

*LITERATURE & THOUGHT*  
GOVERNMENT AND CURRENT EVENTS

**INDIVIDUAL RIGHTS  
THE BLESSINGS OF LIBERTY**



**Perfection Learning**

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# WHAT PREVENTS TYRANNY?

**T**he question above is the essential question that you will consider as you read this book. The selections, activities, and organization of the book will lead you to think critically about this question and to develop a deeper understanding of how effectively the Constitution, Bill of Rights, and other amendments guard individual liberties.

**CLUSTER ONE** How would society be different without the First Amendment?

**CRITICAL THINKING SKILL EVALUATING ARGUMENTS**

**CLUSTER TWO** How well does federalism protect individual rights?

**CRITICAL THINKING SKILL DEFINING KEY WORDS AND PHRASES**

**CLUSTER THREE** Why are suspects' rights important?

**CRITICAL THINKING SKILL INTEGRATING MULTIMEDIA INFORMATION**

**CLUSTER FOUR** Thinking on Your Own

**CRITICAL THINKING SKILL INTEGRATING SOURCES OF INFORMATION**

Notice that the final cluster asks you to think independently about your answer to the essential question—What prevents tyranny?

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and **secure the Blessings of Liberty** to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

*—Preamble to the Constitution of the United States, 1787*



The Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, **in order to prevent misconstruction or abuse of its powers**, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution.

*—Preamble to the Bill of Rights, 1791*



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## THE BILL OF RIGHTS

When the Constitution was signed in September of 1787, not all the states immediately ratified it, in part because many leaders felt that it did not do enough to protect the basic rights of American citizens. In September 1789, the First Congress of the United States set about drafting a set of amendments that would spell out and secure the “certain unalienable rights” lauded in the Declaration of Independence. Congress proposed 12 amendments to the Constitution. The first two, which concerned the number of constituents for each Representative and the compensation of Congressmen, were rejected, but the other ten were ratified and eventually came to be known as the Bill of Rights.

### Amendment I

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.

### Amendment II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

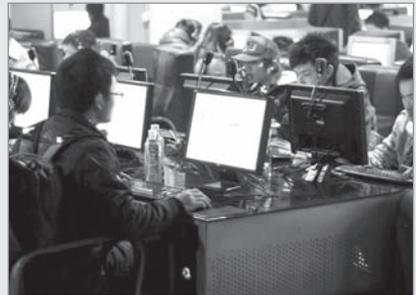
### Amendment III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.



### Amendment I

This amendment protects five fundamental freedoms: religion, speech, press, assembly, and petition. In discussions about religion and the Constitution, people often use the phrase “separation between church and state.” However, this phrase is not found in the First Amendment. Thomas Jefferson coined the phrase in an 1802 letter to a group concerned about religious freedom. (*Read Jefferson’s letter on page 20.*)



Unlike the United States, the People’s Republic of China censors free speech and represses Internet sites it deems critical of the Chinese government.

### Amendment II

Having had their guns confiscated by the British, the leaders of the new country were eager to protect their right to bear arms. Today, however, this right is a point of debate between gun control advocates and gun rights supporters. (*Read “Putting the Second Amendment Second” on page 75.*)

### Amendment III

Americans resented that the King had passed laws that permitted “quartering large bodies of armed troops” in the houses of private citizens. This amendment was a direct response to this abuse.

### Amendment IV

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

### Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

### Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

### Amendments IV–VI

These amendments protect the rights of people suspected or accused of crimes. (*Read about the rights of suspects in Cluster Three, pages 81–109.*)

Because of the Fourth Amendment, police officers must have a reasonable belief that someone has committed a crime (probable cause), and then they usually must obtain a search warrant to search private property.

Because of the Fifth Amendment, people cannot be accused of a serious crime unless a grand jury believes there is enough evidence to warrant a trial. People cannot be charged for the same crime twice; they can't be forced to testify against themselves; and their lives, freedom, and money and belongings cannot be taken from them unless the full process of law is followed.

The Sixth Amendment outlines the rights of a person accused of a crime, including the right to a speedy and public trial by an impartial jury.

### Amendment VII

Guaranteed by this amendment is the right to have a jury hear civil cases, or noncriminal lawsuits.



## Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

## Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

## Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.



Protesters from the “Tea Party,” a loosely-organized group of citizens opposed to big government, let the federal government know they want states’ rights respected.

## Amendment XIV

**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.

**Section 5** The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

## Amendment VIII

In recent years, this amendment has been used to question the constitutionality of the death penalty and interrogation methods used with suspected terrorists. *(Read about the application of the Eighth Amendment to juvenile justice on pages 129–139.)*

## Amendment IX

This amendment was a response to critics of the Bill of Rights. They believed that because it was impossible to list all of the rights, it would be dangerous to list some, because the government might take the opportunity to step in and abuse rights not clearly enumerated. *(Read about the first Supreme Court decision to use the Ninth Amendment as the core of its opinion on page 62.)*

## Amendment X

The Tenth Amendment clarifies that the federal government retains only those powers granted by the Constitution and that all other powers not stated are given to the states or to the people.

## Amendment XIV

Sections 1 and 5 of the Fourteenth Amendment are especially important in assuring that the states, not just the federal government, protect individual rights.

*(Read “The Doll Test and the Fourteenth Amendment” on page 52, “Privacy and the Ninth Amendment” on page 62, and “The Civil Rights of American Muslims After 9/11” on page 91, for more on the Fourteenth Amendment and its role in protecting individual rights.)*

## CLUSTER ONE

### HOW WOULD SOCIETY BE DIFFERENT WITHOUT THE FIRST AMENDMENT?

Thinking Skill EVALUATING ARGUMENTS





# THOUGHTS THAT WE HATE

ANTHONY LEWIS

*In the 1929 Supreme Court case United States v. Schwimmer, the court ruled 6-3 that citizenship could be denied to a woman from Hungary who refused to say she would take up arms to defend the United States—part of the oath of citizenship—because she was a Quaker and a pacifist. The Supreme Court reversed that ruling in a 1946 decision, allowing a Canadian citizen to become an American citizen even though he, too, was a pacifist—in his case on the strength of his beliefs as a Seventh-day Adventist. While the 1929 judgment crumbled, the words of dissenting Justice Oliver Wendell Holmes, Jr., have endured. He wrote, “. . . if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.”*

**I**t was in the case of a pacifist that Justice Holmes spoke of “freedom for the thought that we hate.” But suppose it were not a pacifist but a Nazi. Would that change her right to freedom of expression? Should it?

Hate speech, it is called: virulent<sup>1</sup> attacks on Jews, blacks, Muslims, homosexuals, or members of any other group. It is pure hatred, not based on any wrong done by an individual. A German may have been a practicing Roman Catholic; but if the Nazis found that he had a Jewish grandfather, off he went to a death camp.

The United States differs from almost all other Western societies in its legal treatment of hate speech. In Germany it is a crime, a serious one, to display the swastika or any other Nazi symbol. In eleven European countries it is a crime to say that the Holocaust did not happen, that Germans in the Nazi years did not slaughter Jews. So it is in Canada, and the Canadian Supreme Court has decided that Holocaust deniers can be

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**1** **virulent:** poisonous and severe

prosecuted and punished despite that country's constitutional guarantee of free expression. In the United States, the First Amendment protects the right to deny the fact of the Holocaust.

At one point the Supreme Court took a different view of bans on hateful speech. In 1952, in the case of *Beauharnais v. Illinois*, it sustained an Illinois law that made it a crime to distribute any publication that “portrays depravity, criminality, unchastity or lack of virtue of a class of citizens, of any race, color, creed or religion,” exposing them to contempt or being “productive of breach of the peace or riots.” Joseph Beauharnais had distributed a leaflet urging Chicago authorities to stop the “invasion of white . . . neighborhoods and persons by the Negro.”

Justice Frankfurter, writing the opinion for a 5–4 majority, saw the Illinois law as a group form of criminal libel<sup>2</sup>—which had existed in the American states from the beginning. “Illinois did not have to look beyond her own borders or await the tragic experience of the last three decades,” Frankfurter said, “to conclude that willful purveyors of falsehood concerning racial and religious groups promote strife. . . .” He instanced the murder in 1837 of Elijah Parish Lovejoy, a newspaper editor in Alton, in southern Illinois, because he favored the abolition of slavery, and recent race riots in the Chicago area. “Libelous utterances,” he said, were not “within the area of constitutionally protected speech.” Justice Black, dissenting, said that the Illinois law was entirely different from statutes against libel of individuals, and much more subject to abuse. Any minority group that welcomed the decision, he said, should remember Pyrrhus’s statement: “Another such victory and I am undone.”<sup>3</sup>

The logical premise of Justice Frankfurter’s *Beauharnais* opinion was undone by the 1964 decision in *New York Times v. Sullivan*, which ended the exclusion of libel from the protection of the First Amendment. Under *Sullivan* and cases stemming from it, public officials and public figures cannot recover damages for libel unless they can prove that a false statement of fact was published knowingly or recklessly. The generalized smear of hate speech—a *Beauharnais* pamphlet, for example—does not lend itself to the factual analysis contemplated by these later decisions,

<sup>2</sup> **libel:** a false published statement that could hurt a person’s reputation

<sup>3</sup> **“Another such victory and I am undone.”** King Pyrrhus of Epirus defeated the Romans at Heraclea in 280 BC and Asculum in 279 BC during the Pyrrhic War. Yet his army suffered such crippling losses that he said any more victories like that would bring his army to ruin. Justice Black was suggesting that the ruling might be used against minority groups.

however vicious the smear may have been. That was so, the Court indicated, even when the viciousness was directed at an individual, as in *Hustler* magazine's attack on Jerry Falwell.<sup>4</sup>

Moreover, the Court in 1969 put extremely tight restrictions on criminal punishment for speech attacking racial or religious groups [in] the case of *Brandenburg v. Ohio*. . . . The speaker there, a Ku Klux Klan leader, said, "Personally, I believe the [African American] should be returned to Africa, the Jew returned to Israel." The Supreme Court unanimously reversed his conviction because there was no proof that the speaker was inciting "imminent lawless action" or that such action was likely to occur.

The issue of free speech for Nazis is symbolized in American law by the word "Skokie." Skokie is a village near Chicago that in 1977 had a large Jewish population, including a substantial number who were survivors of Nazi concentration camps. An American Nazi party announced that it would hold a demonstration in Skokie, with the demonstrators wearing a swastika, the Hitler symbol. The village authorities passed ordinances that among other things prohibited the dissemination of anything, including signs and clothing, that "incites hatred against persons by reason of their race, national origin, or religion." The authorities also sought an injunction<sup>5</sup> to the same effect from the Illinois courts. Cases went through state and federal courts. The ultimate judgment was by the United States Court of Appeals for the Seventh Circuit, which held that the village ordinances designed to stop the demonstration were unconstitutional. The Nazi group then canceled its plan.

The Skokie episode created wide controversy among civil libertarians. Many members of the American Civil Liberties Union resigned because the ACLU had supported the Nazis' right to march. But the ACLU leadership did not budge, and in the end its stand probably improved its public standing and enlarged its membership.

Roger Errera, a French legal scholar and jurist, said that Europeans would not accept American tolerance for hateful speech, as in the Skokie case. The American view, he suggested, must be based on "an inveterate

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<sup>4</sup> **Hustler magazine's attack on Jerry Falwell:** *Hustler*, an adult magazine known for nudity and crude humor, parodied Jerry Falwell, a well-known conservative Southern Baptist televangelist. Falwell sued for damages, but in 1988 the Supreme Court ruled that public figures could not sue over parodies since they are understood not to be factual.

<sup>5</sup> **injunction:** a judicial order to prevent or stop a course of action



This demonstration in north suburban Skokie was one of three in the Chicago area on July 4, 1977, protesting the Nazis' plan to march through the suburb, where many Holocaust survivors lived.

social and historical optimism”—which Europeans could not be expected to share after their tragic experience at the hands of the Nazis and Communists. Hitler had made his murderous intentions plain enough in *Mein Kampf*.<sup>6</sup> Wouldn't it have been better to imprison him for such expression before he could organize his words into horrendous reality?

That is the dominant view in Europe, but it is not the only one. *The Economist*, the British weekly with an orientation toward the United States, made strong arguments in 2006 against laws criminalizing Holocaust denial and other forms of racist speech. Such laws, it warned, could be interpreted to punish or restrain speech that “merely causes offense.” It instanced the example of Oriana Fallaci, the great Italian journalist, who when she died in 2006 was awaiting trial for offending Islam in a critical essay about the religion. “The big danger,” *The Economist* wrote, “is that, in the name of stopping bigots, one may end up by stopping all criticism.”

A notorious English Holocaust-denier, David Irving, served thirteen months in an Austrian prison in 2006–2007 for speeches he made in that

<sup>6</sup> *Mein Kampf: My Struggle*, a book by Adolf Hitler in which he mixed autobiography and exposition of his political views

country. Irving had sued an American author, Deborah Lipstadt, for libel for calling him a denier; an English judge, in a devastating judgment, found that the characterization was true. But Lipstadt said she regretted his imprisonment in Austria, which made him “a martyr to free speech.”

The conflict over how to deal with hate speech grew more intense with the rise of Islamic extremism and terrorist acts at the beginning of the twenty-first century. Britain, one of several European countries with a substantial Muslim population, faced the issue particularly acutely. A number of imams<sup>7</sup> allegedly urged violent jihad<sup>8</sup> in sermons in their mosques. One was prosecuted and convicted for soliciting murder and racial hatred. A leader of a British Islamist group, Atilla Ahmet, said: “You are attacking our people in Muslim countries, in Iraq, in Afghanistan. So it’s legitimate to attack British soldiers and policemen, government officials and even the White House.” In July 2005 four Muslim suicide bombers killed fifty-two people in London subways and on a bus. A militant spokesman, Abu Izzadeen, called the bombings “praiseworthy.” In 2007 he was arrested for a later speech and charged with encouraging terrorism.

The great statement of reasons for allowing even the most noxious<sup>9</sup> speech was made by [Supreme Court Justice Louis] Brandeis in his opinion in *Whitney v. California*: “Discussion affords ordinarily adequate protection against the dissemination of noxious doctrine,” he wrote. And, “The fitting remedy for evil counsels is good ones.” But even the Supreme Court’s highly tolerant decision in *Brandenburg v. Ohio* in 1969 would allow legal action against speech that is intended to incite imminent lawlessness and is likely to do so. Doesn’t a call for the murder of police and other officials pass that test, given the fact of actual murders in the Islamist cause? Given the context—an actual terrorist bombing in Britain—the Brandenburg requirement of imminence seems to me inappropriate.

One of the arguments for allowing hateful speech is that it makes the rest of us aware of terrible beliefs and strengthens our resolve to combat them. This argument was rudely countered by Jeremy Waldron, an Englishman who emigrated to teach law in the United States. He wrote:

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7 **imam:** prayer leader of a mosque

8 **jihad:** in Islam, a religious obligation, a spiritual struggle, or a holy war

9 **noxious:** poisonous

The costs of hate speech . . . are not spread evenly across the community that is supposed to tolerate them. The [racists] of the world may not harm the people who call for their toleration, but then few of them are depicted as animals in posters plastered around Leamington Spa [an English town].<sup>10</sup> We should speak to those who are depicted in this way, or those whose suffering or whose parents' suffering is mocked by the [Skokie neo-Nazis] before we conclude that tolerating this sort of speech builds character.

Something like Jeremy Waldron's view animated a movement, in the 1980s and 1990s, to ban hateful speech on university campuses. Spurred by members of minority groups, the movement aimed at racist speech. Proponents of banning hate speech against minorities said students who were victimized by such speech were traumatized by it. To deal with the problem, some professors and students called for the adoption of speech codes, with penalties for violations.

A significant number of universities adopted speech codes. In practice, they dealt with hurtful comments on a wide range of matters beyond the original proposal, race. One of the best-known codes, adopted by Stanford University, prohibited "harassment by personal vilification" when it was "intended to stigmatize an individual or a small number of individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin." A code proposed by the University of Massachusetts at Amherst in 1995 added to those subjects "age, marital status, veteran status." The graduate students' union there wanted to add "citizenship, culture, H.I.V status,<sup>11</sup> language, parental status, political belief and pregnancy."

The lengthening list of characteristics to be protected from harassing speech brought ridicule on the speech-code campaign. In 1989 a federal court held the University of Michigan code unconstitutional. Stanford's failed a legal test a few years later. And the campaign ebbed. . . .

The largest controversy about offensive speech in modern America concerned not a verbal utterance but symbolic expression: burning the flag. During the Republican National Convention in 1984 a group of

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<sup>10</sup> In the 1970s, a racist agitator plastered posters portraying Britons of African descent as apes. He was sentenced to a short prison term.

<sup>11</sup> **H.I.V. status:** People with an H.I.V. positive status are infected with a virus that can lead to AIDS, a disease associated with homosexuals.

demonstrators marched through the streets protesting the policies of the Reagan administration. One of them, Gregory Lee Johnson, set an American flag on fire in front of the Dallas City Hall. He was convicted of violating a Texas law that prohibited desecration<sup>12</sup> of a “venerated<sup>13</sup> object.” The Supreme Court, by a vote of 5 to 4, reversed his conviction, finding the flag-burning expressive conduct that was protected by the First Amendment. “If there is a bedrock principle underlying the First Amendment,” Justice Brennan wrote in the opinion of the Court, “it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”

Many Americans indeed found the burning of the flag offensive. Congress came close to approving a constitutional amendment to allow the criminalizing of flag-burning. It did pass a criminal statute, the Flag Protection Act of 1989, to punish anyone who, except to dispose of a worn or soiled flag, “mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States.” In *United States v. Eichman* in 1990 the Supreme Court, by the identical 5–4 vote, held that statute unconstitutional. Justice Brennan, writing again for the majority, said the very list of prohibitions showed that the concern behind the act was “disrespectful treatment” of the flag. Thus the act “suppresses expression out of concern for its likely communicative impact.” Justice Brennan concluded: “Punishing desecration of the flag dilutes the very freedom that makes this emblem so revered, and worth revering.”

In the catalog of hateful or offensive expression, burning a flag is surely less dangerous than most other examples: anti-Semitic ravings in a Munich beer hall, say, or preaching to young Muslims in England that they should become suicide bombers. (One worshipper who heard such sermons, Richard Reid, tried unsuccessfully to blow up an airliner with a bomb in his shoe.)

In 1994 broadcasts on a radio station in Rwanda urged Hutus, who were a majority of the population, to kill Tutsis, the minority, and moderate-minded Hutus. A massacre followed, and more than 500,000 people were killed. Years later a Tutsi-led government forbade political parties to appeal to group identity, and public statements promoting “divisionism” were outlawed. Should we in America who have avoided

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12 **desecration:** disrespecting

13 **venerated:** revered

such tragedies tell Rwandans that it is wrong for them thus to limit freedom of speech?

In an age when words have inspired acts of mass murder and terrorism, it is not as easy for me as it once was to believe that the only remedy for evil counsels, in Brandeis's phrase, should be good ones. The law of the American Constitution allows suppression only when violence or violation of law are intended by speakers and are likely to take place imminently. But perhaps judges, and the rest of us, will be more on guard now for the rare act of expression—not the burning of a flag or the racist slang of an undergraduate—that is genuinely dangerous. I think we should be able to punish speech that urges terrorist violence to an audience some of whose members are ready to act on the urging. That is imminence enough.



Louis D. Brandeis (1856-1941) served on the U.S. Supreme Court from 1916-1939. Stating his famous view about the remedy for bad ideas in more popular terms, he wrote, "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."

# RESPONDING TO CLUSTER ONE

## HOW WOULD SOCIETY BE DIFFERENT WITHOUT THE FIRST AMENDMENT?

### Critical Thinking Skill EVALUATING ARGUMENTS

1. Evaluate the reasons Jefferson gives for holding in “sovereign reverence” the clause in the First Amendment that guarantees religious freedom. Identify each supporting point as fact, opinion, or reasoned judgment.
2. In “Banning the Veil,” Linda Chavez says: “We may not ban the burqa here, but we can and should disapprove of it.” Trace the claims Chavez makes to support that view and evaluate the reasoning behind each claim.
3. By what reasoning does Margaret Chase Smith conclude that by establishing a climate of suspicion, Democrats and Republicans were threatening “the American way of life”?
4. Using details from “Thoughts That We Hate,” summarize the reasons people have for supporting bans on hate speech, as well as the reasons people have for opposing such bans. Create and complete a chart similar to the one below to help you gather and organize the various reasons. Then evaluate those reasons, explaining which seem most persuasive.

Reasons for supporting bans on hate speech	Reasons for opposing bans on hate speech

5. Closely read the arguments put forward by the Petitioners and those put forward by the Respondents in the transcript of oral arguments on First Amendment protection of violent video games. Analyze how each side refers to previous court cases to support its claims.

### Writing Activity: Evaluate an Argument

Analyze the selections in this cluster, looking for information, claims, and evidence that have a bearing on the issue of the rights of the Nazis to march in Skokie. Then closely read the arguments Anthony Lewis lays out on that topic in the selection “Thoughts That We Hate.” Evaluate the arguments the courts made on the Skokie march. You might present your evaluation in a chart or discuss it in an essay.

### A Strong Evaluation

- evaluates the argument’s premises by corroborating or challenging them with other information
- evaluates the argument’s claims to decide whether they follow logically from the premises
- evaluates the argument’s evidence by corroborating or challenging it with other information