERIOD

CRITICAL THINKING QUESTIONS

Cite evidence from the text in your answers.

1. In *The New York Times Co. v. United States*, briefly explain the First Amendment right that was presented before the Supreme Court.

2. Based on the majority and concurring opinions of Justices Hugo Black, William Douglas, Potter Stewart, and William Brennan, briefly explain how the Supreme Court justified and supported its ruling on this issue.

3. Based on his minority opinion, how did Justice Harry Blackmun justify his dissent from this ruling?

TEACHING CIVICS THROUGH HISTORY

NAME

DATE

PERIOD

Analyzing a Cartoon

Cartoon #

Give your own original title to this cartoon:

What is the significance of the central figure(s) and/or object(s) in this cartoon?

What action is taking place in the cartoon?

What mood or tone is created by the cartoon and what in the image is creating that mood or tone?

Briefly explain the message that the artist is giving to the viewer.

TEACHING CIVICS THROUGH HISTORY

NAME

DATE

PERIOD

Analyzing a Cartoon

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Give your own original title to this cartoon:

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What mood or tone is created by the cartoon and what in the image is creating that mood or tone?

Briefly explain the message that the artist is giving to the viewer.

TEACHING CIVICS THROUGH HISTORY

NAME

DATE

PERIOD

Analyzing a Cartoon

Cartoon #

Give your own original title to this cartoon:

What is the significance of the central figure(s) and/or object(s) in this cartoon?

What action is taking place in the cartoon?

What mood or tone is created by the cartoon and what in the image is creating that mood or tone?

Briefly explain the message that the artist is giving to the viewer.

TEACHING CIVICS THROUGH HISTORY

NAME

DATE

PERIOD

Analyzing a Cartoon

Cartoon #

Give your own original title to this cartoon:

What is the significance of the central figure(s) and/or object(s) in this cartoon?

What action is taking place in the cartoon?

What mood or tone is created by the cartoon and what in the image is creating that mood or tone?

Briefly explain the message that the artist is giving to the viewer.

TEACHING CIVICS THROUGH HISTORY

NAME

DATE PERIOD

Analyzing a Cartoon

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What action is taking place in the cartoon?

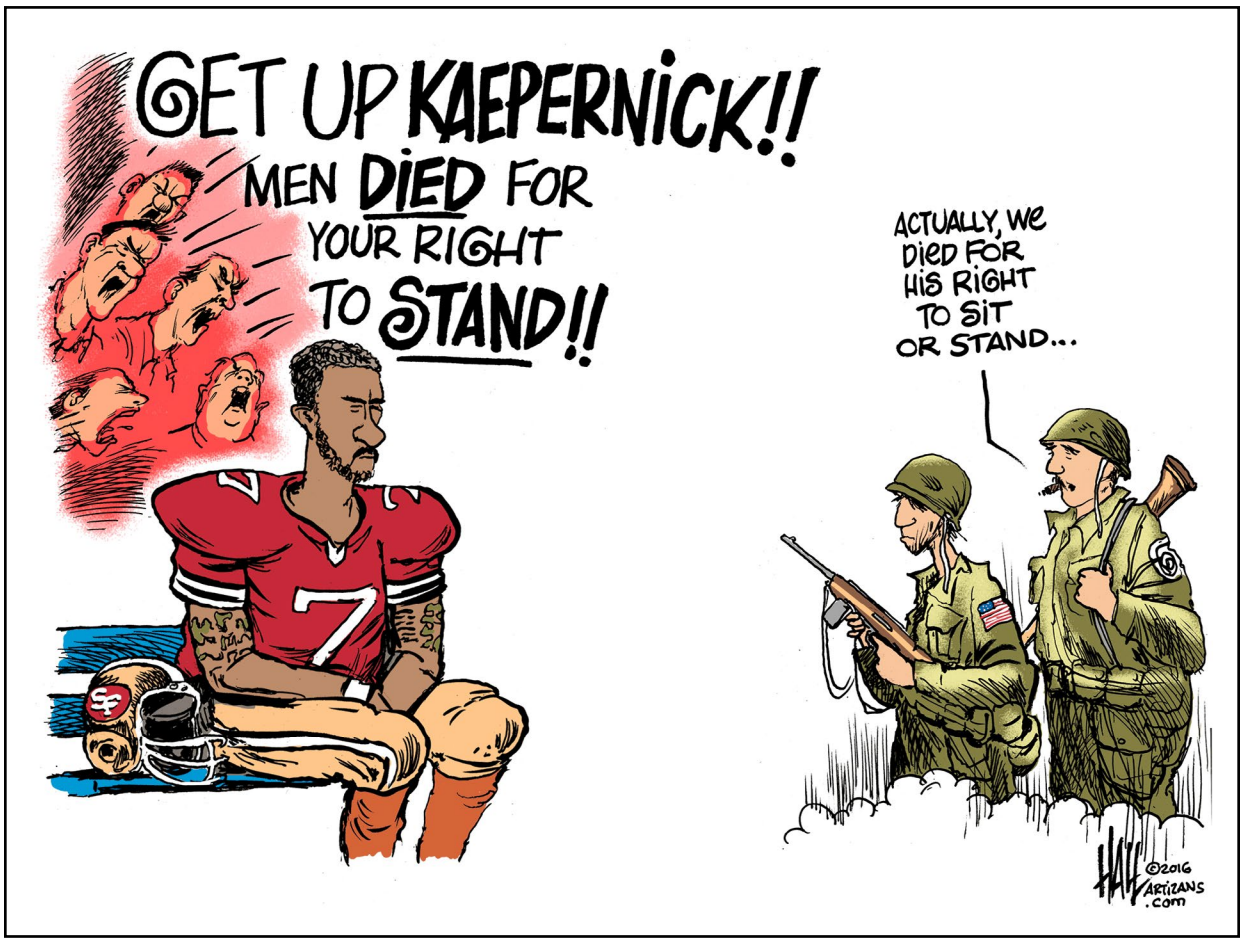
What mood or tone is created by the cartoon and what in the image is creating that mood or tone?

Briefly explain the message that the artist is giving to the viewer.

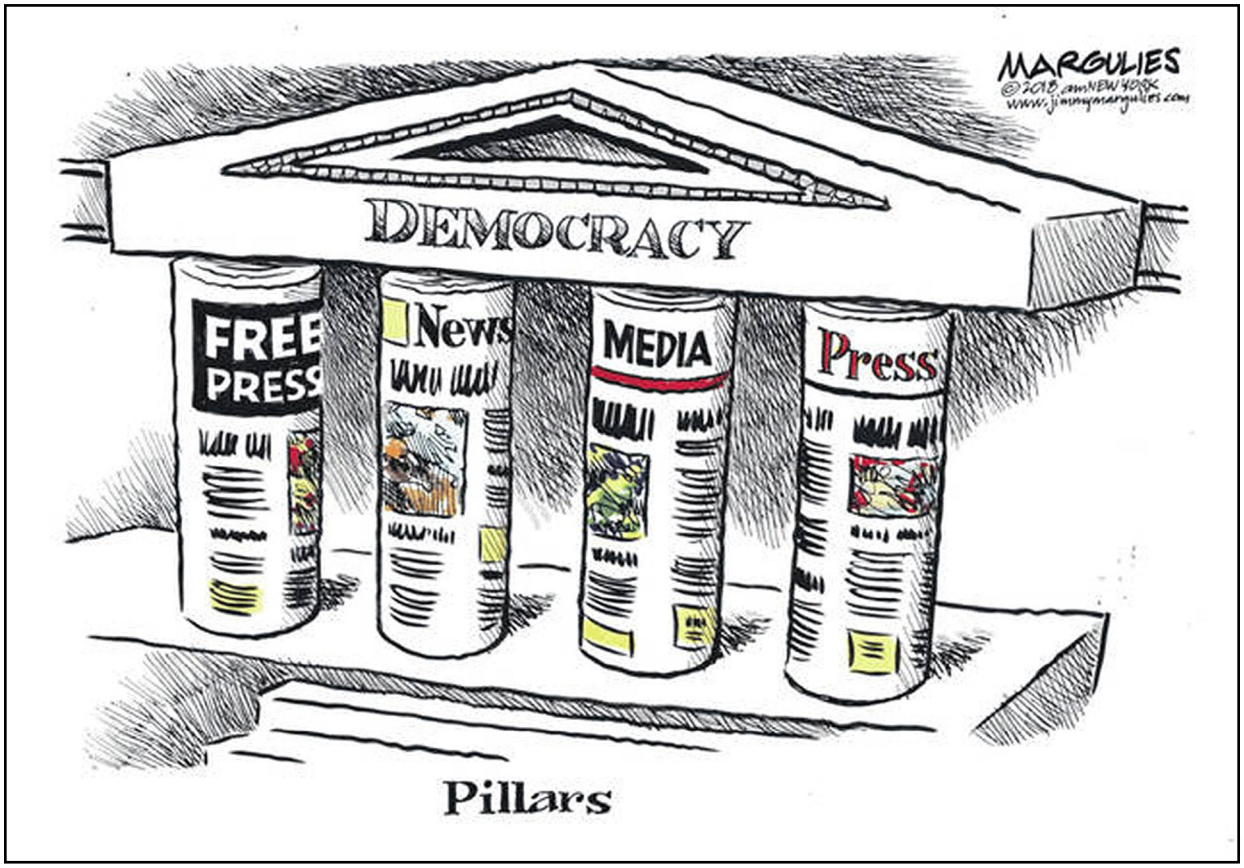
Cartoon 1


FREE SPEECH
CAN YOU JUST MOVE IT
SO IT DOESN'T COVER THEM?
Delicate U.
Copyright by Signe Wilkinson

Cartoon 2


GET UP KAEPERNICK!!
MEN DIED FOR YOUR RIGHT TO STAND!!
ACTUALLY, WE DIED FOR HIS RIGHT TO SIT OR STAND...
©2016 ARTIZANS .com

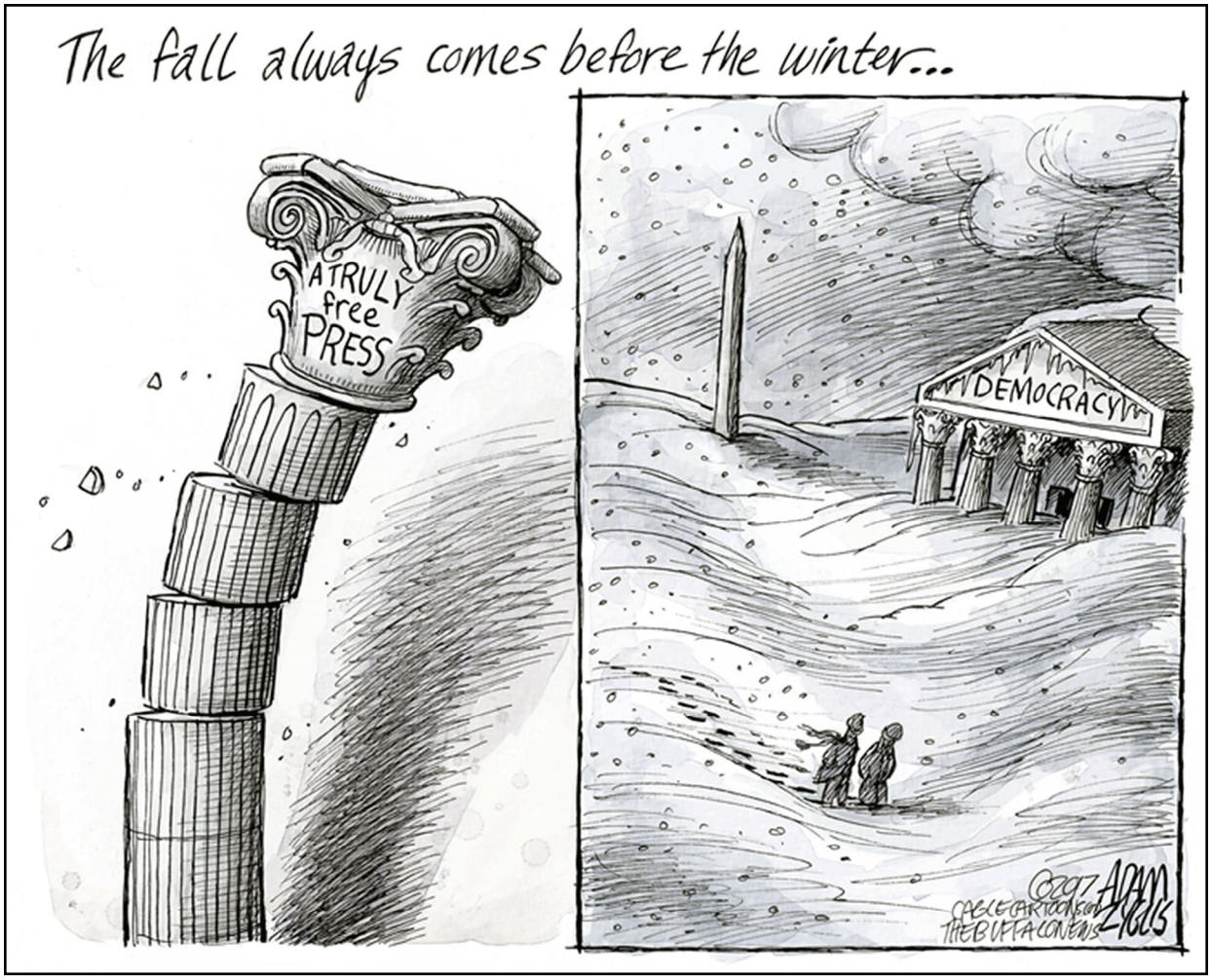
Cartoon 3



Cartoon 4


WANTED
JOURNALISTS
FOR COMMITTING ACTS OF JOURNALISM
DETAIN, HARASS AND INTIMIDATE WITH ANTI-TERRORISM LAWS AND ESPIONAGE ACTS
We Decide What You Need to Know
THE NATIONAL SECURITY STATE
M. WUERKER
POLITICO Universal Uclick

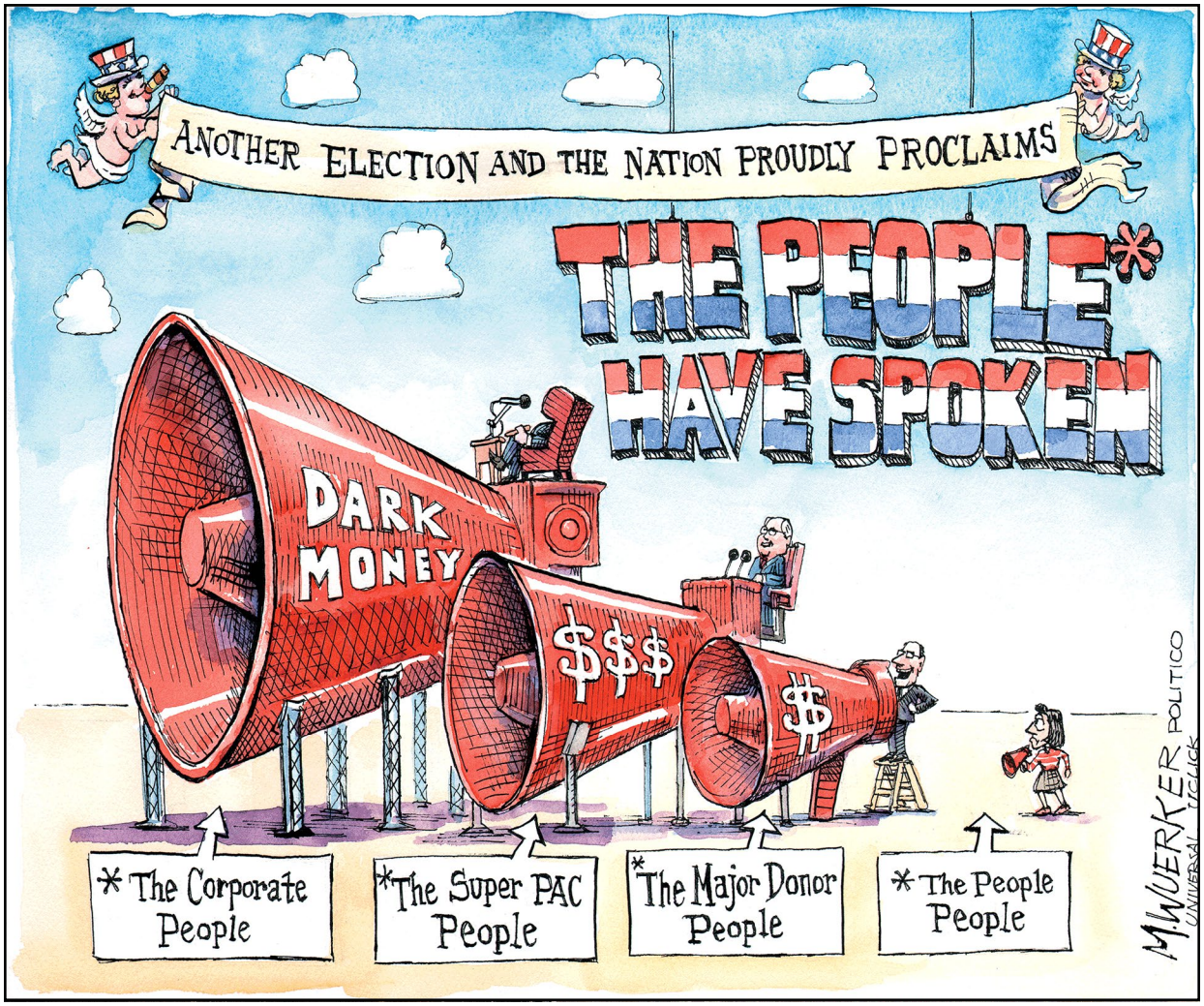
Cartoon 5


The fall always comes before the winter...
A TRULY free PRESS
DEMOCRACY
CAGLECARTOONS.COM
THEBUFFALONEWS
ADAM ZYGLIS

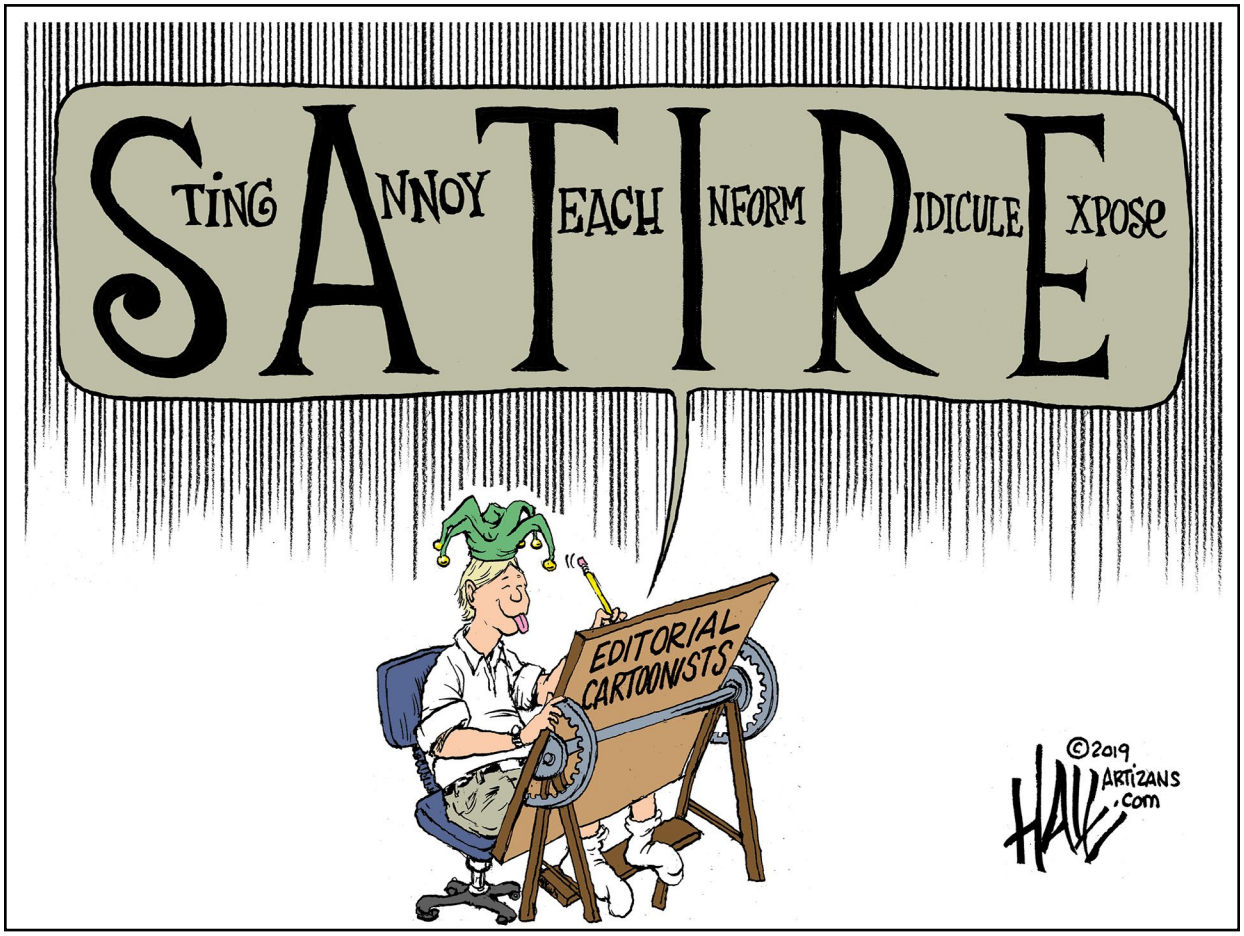
Cartoon 6


ADAM ZYGLIS
THEBUFFALONEWS
CAGLECARTOONS.COM
©2014
IF SPEECH IS FREE, WHY CAN'T I AFFORD IT?
SCOTUS

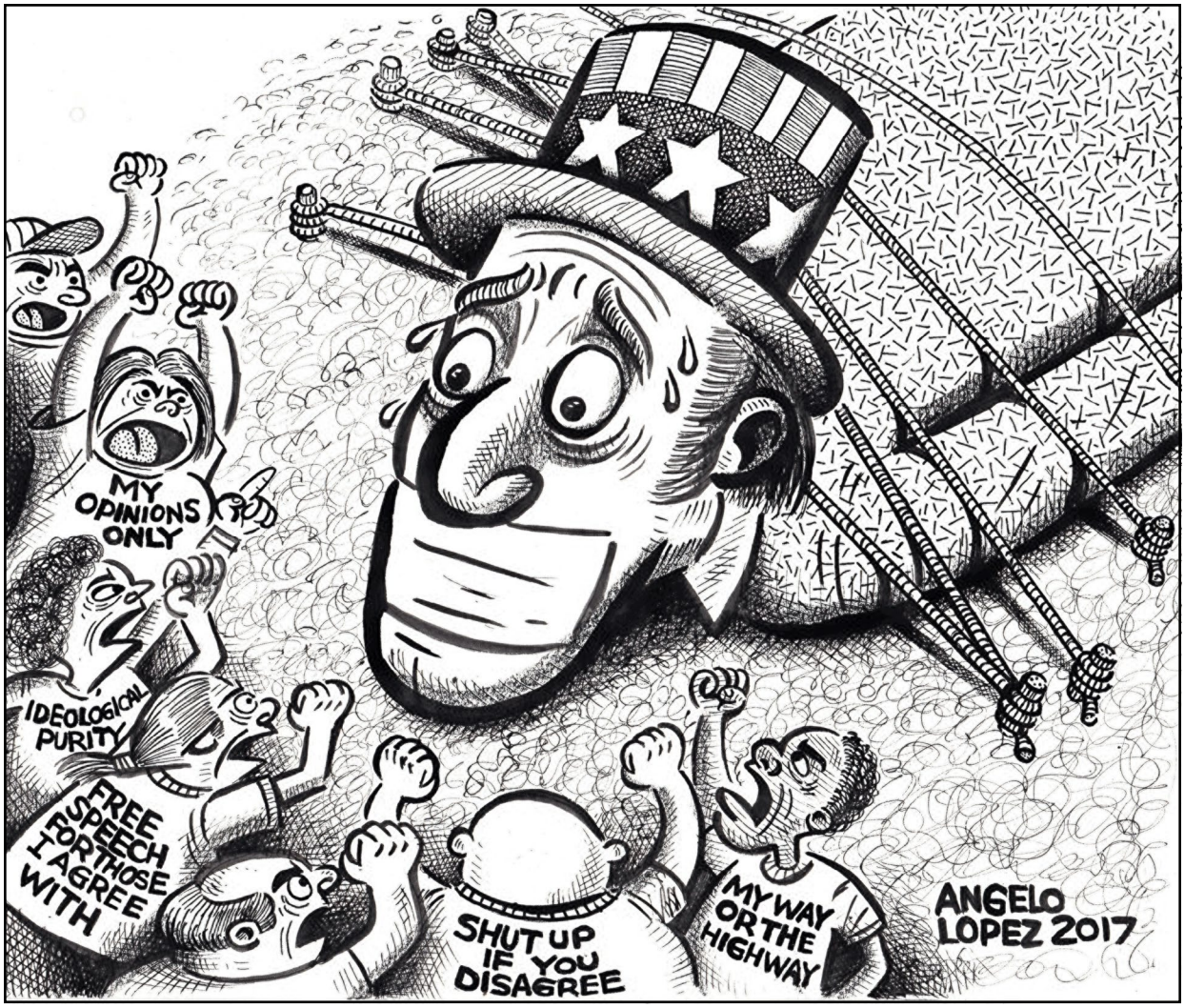
Cartoon 7


ANOTHER ELECTION AND THE NATION PROUDLY PROCLAIMS
THE PEOPLE* HAVE SPOKEN
DARK MONEY
$$$
$
*The Corporate People
*The Super PAC People
*The Major Donor People
*The People People
MWUERKER POLITICO
UNIVERSAL UCLICK

Cartoon 8


SATIRE
STING ANNOY TEACH INFORM RIDICULE EXPOSE
EDITORIAL CARTOONISTS
©2019 ARTIZANS .com
HALL

Cartoon 9


MY OPINIONS ONLY
IDEOLOGICAL PURITY
FREE SPEECH FOR THOSE I AGREE WITH
SHUT UP IF YOU DISAGREE
MY WAY OR THE HIGHWAY
ANGELO LOPEZ 2017

TEACHING CIVICS THROUGH HISTORY

NAME

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Analyzing a News Article

Source *(name of newspaper/magazine/website)*:

Date published:

Article title:

1. What did you already know about the topic?

2. Basic information presented:

Who?

What?

When?

Where?

TEACHING CIVICS THROUGH HISTORY

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DATE PERIOD

Why?

How?

3. Does your article have a right/center/left point of view? What evidence leads you to that conclusion?

4. What audience was this article written for? What evidence supports your conclusion?

5. Reliability of Sources

a. Is there an author's name? If so, who is the author:

b. What source or sources does the author quote or refer to in the article? Do you think these sources are reliable? Why or why not? What evidence supports your conclusion?

6. Personal Reaction: What do you think of this article? (Include two points made in the text to support your answer.)

TEACHING CIVICS THROUGH HISTORY

NAME

DATE PERIOD

Analyzing a News Article

Source *(name of newspaper/magazine/website)*:

Date published:

Article title:

1. What did you already know about the topic?

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Who?

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TEACHING CIVICS THROUGH HISTORY

NAME

DATE PERIOD

Why?

How?

3. Does your article have a right/center/left point of view? What evidence leads you to that conclusion?

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TEACHING CIVICS THROUGH HISTORY

NAME

DATE PERIOD

Analyzing a News Article

Source *(name of newspaper/magazine/website)*:

Date published:

Article title:

1. What did you already know about the topic?

2. Basic information presented:

Who?

What?

When?

Where?

TEACHING CIVICS THROUGH HISTORY

NAME

DATE PERIOD

Why?

How?

3. Does your article have a right/center/left point of view? What evidence leads you to that conclusion?

4. What audience was this article written for? What evidence supports your conclusion?

5. Reliability of Sources

a. Is there an author's name? If so, who is the author:

b. What source or sources does the author quote or refer to in the article? Do you think these sources are reliable? Why or why not? What evidence supports your conclusion?

6. Personal Reaction: What do you think of this article? (Include two points made in the text to support your answer.)

Civil Discourse Guidelines

1. Listen respectfully without interrupting.
2. Allow everyone the opportunity to speak.
3. Criticize ideas, not individuals or groups.
4. Avoid inflammatory language, including name-calling.
5. Ask questions when you don't understand; don't assume you know others' thinking or motivations.
6. Don't expect any individuals to speak on behalf of their gender, ethnic groups, class, status, etc. (or the group(s) you perceive them to be a part of).
7. Base your arguments on evidence, not assumptions.

TEACHING CIVICS THROUGH HISTORY

NAME

DATE

PERIOD

Civic Engagement Project Proposal

Project Title:

Project Participant(s):

Project Goal:

Action Steps:

TEACHER'S COMMENTS

Questions to Consider:

Revisions Needed:

Approved: