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*Childhood* published online 28 May 2013
DOI: 10.1177/0907568213484343

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What is This?
Subjects, citizens, or civic learners? Judicial conceptions of childhood and the speech rights of American public school students

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Abstract
This article, based on a qualitative analysis of 81 legal opinions, considers the relationship between judicial conceptions of childhood and the speech rights of American public school students. The author presents six main principles from the opinions and examines the relationship between them and conceptions of childhood. The article shows that the opinions reflect three primary conceptions of childhood: as a period walled off from adulthood in which children are subjects; as a period of becoming in which children are civic learners; and as a period akin to adulthood in which adults and children, as well as their respective rights, are fundamentally the same. The article concludes that judicial conceptions of childhood have helped produce a body of law that reflects and perpetuates society’s inconsistent and ambivalent beliefs regarding childhood.

Keywords
Childhood, free speech, law, rights, schools

Among the contexts in which the concept of childhood has been given meaning, the law has been one of the most central. In various areas of law, including family law (Van Krieken, 2005), criminal law (Shook, 2005), administrative law (Fernqvist, 2011), and constitutional law (Clark, 1992), judicial decisions have helped shape and define what it means to be a child. In the process, judges have drawn on and articulated various ‘conceptions of childhood’ (Archard, 2004). In this article, I consider the relationship between judicial conceptions of childhood and the law regarding the speech rights of...
American public school students. Cases involving student speech rights present us with what Jenks (2005) has called the ‘paradox’ of childhood:

Simply stated, the child is familiar to us and yet strange; he or she inhabits our world and yet seems to answer to another; he or she is essentially of ourselves and yet appears to display a systematically different order of being. (Jenks, 2005: 2–3)

Cases involving student speech rights present a particular version of this paradox. On one hand, children, like ‘us,’ are persons and, thus, arguably entitled to speech rights. On the other hand, children differ from ‘us’ in ways that arguably undermine that entitlement or at least merit limiting their rights in comparison to the rights of adults. In this article, I explore judicial responses to this paradox and argue that (1) those responses reflect ongoing ambivalence vis-a-vis childhood and (2) this ambivalence has contributed to the content, complexity, and lack of clarity that characterize this area of law.

In justifying his research regarding the connection between law, particularly the law related to school exclusions, and the ‘construction’ of childhood, Monk (2000) has written that his work rests on the premise that:

… education law determines not simply where and how children should be educated, and by whom and for how long, [it also] operates as an increasingly important site for and provides significant insights into contemporary definitions and understandings of childhood. (Monk, 2000: 355)

This article rests on a similar and related premise: student speech rights jurisprudence not only determines the extent to which student speech is protected under the Constitution, it also provides a context in which social norms related to childhood and children are revealed and shaped. Judicial opinions dealing with student speech rights offer evidence of what conceptions of childhood judges have brought to the adjudication of those cases and what conceptions of childhood have emerged from the process of adjudication to become norms for society at large, and, in turn, helped define childhood itself.

Below, I describe the research process I employed for this article and present six central principles related to student speech articulated in American judicial opinions: (1) schools must have the authority to control unruly students; (2) schools must have the authority to protect vulnerable students from the effects of speech; (3) schools must have the authority to restrict student speech in order to shape children into ‘civil’ citizens who share common values; (4) student speech must be protected so that children develop into autonomous adults who will exercise their rights; (5) student speech must be protected in order to restrict the power of the state to assert ‘normative dominance’ (Tyack et al., 1987); and (6) student speech must be protected because students are civic participants and public schools are civic spaces. After presenting and illustrating these principles and considering the relationship between them and conceptions of childhood, I conclude with the argument that judicial conceptions of childhood (1) mirror society’s ambivalence vis-a-vis children and (2) have contributed to the development of a body of law that Supreme Court Justice Stephen Breyer, echoing many scholars (e.g. Chemerinsky, 1999–2000, 2008; Dupre, 2009; Waldman, 2008; West, 2008; Yudof, 1995), has called ‘complex, ... difficult to apply and unclear.'
The research: Data and analysis

This exploration of judicial conceptions of childhood and their relationship with American student speech rights law is based on my analysis of 81 opinions from 40 cases. The research process involved three ongoing and overlapping steps: (1) selecting opinions; (2) reading those opinions and developing, applying, and revising a set of codes; and (3) analyzing the results of the coding process. The following questions guided me: What conceptions of childhood are reflected in the opinions? And what is the relationship between these conceptions and the law in this area?

In selecting opinions, I began with the Supreme Court’s student speech rights ‘canon’:6 *Barnette v. West Virginia* (1943);7 *Tinker v. Des Moines* (1969);8 *Island Trees v. Pico* (1982);9 *Bethel v. Fraser* (1986);10 *Hazelwood v. Kuhlmeier* (1988);11 and *Morse v. Frederick* (2007).12 In the first three cases, the Court struck down mandatory flag salute and pledge of allegiance ceremonies (*Barnette*), a ban on arm bands worn to protest the Vietnam War (*Tinker*), and the removal of books from school libraries for ideological reasons (*Pico*). In the three later cases, the Court upheld restrictions on student speech that was ‘lewd’ (*Fraser*), ‘school-sponsored’ (*Kuhlmeier*), or could be seen as endorsing the use of illicit drugs (*Morse*). To these cases, I added the seminal Supreme Court cases of *Meyer v. Nebraska* (1923)13 and *Pierce v. Society of Sisters* (1925),14 two cases that did not involve children’s rights per se but placed restrictions on the authority of the state vis-a-vis education and provided some of the jurisprudential foundation for student speech rights law. These eight cases provided 30 opinions15 that formed the foundation of my data set.

While these opinions provided a significant amount of relevant data, I expanded my data set for two reasons. First, whereas the Supreme Court’s canon has been the subject of voluminous literature, lower court cases, which may offer better insight into judicial attitudes,16 have been relatively understudied. Second, in order to examine ‘judicial’ conceptions of childhood, I felt it appropriate to include opinions from cases decided by courts other than the federal Supreme Court. In selecting additional opinions, I first identified six cases17 decided prior to *Barnette* which, like *Barnette*, involved challenges to mandatory flag ceremonies. I also added the lower court opinion in *Barnette*18 for a total of 11 opinions, five that struck down mandatory flag ceremonies and six that upheld them.

For the period following *Barnette*, I conducted three Westlaw database searches for state and federal cases that involved student speech rights. The first search, for the period from *Barnette* through 1963,19 generated only three additional opinions: *Isgrig v. Srygley* (1946),20 which upheld a policy prohibiting students from joining fraternities or sororities; *Sheldon v. Fannin* (1963),21 which struck down a policy requiring students to stand during the singing of the National Anthem; and *Stein v. Oshinsky* (1963),22 which recognized a child’s right to pray in school. My second search, for the period from 1964 until the Supreme Court’s decision in *Tinker*,23 generated 10 additional cases. *Robinson v. Sacramento* (1966)24 upheld a ban on fraternities and sororities. *Burnside v. Byars* (1966)25 struck down a policy banning ‘freedom buttons’ worn to show support for the Civil Rights Movement; in *Blackwell v. Issaquena County* (1966),26 the same court, citing the level of violence associated with the buttons, upheld
a similar ban. The fourth case, *Scoville v. Joliet Township* (1968), upheld the punishment of two high school students who had circulated a newspaper criticizing school administrators and calling on other students to refuse to present school-generated publications to their parents. The remaining six cases from this period involved policies regulating the length of boys’ hair and prohibiting facial hair. In addition to the 14 opinions from these 10 cases, I added the 1965 appellate court opinion that overturned the earlier decision in *Stein* and the lower court opinion in *Tinker* (1966), for a total of 16 opinions from this period.

Following the Supreme Court’s 1969 decision in *Tinker*, the number of student speech rights cases ballooned. Therefore, for the period following *Tinker*, I focused my Westlaw search on one court, the Federal Court of Appeals for the Third Circuit. There are at least two reasons to focus on federal appellate cases: first, they apply to large geographic areas; and, second, ‘the Supreme Court reviews relatively few circuit court decisions each year, thus leaving circuit court judges with the task of settling a number of important legal controversies’ (Kaheny, 2010: 129). While focusing on any one of the 13 circuits would have been appropriate, I chose the Third because I was teaching education law in that circuit and was aware of several Third Circuit cases involving student speech rights. This search produced 13 cases with 21 opinions. The cases involved a range of issues, including whether students may be required to stand during the pledge of allegiance or perform community service, and the extent to which schools may restrict students’ ‘hate speech’ and speech on the internet.

After I added these opinions, my data set included opinions issued at different moments in time (from 1923 through 2010), by different courts (including state and federal lower, appellate, and supreme courts), and taking different positions (siding with the school/state or with the student). Having identified a data set, I started reading the opinions and generating codes to examine the conceptions of childhood reflected in them. For purposes of coding, I used NVivo8/10 software, focusing on the rationalizations the authors gave for their positions. I then synthesized the codes into the six principles below. Finally, I considered the relationship between the principles, conceptions of childhood, and the law.

**Judicial principles and conceptions of childhood**

**Principle 1: Schools must have the authority to control unruly children**

The first principle emphasizes schools’ need to control children in their custody. Drawing on the conception of children that Jenks (2005: 62) has termed the ‘Dionysian child,’ judges articulating this principle have asserted that children are naturally defiant of authority and prone to distracting, disruptive, or even violent behavior. For example, in his concurrence in *Morse v. Frederick* (2007), Supreme Court Justice Stephen Breyer presented a vision of children (or ‘adolescents’) as natural troublemakers:

A school official, knowing that adolescents often test the outer boundaries of acceptable behavior, may believe it is important (for the offending student and his classmates) to establish
when a student has gone too far. … Students will test the limits of acceptable behavior in myriad ways better known to schoolteachers than to judges. (pp. 2639, 2640)

Other judges have raised the specter of defiant and unruly students to condemn court rulings restrictive of school authority over student speech. For example, in Sypniewski v. Warren Hills (2002), federal circuit Judge Max Rosenn rejected the majority’s decision to strike down the part of a school’s racial harassment policy that banned written material that created ‘ill will’:

The majority gives words of enmity and wickedness at heart in a children’s ambience an unjustifiable sense of propriety. It does this at a time when the Nation’s public schools are struggling for survival. Such protective construction of words, I fear, to children attending elementary and public schools may only encourage them to defy their teachers, discourage school teachers, and threaten to undermine a school system already under strong attack. (pp. 275–276)

Even opinions protective of student speech often reflect the assumption that students behave in disruptive and unruly ways. For example, this assumption provided the basis for the Tinker standard formulated in Tinker v. Des Moines (1969):

Conduct by the student, in class or out of it, which for any reason – whether it stems from time, place, or type of behavior – materially disrupts classwork or involves substantial disorder ... is, of course, not immunized by the constitutional guarantee of freedom of speech. (p. 513)

Elsewhere, judges have taken this principle a step further, arguing that children were inclined to violence. For example, in his dissent in Tinker (1969), Supreme Court Justice Black suggested that schools must have sweeping authority to restrict students’ speech in order to prevent complete chaos at the hands of destructive, out-of-control students:

One does not need to be a prophet or the son of a prophet to know that after the Court’s holding today some students in Iowa schools and indeed in all schools will be ready, able, and willing to defy their teachers on practically all orders. This is the more unfortunate for the schools since groups of students all over the land are already running loose, conducting break-ins, sit-ins, lie-ins, and smash-ins. Many of these student groups … have already engaged in rioting, property seizures, and destruction. (pp. 525–526)

**Principle 2: Schools must have the authority to protect vulnerable students from the effects of speech**

The second principle, like the first, supports schools’ authority to restrict student speech. Under Principle 2, that authority stems from children’s inherent vulnerability and the schools’ concomitant need to protect them. In his concurrence in Morse v. Frederick (2007), Supreme Court Justice Samuel Alito asserted that children were particularly vulnerable at school:

Students may be compelled on a daily basis to spend time at close quarters with other students who may do them harm. Experience shows that schools can be places of special danger. (p. 2638)
In other opinions, judges have pointed to various ways in which exposure to speech can harm children, either by teaching them bad things or exposing them to certain language and messages. For example, judges have noted the potential harm in exposing students to speech about drugs and even “the existence of Santa Claus.” A concurrence in *Walker-Serrano v. Leonard* (2003) even suggested that engaging in speech can, in itself, be harmful:

When Amanda presented her petition to the other children she was infringing on their rights as they were entitled while at school to be free from her solicitation of their signatures. While I recognize that some people are of the opinion that it is never too early for a person to learn to challenge authority, I believe that a school should protect an eight- or nine-year old child from the solicitation of another child to sign a petition. (p. 421)

The need to protect vulnerable students, particularly girls, from speech provided the basis for Supreme Court Chief Justice Burger’s opinion in *Bethel v. Fraser* (1986), which upheld the punishment of a student for his ‘lewd’ speech nominating another student for student government:

By glorifying male sexuality, and in its verbal content, the speech was acutely insulting to teenage girl students. … The speech could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality. (pp. 683–684)

Earlier in that same opinion, Burger relied on the adult–child distinction in explaining why such speech could be restricted when uttered by students in school but not when uttered as part of ‘adult public discourse’:

The First Amendment guarantees wide freedom in matters of adult public discourse. A sharply divided Court upheld the right to express an antidraft viewpoint in a public place, albeit in terms highly offensive to most citizens. See *Cohen v. California*. It does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school. (p. 682)

Although Principle 2 is reflected in opinions involving students of all ages, in several opinions, judges have noted that the need to protect students from speech – and thus the authority of schools to restrict speech – fluctuates with the age of the students involved. On one hand, younger children, due to their lower cognitive and emotional development, are more vulnerable to the harm speech can cause. At the same time, as children develop cognitively and emotionally, their interest in having their speech protected increases. This linear conception of children’s development – and the importance of protecting innocent or pure younger children from corrupting influences – is present in many opinions, including some in which judges have applied the precedent of the Supreme Court to cases involving elementary school students.
**Principle 3: Schools must have the authority to restrict student speech in order to shape children into ‘civil’ citizens who share common values**

While the first two principles emphasize the qualities that children presently have or do not have, the third and fourth highlight the qualities that children will come to have. Under the third principle, which, like the first two, supports schools’ authority to control student speech, children are ‘civic learners’ or ‘citizens in the making’ (Marshall, 1950: 25). Childhood is understood as a period of ‘becoming’ (Johansson, 2011) during which schools shape children into ‘good citizens’ who respect common values and norms. Excerpts reflecting Principle 3 focus on the consequences that failing to limit children’s speech has on what children learn about respecting rules, behaving in a socially responsible manner, and participating properly in civic life.

The idea that schools are charged with shaping children into citizens appears in the Supreme Court cases of *Meyer v. Nebraska* (1923) and *Pierce v. Society of Sisters* (1925). In *Meyer*, Justice McReynolds declared that ‘the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally’ (p. 401). However, in these cases, the Court nonetheless placed limitations on state authority over children, emphasizing that the job of shaping children into adults was one that the state shared with parents. In the words of McReynolds writing in *Pierce*, ‘the child is not the mere creature of the State’ (p. 535).

In subsequent cases, particularly those challenging mandatory pledge of allegiance and flag salute ceremonies, judges began linking children’s civic learning to schools’ authority to restrict students’ liberty. In his majority opinion in *Minersville v. Gobitis* (1943), Supreme Court Justice Felix Frankfurter relied on Principle 2 in crafting his argument upholding mandatory flag ceremonies:

> National unity is the basis of national security. … The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization. (pp. 595–596)

Although mandatory flag ceremonies eventually were declared unconstitutional by the Supreme Court in *Barnette v. West Virginia* (1943), the notion that children’s status as civic learners supports schools’ authority to restrict student expression has surfaced in several subsequent opinions. For example, the notion was central to the Supreme Court’s decision in *Bethel v. Fraser* (1986), in which Chief Justice Burger applied the principle to support upholding the punishment of a student for his ‘lewd’ and ‘offensive’ speech:

> Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. … The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy. (p. 683)
Other judges have followed Burger’s lead and relied on the conception of children as civic learners to support upholding school restrictions on student speech.53

**Principle 4: Student speech must be protected so that children develop into autonomous adults who will exercise their rights**

Principle 4, like Principle 3, reflects a conception of children as civic learners. However, whereas Principle 3 relies on this conception to support restricting student speech, Principle 4 relies on it to support protecting student speech.54 Opinions reflecting Principle 4 are less concerned with teaching children common values and more concerned with shaping children into autonomous adults who value individual liberty and are active, even critical, citizens. Thus, under this principle, children must practice active citizenship now – and thus, have their speech protected now – so that they will be prepared for the responsibilities of citizenship when they, with the passage of time, become citizens.

Principle 4 first appeared in the Third Circuit’s 1939 *Gobitis* decision,55 which struck down mandatory flag ceremonies. Although that decision was overturned the following year,56 Principle 4 resurfaced in the Supreme Court’s 1943 *Barnette* decision,57 which endorsed the Third Circuit’s position in *Gobitis*. In *Barnette*, Justice Jackson argued:

> 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. (p. 637)

More than 25 years later, Supreme Court Justice Abe Fortas expanded the link between students’ speech rights and students’ civic learning. In *Tinker v. Des Moines* (1969),58 Fortas argued that civic learning not only required schools to abandon mandatory flag ceremonies; it also required schools to respect students’ right to express themselves:

> The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.’ (p. 512)


**Principle 5: Student speech must be protected in order to restrict the power of the state to assert normative dominance**

Principle 5 reflects concern about the power of the state over individuals, in particular the power that public schools exert over students’ beliefs. This principle links the protection of student expression to the fear that schools will impose ‘normative dominance’ (Tyack et al., 1987) and function as ‘enclaves of totalitarianism.’62 It minimizes or ignores distinctions between children and adults and focuses instead on the public nature
of public schools. Whereas the first four principles focus on how children are different from adults – more prone to disruptive or violent behavior; more vulnerable to the harm speech may cause; less developed and autonomous – Principle 5 focuses on the similari-
ties between children and adults and the similarities between the public school and other arms of the state. When opinions reflect this principle, they suggest that the student–school relationship is akin to the adult–state relationship.

While the equation of public schools with other arms of the state is at least implicit in most of the opinions, judges sometimes have stated the notion explicitly. In *Breen v. Kahl* (1969), Federal District Judge James Doyle ominously linked public schools with the coercive power of the state:

> It must not be forgotten, however small the community, however familiar to one another the characters in the drama, that when a school board undertakes to expel a public school student, it is undertaking to apply the terrible organized force of the state, just as surely as it is applied by the police, the courts, the prison warden, or the militia. (p. 707)

Once the public school is equated with other arms of the state, ‘educating children for citizenship’ can look a lot like indoctrination. In his opinion in *Tinker* (1969), issued four days after *Breen*, Supreme Court Justice Fortas voiced the concern that the state could use public education to control students’ access to ideas and information: ‘In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate’ (p. 511). Dissenting in *Hazelwood v. Kuhlmeier* (1988), Supreme Court Justice Brennan voiced similar concerns:

> … the state educator’s undeniable, and undeniably vital, mandate to inculcate moral and political values is not a general warrant to act as ‘thought police’ stifling discussion of all but state-approved topics and advocacy of all but the official position. (pp. 285–286)


**Principle 6: Student speech must be respected because students are civic participants and public schools are civic spaces**

Whereas Principle 5 equates public schools with other arms of the state and emphasizes the need to restrict the power of public schools over students’ access to ideas and information, Principle 6 equates public schools with the public square and emphasizes students’ interests in expressing themselves. Under this principle, which, like Principle 5, minimizes the differences between adults and children, students’ speech is approached in much the same manner as adults’ speech. Specifically, student speech is seen as contributing to the ‘marketplace of ideas’ and as part of students’ ability to live a good life. Principle 6 draws on what may be called the ‘liberationist’ conception of childhood. Under this conception, we should approach the rights of children the same way we approach the rights of adults. In the more extreme liberationist view,
children have the right to exercise all of the rights accorded to adults, including the right ‘to vote, work, own property, choose one’s guardian and make sexual choices’ (Archard, 2004: 72).

Although the extreme liberationist vision does not appear in the opinions I discuss here, some of the opinions do implicitly or explicitly equate student speech rights with the speech rights of adults. This approach first appeared in several of the flag ceremony cases from the 1930s and 1940s, where judges began to frame conflicts related to school authority over students as conflicts between that authority and students’ – as opposed to parents’ – rights. A more recent example appeared in Supreme Court Justice Brennan’s dissent in *Hazelwood v. Kuhlmeier* (1988), where he drew parallels between ‘the street corner’ – a hallowed part of the public square under American constitutional law – and public schools:

> Just as the public on the street corner must, in the interest of fostering ‘enlightened opinion,’ tolerate speech that ‘tempt[s] [the listener] to throw [the speaker] off the street,’ 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. (p. 280)⁶⁹

Another example appeared in an opinion written by Supreme Court Justice Samuel Alito (then serving as a judge on the Third Circuit) in *Saxe v. State College Area School District* (2001).⁷⁰ There, Alito made extensive use of principles related to the speech rights of adults to support striking down a school speech code aimed at students. The opinion of Federal District Judge Doyle in *Breen v. Kahl* (1969) also reflected Principle 6 when he declared, ‘it is time to broaden the constitutional community by including within its protections younger people whose claim to dignity matches that of their elders’ (p. 708).

**Implications and conclusions**

This article contributes a previously unexplored perspective to the literature that examines conceptions of childhood within various contexts (e.g. Archard, 2004; Brewer, 2005; Cunningham, 2005; Grossberg, 1988; Honeyman, 2005; James and Prout, 1997; Jenks, 2005; Mintz, 2004). The article shows that American judges have drawn on and articulated different and, to some extent, competing conceptions of childhood in opinions from student speech rights cases. Sometimes, the opinions reflect a conception of children as subjects who must be controlled and protected. Under this approach, childhood is a period walled off from adulthood and children are fundamentally different from adults because children lack self-control or are particularly vulnerable. At other times, the opinions reflect a conception of children as civic learners. Under this approach, childhood is a period of becoming during which schools teach children the skills and qualities needed to be good citizens. Finally, the opinions sometimes reflect a conception of children as citizens. Under this approach, childhood is a period not unlike adulthood and the differences between children and adults are minimized. My analysis shows that the opinions do not reflect a clear linear progression towards more robust rights for children. Rather, starting in the 1930s, when the conceptions of
children as citizens and civic learners appeared alongside the conception of children as subjects, they have coexisted, sometimes within the same opinion, and their prevalence has ebbed and flowed.

In addition to demonstrating that opinions involving student speech have reflected three somewhat contradictory conceptions of childhood, this article examines the relationship between those conceptions and the law. On the one hand, judicial conceptions of childhood have played a role in the broader constitution of childhood. As has been documented by several law and society scholars, the ‘law and law use provide ordinary citizens with a potent social discourse that they use in a variety of settings to explain and comment on the everyday experience’ (Greenhouse et al., 1994: 3). In the context of student speech rights law, judicial opinions provide a ‘potent social discourse’ related to childhood, children’s rights, and the place of children within society. The increase in cases involving student speech rights in the aftermath of Tinker suggests that this discourse has affected social norms related to childhood and the relationship between children and schools. However, the holistic analysis presented here also shows that this discourse has reflected a vision of childhood marked by ambiguity and contradiction.

The relationship between conceptions of childhood and student speech rights law is not one-way, however. As posited by many law and society scholars, there is ‘interplay between the social world and everyday life, on the one hand, and the law and its institutions, on the other, in reciprocally constructing meaning’ (Richman, 2002: 286). In other words, law and culture/behavior/norms, including those related to childhood, are mutually constitutive. Given the nexus between conceptions of childhood and student speech rights, to the extent that opinions have reflected different and conflicting conceptions of childhood, it is no surprise that they also have approached student speech rights cases in different and conflicting ways. If children are naturally disruptive and vulnerable, schools’ authority to control and protect children may be paramount. If differences between children and adults – and between their respective relationships with the state –are minimal, it makes sense to apply general free speech principles, which are more protective of speech than are the principles that govern student speech. Finally, if children are civic learners, the extent to which students’ speech must be protected may hinge on how one understands citizenship. Thus, conceptions of childhood may motivate judges to rule in particular ways or, if we accept the claim that judges’ ideological beliefs shape their decision-making, provide them with a malleable justification for the ruling that best matches their ideological preferences.

Regardless of whether judicial conceptions of childhood have served as motivation or justification for judicial responses to student speech rights cases, the fact that judges have drawn on and articulated divergent conceptions of childhood helps explain why the principles found in this area of law are, to return to Justice Breyer’s words, ‘complex, ... difficult to apply and unclear.’ Specifically, these divergent conceptions of childhood – and the related divergence in how judges have approached student speech rights – may be found across the body of opinions that govern student speech rights cases. Thus, a judge, lawyer, or educator trying to apply the law to a particular set of facts is faced with a set of principles that are, like the conceptions of childhood on which they are based, in
tension with each other. As a result, rather than providing clear guidance, student speech rights law, in the words of Supreme Court Justice Clarence Thomas, ‘says that students have a right to speak in schools except when they don’t.’

By examining the relationship between judicial conceptions of childhood and the development of American student speech rights law, this article contributes to the vast body of literature regarding this area of law (e.g. Blacker, 2009; Chemerinsky, 1999–2000; Dupre, 2009; Ross, 2000; Roy, 2005; Saunders, 2003; Waldman, 2008) and the assumptions and reasoning upon which it rests (e.g. Hafen and Hafen, 1995; Johnson, 1999; Yudof, 1995). At the same time, by examining the mutually constitutive nature of this relationship, this article contributes to the body of literature concerned with the relationship between the law and conceptions of childhood. Specifically, the article demonstrates the link between the tension and malleability that characterize societal conceptions of childhood and the tension and malleability that characterize student speech rights law.

Overall, as Jenks (2005) has argued about childhood in general, legal opinions from cases involving public school students’ speech rights present us with a ‘paradox.’ At times, the opinions reflect the notion that because students are ‘like us,’ their speech rights are more or less the same as the speech rights of adults. At other times, the opinions suggest that, because students are very much not ‘like us,’ their rights are, at best, less robust than ours or, at worst, non-existent. Finally, at still other times, the opinions point out that, while students are very different from us, they will, with time, become one of us. Given society’s ambivalence regarding childhood, perhaps this ‘legal ambivalence’ (Minow, 1995: 277) should be expected. As Mark Weber (2009: 102) noted in his analysis of special education law, ‘a certain amount of disorder may always be present in legal regimes that address complex social problems.’ In the context of student speech rights law, conceptions of childhood have contributed to this disorder and helped make that law, like Weber writes about special education law, ‘messy indeed’ (2009: 102).

Acknowledgements
I would like to thank the reviewers for Childhood, who provided highly useful and timely comments on an earlier draft of this article. I also would like to thank Sigal Ben-Porath, Rogers Smith, and Catherine Ross for their guidance and insight when I was developing the analysis I present here. Finally, thank you to Diana Nastasia for helping me revise, improve, and edit earlier drafts.

Funding
This article draws on my dissertation research, which was funded in part by the Penn Program on Democracy, Citizenship, and Constitutionalism at the University of Pennsylvania.

Notes
1. This article draws on my dissertation (Buckley, 2011), which examined the relationship between judicial conceptions of children, judicial conceptions of citizenship, and public school students’ speech rights.
2. In this article, ‘public school’ refers to any primary or secondary school funded primarily by government revenue and thus falling under the purview of the First Amendment. I use the
term ‘student(s)’ to refer to public school student(s) and ‘student speech rights’ to refer to public school students’ speech rights.

3. Although a comparison of student speech rights law and the free speech law applicable to adults is beyond the scope of this article, it is clear that the speech rights of adults rest on different principles and are more expansive than those of students. For one example, see the discussion of *Bethel v. Fraser*, 478 U.S. 675 (1986) and *Cohen v. California*, 403 U.S. 15 (1971) under Principle 2, below.

4. Throughout this article, I use the terms ‘the Supreme Court’ or ‘the Court’ to refer to the federal or US Supreme Court.

5. *Morse v. Frederick*, 127 S.Ct. 2618, 2641 (2007). While other areas of law lend themselves to analyzing judicial conceptions of childhood, focusing on speech rights law allowed me to explore the link between those conceptions and these qualities.

6. I started with these cases because they apply to all American public schools and are binding precedent in student speech rights cases. However, their significance extends beyond the legal arena. As Weber (1990–1991: 429) has written, ‘decisions of the Supreme Court can unleash expectations or stymie popular movements.’

7. 319 U.S. 624.
8. 393 U.S. 503.
10. 478 U.S. 675.
12. 127 S.Ct. 2618.
15. This includes Justice Oliver Wendell Holmes’ dissent in *Bartels v. Iowa*, 262 U.S. 404 (1923), a companion case to *Meyer*.
17. *Nicholls v. Lynn*, 7 N.E.2d 577 (1937); *Hering v. State BOE* 117 N.J.L. 455 (1937); *Leoles v. Landers*, 184 Ga. 580 (1937); *Gabrielli v. Knickerbocker*, 74 P.2d 290 (1937), 12 Cal.2d 85 (1938); *Johnson v. Deerfield*, 25 F. Supp. 918 (D. Mass. 1939); and *Minersville v. Gobitis*, 21 F. Supp. 581 (E.D. Pa. 1937), 24 F. Supp. 271 (E.D. Pa. 1938), 108 F.2d 683 (3rd Cir. 1939), 310 U.S. 586 (1940). The Supreme Court’s decision in *Gobitis* (1940), which upheld mandatory flag ceremonies, was overturned by the Court in *Barnette* (1943). While other flag cases were decided prior to *Barnette*, I chose these six because they (or, in the case of *Johnson*, the case upon which they are based) were upheld by the Supreme Court.
19. Terms: (speech & school) & (‘First Amendment’) & DA(after 14 June 1943 and before 1 January 1964). For all searches, I excluded cases not involving student speech rights.
20. 197 S.W.2d 39.
24. 245 Cal.App.2d 278.
25. 363 F.2d 744.
26. 363 F.2d 749.
27. 286 F. Supp. 988.

29. 348 F.2d 999.
30. 258 F.Supp. 97.
31. Terms: (speech & school) & ‘First Amendment’ & DA (after 24 February 1969 and before 31 December 2010). This search went through 2010.
37. 127 S.Ct. 2618.
38. Internal references removed from all opinion excerpts.
39. 307 F.3d 243.
40. 393 U.S. 503.
41. 393 U.S. 503.
42. 127 S.Ct. 2618.
45. 325 F.3d 412.
46. 478 U.S. 675.
48. 262 U.S. 390.
49. 268 U.S. 510.
50. 319 U.S. 624.
52. 478 U.S. 675.
54. One explanation for this dichotomous application of the conception of children as civic learners lies in judges’ competing understandings of citizenship (see Buckley, 2011).
55. 108 F.2d 683.
56. 310 U.S. 586.
57. 319 U.S. 624.
58. 393 U.S. 503.
60. 484 U.S. 260, 290–291.
61. 668 F.2d 214.
63. 296 F. Supp. 702.
64. 393 U.S. 503.
65. 484 U.S. 260.
67. 650 F.3d 205, 260.
68. 484 U.S. 260.
70. 240 F.3d 200.
71. 296 F. Supp. 702.
72. See note 3.
73. As Sunstein (1996: 93) has argued, ‘For many judges, so-called legal reasoning really reflects a process in which politically preferred solutions are sought and reached except to the extent that they are “blocked” by authoritative legal materials.’

References


