

Using Conceptual Tensions and Supreme Court Cases to Increase Critical Thinking in Government and Civics Classrooms

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Each week, U.S. government classes at our school eagerly organize and participate in moot courts. When we began a search for a Supreme Court case study on substantive due process, we found that the only appropriate brief on the StreetLaw website—a treasure trove of student-accessible court case summaries—*Lawrence v. Texas* (2003), was a case on anti-sodomy laws. Ayo cautiously explained the situation to her class of mostly teenage boys, expecting an uproar and potentially insensitive complaints. Instead, there was a moment of silence. Brian, a quiet teenage father who rarely says a word in class, suddenly piped up from the corner of the room, “That’s okay, it’s not about gay sex. It’s about privacy.”

And indeed it was. In the following moot court, a roomful of teenagers passionately and maturely wrestled with the tension between protecting individual privacy rights, on the one hand, and protecting a perceived “common good of family values” on the other. Our students, who have studied public policy since 9th grade, are quite liberal in their views, and individual rights carried the day hands down.

Our school requires two 12TH-grade civics courses: one is a traditional U.S. government class and the other is a thesis class in which students analyze a public policy issue of their choice, write a 15-page paper and defend it to an external panel as part of their graduation requirement. After much experimentation, we have found that these courses work best when they are deeply rooted in conceptual tensions and Supreme Court cases. Activities like the moot courts, which encourage students to investigate government concepts in a rigorous way, have revitalized our classrooms and fostered a love for political thinking amongst our students.

Concepts-based Curriculum and Instruction and Supreme Court Cases

In her book *Concept-based Curriculum and Instruction for the Thinking Classroom*, Lynn Erickson argues that focusing instruction on concepts and transferable understandings (which use facts as a tool rather than an end point) deepens understanding and heightens engagement.¹ Instead of simply memorizing facts, dates and events, our social studies students should be grappling with universal, timeless concepts and applying them to situations that are relevant to their lives.

As teachers of government and civics, we were thrilled to discover that at the root of every public policy issue that we wanted our students to understand lie several constitutional, political, or philosophical conceptual *tensions*: individual rights vs. the common good (including liberty vs. security); limited vs. empowered government (including state vs. federal powers and limited vs. empowered executive power); and equity vs. efficiency (including equality of opportunity vs.

equality of outcome). These dichotomous tensions are usually universal, timeless, historical tensions between opposing values or beliefs. Almost all of these debates have also been the subject of landmark Supreme Court cases, and the arguments for both sides were usually neatly laid out in the majority opinion and dissents. We set about reforming our curriculum to center around these conceptual tensions (see Unit 1, on pp 208–210).

We found that these conceptual tensions lie at the root of most U.S. government concepts, philosophies, history, and primary documents—content that many young people see as boring and irrelevant to their lives. Yet these same tensions also characterize many modern-day public policy topics that the students consider interesting and relevant: video game violence, Internet censorship, medical marijuana, same-sex marriage, affirmative action, etc. Teaching U.S. government concepts through these conceptual tensions allowed us to show, for example, how the modern-day debate over video game violence is rooted in natural rights and classical republican philosophies, the Declaration of Independence, the Constitution, and landmark Supreme Court cases on free speech; and how the debate over same-sex marriage is rooted in both the Supreme Court’s evolving definition of privacy and our country’s historical debate over federalism and anti-federalism. In this manner, students see the relevance and applicability of U.S. government principles. Instead of memo-

rizing them, they apply them to the issues that directly interest and affect them.

We drew on many experts in the field, in addition to Erickson. This “tensions” component is similar to Hartoonian and Scotter’s four “value tensions.”² The case for teaching with Supreme Court cases and the Constitution was argued by Diana Hess and Lee Arbetman.³ Finally, George Hillocks contends in his book *Teaching Argumentative Writing* that Supreme Court cases make ready-made “data sets” with which to teach argumentative writing. In light of our recent shifts to the Common Core State Standards, this curricular transformation made even more sense.

Our curriculum reforms began in thesis class, where Ayo found that asking students to analyze these tensions transformed the regurgitating, “knowledge-telling,”⁴ “book report” thesis papers and presentations of previous years into exciting, insightful, analytical presentations that caused even our expert judges on public policy to reflect on the tensions. Students used constitutional law and Supreme Court cases to analyze public policy, instead of just memorizing and spouting a litany of facts about their public policy topic. The “facts of the case” supplied an anecdotal story that helped struggling learners connect with the theoretical issues. The majority opinion and dissents provided strong arguments for both their claim and counter-claim, which also facilitated instruction on analytical and argumentative writing.⁵

In government class, instead of memorizing civic and government facts in a vacuum, students “picked them up” organically within the context of these conceptual tensions and Supreme Court public policy case studies. Rather than memorizing the three branches of government and the powers and limits of each, students analyzed and debated how the different powers and limits of each branch give it “too much” or “too little” power at different junctures in history or within the context of different public policy situations. Specifically, in a moot court of *Hamdan v. Rumsfeld*, students debated

whether the executive branch exceeded its powers when it created the Guantanamo Bay military commissions.

Impacts on the Classroom

Focusing instruction on conceptual *tensions* multiplies the benefits of a concepts-based curriculum. The tensions make it easier for us to show connections between historical events or issues and modern-day events or issues that students know and care about; and it makes it easier for students to use their modern-day knowledge and interest to understand historical events and issues. The result has amazed us. Our students are now doing complex, intellectual work every day. Their writings, discussions, and presentations rival those of law students.

Theses on child abuse now analyze the tension the government faces between prioritizing parental rights (protected by the 14TH Amendment’s due process clause) on the one hand, and prioritizing the state’s interest in protecting children, on the other. As a result, the child welfare policy swings like a pendulum between child removal and parental support programs. Theses on medical marijuana and gay marriage now analyze federalism and the tension between state (10TH Amendment) and federal (Commerce clause) powers.

Teaching students federalism through historical events had yielded mixed results in past U.S. government classes, but now that we teach it through the issues of medical marijuana and same-sex marriage, federalism is their favorite topic. Once they understand the historical and constitutional context for a given unit’s tension, students spent the bulk of each unit exploring the tension through current public policy Supreme Court cases. We have found that this “issue based” or “controversial classroom” approach espoused by Hess has been particularly effective for students with non-traditional learning styles and who previously had low academic motivation.⁶ Additionally, each year several students with learning disabilities discover talents for analysis that had been hidden behind their struggles to read, write, and memorize. In fact,

the best thesis presentation prize last year went to a student with a learning disability who had dragged herself through high school with a grade point average in the low 2-point range.

The end result of marrying conceptual tensions, Supreme Court cases, and democratic discussions in this manner was recently summarized by one of my students in the following way: “In most classes you learn to find the right answer, but in U.S. government class you begin to gain the skill of going beyond finding an answer, to finding the true idea under issues. And you learn that there is no right or wrong—only an opposite opinion.”⁷

See pp. 208–210 for the unit on **Individual Rights vs. the Common Good.**

Notes

1. H. Lynn Erickson, *Concept-Based Curriculum and Instruction: Teaching Beyond the Facts* (Thousand Oaks, Calif.: Corwin Press, 2007).
2. H. Michael Hartoonian and Richard Van Scotter, “The Paradox of the Democratic Mind: Value Tensions and Argument,” *OAH Magazine of History* 20 (July 2006): 23–25.
3. Diana Hess and Lee Arbetman, “Cases, Controversy, and the Court: Teaching about the Supreme Court,” *Social Education* 66, no. 1 (Jan/Feb 2002).
4. C. Bereiter and M. Scardamalia, *The Psychology of Written Composition* (Hillsdale, N.J.: Lawrence Erlbaum Associates, 1987).
5. George Hillocks, Jr., *Teaching Argument Writing, Grades 6–12: Supporting Claims with Relevant Evidence and Clear Reasoning* (Portsmouth, N.H.: Heinemann, 2011).
6. Diana E Hess, *Controversy in the Classroom: The Democratic Power of Discussion* (New York and London: Routledge, 2009).

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UNIT 1: Individual Rights vs. the Common Good

2-4 weeks (10 lessons, 1 quiz per day)

Enduring Understandings:

Individual Rights vs. the Common Good: When individuals exercise their individual rights, they can sometimes negatively affect others (the common good). The Bill of Rights demands of the government that it not violate individual rights. Other parts of the Constitution, however, and societal expectations, demand that the government protect the common good. The government is therefore charged with two goals that are sometimes in conflict. Government must decide where the balancing line lies. The value our country places on individual rights is rooted in natural rights philosophy. The value our country places on the common good is rooted in classical republicanism philosophy. Generally, the legislative branch tends to prioritize protecting the common good, while the Supreme Court tends to favor protecting individual rights.

Essential Questions:

Why is it important for our government to protect individual rights?

Why is it important for our government to protect the common good?

How does government balance individual rights with the common good?

At what point does honoring individual rights violate the common good?

Objectives:

1. Students can describe the historical and philosophical arguments laid out by **natural rights and classical republican philosophers** for prioritizing individual rights vs. the common good.
 2. Students can explain the meaning of the **First, Fourth, and Fifth Amendments in the Bill of Rights and of substantive due process in the 14th Amendment** and identify when laws and policies have violated them at various points in our history.
 3. Students can analyze the tension between individual rights and the common good and apply this conceptual framework to public policy scenarios.
 4. Students can analyze the strengths and weaknesses of arguments for and against prioritizing individual rights vs. the common good when applied to public policies (through Supreme Court cases).
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Lesson 1 Introduction and “Take a Stand”

Intro to conceptual/value tensions

Definition of individual rights and the common good

Intro to tension between individual rights and the common good

Students “take a stand” on a taped line across the classroom floor between “individual rights” on one side of the room and “common good” on the other for a number of modern public policy issues: censorship violence in video games (*Brown v. EMA*); censoring inciting speech (*Brandenburg v. Ohio*); refusing life support (passive euthanasia, *Cruzan v. Missouri Dept of Health*); assisted suicide (active euthanasia, *Washington v. Glucksberg*); abortion (*Planned Parenthood v. Casey*); partial birth abortions (*Gonzales v. Carhart*). Volunteers explain their stances. One student represents the Court and reads a summary of the Court’s “stand” on the issue.

Pondering in pairs: “Determine the *criteria* or *rule* that the Supreme Court seems to be using when deciding how to balance individual rights and the common good when making public policy.”

Lesson 2 Historical/Philosophical Roots: Individual Rights

Intro to natural rights philosophy (John Locke and Thomas Hobbes)

Overview of historical experiences reinforcing the value placed on individual rights

Students identify influences of natural rights philosophy in the Declaration of Independence

Pondering in pairs: "Why is it important for the government to protect individual rights?"

Sources for close reading:

Thomas Hobbes: "During the time men live without a common power to keep them all in check, they are in that condition called war; and such a war where every man, against every man. Without that law ... the life of man is solitary, poor, nasty, brutish and short."

John Locke: "A state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another..." "[Man] seeks out, and is willing to join in society with others who are already united, or have a mind to unite for the mutual preservation of their lives, liberties, and estates [property]." "If a ruler seeks absolute power, if he acts both as judge and participant in disputes, he puts himself in a state of war with his subjects and we have the right and the duty to kill such rulers and their servants."

Lesson 3 Historical/Philosophical Roots: Common Good

Intro to classical republicanism (Aristotle and Cicero)

Students identify influences of classical republicanism in the Preamble

Pondering in pairs: "Why is it important for the government to promote the common good?"

Sources for close reading:

Aristotle: "The true end of a city is a good life, and it is the common interest to achieve this: the right kind of rule is authority exercised in the common interest."

We may thus distinguish "right" constitutions, which are directed to the common interest, and "wrong" or "perverted" constitutions directed to the selfish interest of the ruling body..." "For this reason people desire to live a social life even when they stand in no need of mutual succor (help); but they are also drawn together by a common interest, in proportion as each attains a share in the good life. The good life is the chief end, both for the community as a whole and for each of us individually."

Cicero: "... [L]et those who preside over the state obey two rules,—one, that they watch for the well being of their fellow citizens, forgetting their own private interests,—and second, that they care for the whole body of the people, and not, while they watch over a portion of it, neglect other portions. As our guardians, the state should work for the benefit of all."

Lesson 4 Judicial Review and Supreme Court rulings/ precedents

Review of three branches

Explanation of court's power of judicial review, Federalist 78 and *Marbury v. Madison* (1803)

Explanation of the idea of Supreme Court "precedents"

Definition of types of opinions: "majority"; "concurrent"; and "dissent"

Pondering in pairs: "Congress often tends to prioritize the common good, while the Supreme Court tends to prioritize individual rights. Why?"

Lesson 5 Free Speech vs. the Common Good

Overview of the First Amendment

Explanation of types of unprotected speech

Pondering in pairs: "Why do you think the Supreme Court allows schools to limit students' free speech?"

Lesson 6
Free Speech vs. the Common Good Moot Court

Overview of procedure

Teacher introduces *Synder v. Phelps* (2011)

Students read case and prepare arguments

Moot Court

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Lesson 7
Rights of the Accused vs. Security/Common Good

Overview and close reading of the Fourth, Fifth, Sixth and Eighth Amendments

Introduction of concepts: Liberty vs. Security

Pondering in Pairs: Under what circumstances should the government limit individual rights of the accused? What is justice? Justice for the accused, or justice for the victim? How should we balance our need for security with our need for liberty?

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Lesson 8
Rights of the Accused vs. Security/Common Good Moot Court

Overview of procedure

Teacher introduces *United States v Jones* (2012)

Students read case and prepare arguments

Moot Court

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Lesson 9
Substantive Due Process Rights vs. the Common Good

Overview of due process clause of the 14th Amendment

Explanation of substantive due process

Landmark substantive due process Supreme Court rulings

Pondering in pairs: “The Supreme Court has used the concept of substantive due process to protect the individual right to participate in some practices that are considered to be immoral, socially unacceptable, and even sinful to a significant part of our society. Should our society be able to put limits on individual behavior/choices that are not physically hurting anyone, but that are morally unacceptable to the majority of the population?”

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Lesson 10
Substantive Due Process Rights vs. the Common Good Moot Court

Overview of procedure

Teacher introduces *Lawrence v. Texas* (2013)

Students read case and prepare arguments

Moot Court

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Lesson 11
Unit Test: Individual Rights vs. the Common Good

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Notes:

1. For lessons that require an “overview” or “introduction” to new content, we have generally found that presenting the information through multiple modes works best. We suggest using short bursts of lecture, images, videos, texts, and skits with various processing activities interspersed between them. We ask students to respond in writing in their notebooks, draw visual metaphors in small groups, and “ponder” thought-provoking questions in pairs to help them understand each “chunk” of content.
2. We used the “moot courts” as formative assessments of students’ understanding of the concepts and tensions and provided feedback on students’ application of the ideas in the context of each case.
3. Student-friendly briefs of the Supreme Court cases are available on the Street Law website, www.streetlaw.org/en/programs/supreme_court_summer_institute_for_teachers#Tab=Resources
4. Our students *loved* moot courts, but if your students tire of them, you can substitute structured academic controversies (SACs) or other similar exercises.