“Students Have a Right to Speak in Schools Except When They Don’t”: Judicial Conceptions of Citizenship and the Convoluted Nature of American Student Speech Rights Law

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Submitted for the Education Law Association’s 63rd Annual Conference
November, 2017
San Diego, California

Abstract

The body of law that defines the free speech rights of American public school students is, in the words of Supreme Court Justice Steven Breyer, “complex, ... difficult to apply and unclear.”\(^1\) While there may be several explanations for these complexities and difficulties, this paper examines the relationship between the contours of student speech rights law and judicial conceptions of citizenship. The author draws on a qualitative analysis of ninety-eight judicial opinions from cases decided between 1877 and 2010. The cases include judicial decisions directly related to student expression as well as other cases in which parents and students challenged the educational authority of the state. In part one, the author establishes the central roles that citizenship and the learning of citizenship have played in shaping the judicial responses to such cases. The author then outlines five competing conceptions of citizenship that judges have responded to, rejected, or embraced within their opinions: ascriptive/assimilative; patriotic; liberal; civic republican; and critical citizenship. In the final section of the paper, the author examines the relationship between these multiple conceptions of citizenship and the development of the jurisprudential framework that constitutes and defines the speech rights of American public school students.

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\(^1\) *Morse v. Frederick*, 127 S.Ct. 2618, 2641 (2007).
public school students. The author contends that, given citizenship’s multiplicity and the roles that citizenship and the learning of citizenship have played in the development of this jurisprudential framework, the complex and somewhat contradictory nature of this area of law is not surprising. The author concludes with a discussion of the implications that the analysis has for understanding and applying student speech rights law. By making the connection between conceptions of citizenship and student speech rights law explicit, the analysis suggests that educators, lawyers, and judges faced with conflicts related to student speech in public schools should consider the implications these conflicts and their resolution have from the perspectives of citizenship and civic learning.
Although many areas of American constitutional law are complex and opaque, the law that governs the speech rights of public school students is notoriously so. While US Supreme Court Justice Stephen Breyer has noted that judges have found the principles that govern student speech rights to be “complex and often difficult to apply,”¹ Justice Clarence Thomas has argued that the law in this area lacks meaningful and consistent principles. In his words, student speech rights “jurisprudence now says that students have a right to speak in schools except when they don’t—a standard continuously developed through litigation against local schools and their administrators.”² The lack of clarity and consistency within this area of law has several implications. First, as suggested by Justice Thomas, it means that parties are more likely to turn to the courts for clarification of the law through litigation. Second, it means that the law is more malleable, allowing judges deciding free speech cases to more easily fit the law to their preconceived preferred outcomes.³ Third, it means that educators lack clear guidance regarding the law in this area and, thus, may apply the law in ways that overly restrict student speech or may hesitate to restrict speech that arguably should be restricted in public schools.

While the reasons for this lack of clarity and consistency undoubtedly are manifold, an examination of legal opinions from cases dealing with student speech rights suggests one possible contributing factor: divergent judicial conceptions of citizenship.⁴ Historical and contemporary scholarship has shown the extent to which the concept of citizenship has meant different things to different people in different contexts.⁵ As Peter Schuck (2002) has argued, “contemporary political discourse uses the term ‘citizenship’ very loosely, often treating it as little more than an empty vessel into which speakers may pour their own social and political ideals” (131). Opinions from student speech rights cases reveal that citizenship’s multiplicity has
played an important role in producing a body of law that understandably leaves jurists and educators scratching their heads.

Any legal case pitting individual rights against the authority of the state involves the issue of citizenship. First, citizenship mediates such disputes by providing the ground rules for the relationship between members of the polity and the state. Citizenship defines the role of the individual in the governing process, from electing and monitoring officials to participating in government itself. Citizenship also delimits the authority of the state over the individual, marking out the spheres and contexts in which exercising that authority is legitimate. Judges have drawn on these citizenship-based ground rules in the process of resolving conflicts between individual liberty and state authority.

At the same time, however, the relationship between the ground rules of citizenship and judicial decisions in constitutional rights cases is not a one-way street: judicial decisions in such cases also have helped define those same ground rules. In the Anglo-American common law system, judicial decisions not only apply the law, they become the law. Thus, in the process of adjudicating cases involving constitutional rights, judges lay down the ground rules that will mediate future conflicts between individual liberty and state authority. Moreover, judicial decisions in constitutional rights cases represent official endorsements of particular models of citizenship, endorsements which in turn influence common and individual understandings and practices of citizenship. 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 cases involving constitutional rights, judicial decisions provide a potent social discourse regarding the relationship between individuals and the state.
In toto, the relationship between citizenship and constitutional law is reciprocal or ‘mutually-constitutive’ (Merry, 1988, 880): social, political, and legal norms related to citizenship help shape judicial responses to cases involving constitutional rights while judicial responses to cases involving constitutional rights help shape those same norms. In the US, this mutually-constitutive relationship between constitutional law and citizenship has been particularly salient in cases in which individuals have challenged the constitutionality of state education policies. One reason the relationship has been especially robust in this context is that judges explicitly have tied the resolution of such conflicts to the issue of citizenship and students’ civic learning (Buckley, 2011, 2013). What’s more, unlike typical constitutional law cases, in which judges are called upon to weigh the authority of the state against a preexisting set of rights held by citizens, cases involving the rights of public school students allow judges to apply more explicitly their own normative conceptions of citizenship. In other words, these cases present judges with an opportunity to consider, discuss, and shape both what citizenship is and what sort of citizen American children ideally should be taught to become.

The relationship between judicial conceptions of citizenship and the law has been particularly salient in cases involving student speech rights. In this paper, I examine that relationship through an analysis of judicial opinions in cases in which parents and/or public school students have challenged the educational authority of the state. The opinions in the data set come from student speech rights cases and cases that provided the jurisprudential foundation for speech rights law. In the next part of the paper, I explain the research design and methods. I then present the four conceptions of citizenship that emerge from the opinions: ascriptive/patriotic citizenship; liberal citizenship; civic republican citizenship; and critical citizenship. In the final part of the paper, I further discuss the relationship between these
conceptions of citizenship and the complex framework that constitutes modern student speech rights law.

**Research Design and Methods**

This exploration of judicial conceptions of citizenship and their relationship with student speech rights law is based on my analysis of eighty-one judicial opinions from forty 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 citizenship are reflected in the opinions? And what is the relationship between those conceptions and the legal principles articulated in the opinions?

In selecting opinions, I began with the Supreme Court’s student speech rights “canon”: *Barnette v. West Virginia* (1943)\(^2\); *Tinker v. Des Moines* (1969)\(^3\); *Island Trees v. Pico* (1982)\(^4\); *Bethel v. Fraser* (1986)\(^5\); *Hazelwood v. Kuhlmeier* (1988)\(^6\); and *Morse v. Frederick* (2007).\(^7\) 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

\(^2\) 319 U.S. 624.  
\(^3\) 393 U.S. 503.  
\(^4\) 457 U.S. 853.  
\(^5\) 478 U.S. 675.  
\(^6\) 484 U.S. 260.  
\(^7\) 127 S.Ct. 2618.
added the seminal Supreme Court cases of *Meyer v. Nebraska* (1923)\(^8\) and *Pierce v. Society of Sisters* (1925),\(^9\) two cases that did not involve children’s rights per se but placed restrictions on the authority of the state vis-à-vis education and provided some of the jurisprudential foundation for student speech rights law. These eight cases provided thirty opinions\(^10\) 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,\(^11\) have been relatively understudied. Second, in order to examine “judicial” conceptions of citizenship, 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 cases\(^12\) decided prior to *Barnette* which, like *Barnette*, involved challenges to mandatory flag ceremonies. I also added the lower court opinion in *Barnette*\(^13\) for a total of eleven 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

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\(^8\) 262 U.S. 390.

\(^9\) 268 U.S. 510.

\(^10\) This includes Justice Oliver Wendell Holmes’ dissent in *Bartels v. Iowa*, 262 U.S. 404 (1923), a companion case to *Meyer*.


\(^12\) *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.

Barnette through 1963, generated only three additional opinions: Isgrig v. Srygley (1946), which upheld a policy prohibiting students from joining fraternities or sororities; Sheldon v. Fannin (1963), which struck down a policy requiring students to stand during the singing of the National Anthem; and Stein v. Oshinsky (1963), 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, generated ten additional cases. Robinson v. Sacramento (1966) upheld a ban on fraternities and sororities. Burnside v. Byars (1966) struck down a policy banning “freedom buttons” worn to show support for the Civil Rights movement; in Blackwell v. Issaquena County (1966), 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 fourteen opinions from these ten cases, I added the 1965 appellate

14 Terms: (speech & school) & ("First Amendment") & DA(aft 06-14-1943 & bef 01-01-1964). For all searches, I excluded cases not involving student speech rights.
15 197 S.W.2d 39.
16 221 F.Supp. 766.
17 224 F.Supp. 757.
18 Terms: (speech & school) & ("First Amendment") & DA(aft 01-01-1964 & bef 02-24-1969).
19 245 Cal.App.2d 278
20 363 F.2d 744.
21 363 F.2d 749.
22 286 F.Supp. 988.
court opinion that overturned the earlier decision in *Stein*\(^{24}\) and the lower court opinion in *Tinker* (1966),\(^ {25}\) for a total of sixteen 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.\(^ {26}\) 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 thirteen circuits would have been appropriate, I chose the Third because I was aware of several Third Circuit cases involving student speech rights. This search produced thirteen cases\(^ {27}\) with twenty-one opinions. The cases involved a range of issues including whether students may be required to stand during the pledge of allegiance\(^ {28}\) or perform community service\(^ {29}\), and the extent to which schools may restrict students’ “hate speech”\(^ {30}\) and speech on the internet.\(^ {31}\)

\(^{24}\) 348 F.2d 999.
\(^{25}\) 258 F.Supp. 97.
\(^{26}\) Terms: (speech & school) & "First Amendment" & DA (aft 02-24-1969 & bef 12-31-2010). This search went through 2010.
With the addition of 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). By including the central US Supreme Court cases, I could examine the relationship between judicial conceptions of citizenship and the opinions that contain the core principles that govern student speech rights. By including opinions from lower courts, I could examine the role that conceptions of citizenship played in the historical and jurisprudential context in which those central cases emerged and the core principles developed.

Having identified a data set, I read and reread the opinions, coding excerpts where the author of the opinion discussed citizenship, the relationship between individuals and the state, and the role of the individual in the American political system. For purposes of coding, I used NVivo8/10 software. From this coding, four conceptions of citizenship emerged: 1) the ascriptive-patriotic conception, which frames citizenship around membership in a unified and loyal national community with common (typically White Anglo-Saxon Protestant) values and norms; 2) the liberal conception, which sees citizenship as a means of protecting and promoting individual rights and the pursuit of individual goals; 3) the civic republican conception rooted in participation in the public sphere and the pursuit of the common good; and 4) the critical conception, which grounds citizenship in independent and critical thinking regarding individual, public, and community beliefs, focusing on the rationalizations the authors gave for their positions. Finally, I considered the relationship between the conceptions of citizenship, the evolution of student speech rights law, and the central principles that govern that area of law.
Judicial Conceptions of Citizenship

Ascriptive-Patriotic Citizenship: Exclusion, Loyalty and Assimilation

The ascriptive-patriotic conception of citizenship most strongly emerges within the earlier opinions examined for this paper. To some extent, those earlier opinions were responding to what I have referred to elsewhere as the “Citizenship Crusade” (Buckley, 2015): a set of loosely connected and coordinated policies designed to shape the character of the American citizenry. This ‘Americanization’ campaign had two overlapping prongs: exclusion and assimilation. As scholars such as Rogers Smith (1997), Desmond King (2000), and Aristide Zolberg (2006) have shown, American citizenship historically has encompassed inegalitarian and ascriptive prejudices. These prejudices have been reflected in the body of law—particularly immigration law but also constitutional law—that has determined who may be an American citizen. Between the 1880s and 1930s, laws and policies sought to restrict and even eradicate the diversity of the American citizenry by equating ‘Americans’ with white Europeans, particularly Anglo-Saxon Protestants. This narrowing of the ethnic and racial composition of the ‘true American’ was pursued through eugenically-inspired immigration laws designed to prevent immigrants of color from entering the US (Tichenor, 2002). Other methods included the deportation of people of color and whites from less favored ethnic backgrounds, as well as the segregation and internal exclusion of African-Americans, Native-Americans, and Mexican-Americans (King, 2000; Haney-Lopez, 2006).

In addition to these attempts to exclude those who did not fit the ascriptive vision that equated ‘American’ with Northern European, the ‘Americanization’ campaign sought to assimilate those who did not fit that vision and yet were not excluded from the American polity. The assimilation campaign primarily targeted those who met the racial requirement—they were
‘white’—but did not meet the cultural requirements—for example, they did not speak English or came from a non-Protestant religious community. The Americanization campaign first required a definition of American culture and values. Unsurprisingly, that definition often reflected the culture and values of Northern European, English-speaking ‘native Americans.’

US public schools served as the primary conduit for many of these policies designed to define the American polity through exclusion, “Americanize”/assimilate children from particular immigrant communities, and shape the character and values of all children. One of the professed goals of these policies was the promotion of patriotism. Commonly, patriotism was equated with feelings of sociocultural affinity and unity, as well as loyalty to the state. For many of its supporters, the citizenship crusade was a response to an existential threat facing the United States. Immigrants from countries where English was not spoken and/or Protestantism did not predominate instilled a degree of fear that was heightened by racial and ethnic prejudices. Driven by such fears and prejudices, the citizenship crusade sought to promote English, counter the influence of the Catholic Church and parochial schools, and instill the political and cultural values of the majority. In addition, because immigrants from southern and eastern Europe were thought to lack a sense of loyalty to the US government and affinity with the American people, aspects of the citizenship crusade were aimed at developing feelings of loyalty and affinity. In the context of the 19th-20th Century citizenship crusade, the combination of outright prejudice, rising nationalism, and threats of armed conflict blurred the lines between education for patriotic citizenship and forced cultural assimilation.

In the process of upholding aspects of the citizenship crusade, then, judges at times implicitly and often explicitly supported the ascriptive-patriotic vision that equated citizenship with patriotism and patriotism with sociocultural assimilation and unwavering loyalty to the
state. One explicit example came in the context of English-only education policies. For some, the promotion of English may have been rooted in the value of having citizens speak a common language and the practicality of having the most widely-spoken language be that common language. However, the Nebraska Supreme Court’s decision upholding restrictions on foreign language instruction demonstrates that, for others, the promotion of English was related to the promotion of particular cultural values and ideals at the expense of those values and ideals associated with other languages and cultures.

The legislature had seen the baneful effects of permitting foreigners, who had taken residence in this country, to rear and educate their children in the language of their native land. The result of that condition was found to be inimical to our own safety. To allow the children of foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents was to rear them with that language as their mother tongue. It was to educate them so that they must always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interests of this country…. [T]he purpose of the legislation was to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals…. It is also affirmed that…certain communities commonly use foreign words, follow foreign leaders, move in a foreign atmosphere, and that the children are thereby hindered from becoming citizens of the most useful type and the public safety is imperiled. (661-662)
Given such sentiment, it is not surprising that laws mandating English as the language of instruction in public or all schools were supported by prominent figures in the ‘Americanization’ movement across the country, including Franklin Lane (Woodhouse, 1992, 1011), Secretary of the Interior under President Woodrow Wilson.

In addition to their endorsement of the equation of patriotism with cultural assimilation, many of the judges who authored opinions in these cases embraced the notion that patriotism implied feelings of loyalty to the state. Unsurprisingly, most of these endorsements came in opinions that upheld mandatory flag ceremonies in which students saluted and pledged allegiance to the flag and government of the United States. For example, in the California Supreme Court’s unanimous opinion upholding mandatory flag ceremonies in *Gabrielli v. Knickerbocker* (1938), Justice Seawell wrote:

> The training of school children in good citizenship, patriotism and loyalty to state and nation is regarded by the law of the state as a means of protecting public welfare and is directed by the school code of the state. The simple salutation to the flag and the repetition of the pledge of allegiance, in the judgment of the proper governing body, tend to stimulate in the minds of youth in the formative period of life sentiments of lasting affection and respect for and unfaltering loyalty to our government and its institutions. (92)

Some judges went further and embraced the view that a lack of loyalty and unity amongst the citizenry posed a serious challenge and perhaps even a threat to the United States. For these judges, state attempts to instill cultural affinity, unity, and loyalty in immigrants and their children were understandable and even desirable. Without a unified and loyal citizenry, American society would suffer on several fronts. As Justice Frankfurter wrote in his opinion
upholding mandatory flag ceremonies, ‘We are dealing with an interest inferior to none in the hierarchy of legal values. National unity is the basis of national security….The ultimate foundation of a free society is the binding tie of cohesive sentiment’ (Gobitis, 1940, 595).

With the rejection of mandatory flag salute and pledge of allegiance ceremonies by the US Supreme Court in 1943, the explicitly ascriptive-patriotic conception of citizenship took a back seat to other conceptions. Policies with a highly ascriptive bent were rejected by courts. Segregationist policies designed to remove people of color from the visible American polity were rejected by the Court in Brown. Discriminatory immigration policies based on race, nationality, or religion were also rejected. That does not mean that schools may not strive to instill patriotic values: the law reflects the notion that public schools have a legitimate interest in developing patriotic citizens. In the words of Justice Stone,

[T]he state is free to compel attendance at school and require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty which tend to inspire patriotism and love of country. (604)

While a milder version would emerge in cases decided in the 1980s, the more extreme ascriptive-patriotic conception of citizenship was largely rejected by judges. In the end, the promotion of the ascriptive-patriotic conception of citizenship through public schooling—and the vigorous role that public schools came to play in Progressive Era society—was more important in terms of student speech rights law for the reaction it triggered, a reaction through which judges tied the rights of students to the learning of citizenship and endorsed competing conceptions of citizenship, in particular the liberal conception.

32 Trump
Liberal Citizenship: Rights and the Individual Pursuit of the Good Life

Whereas the patriotic-ascriptive conception of citizenship primarily supports the authority of schools to restrict students’ rights, the liberal conception largely supports limiting that authority. As Rogers Smith (2002) has explained, ‘liberal conceptions [of citizenship] are said to present civic membership basically as an instrument of a diverse range of self-interested personal life plans, with the emphasis on seeking economic, religious, and familial fulfillment’ (109). As I am using the term, liberal citizenship primary values maximized individual liberty (Schuck, 2002, 132) and sees citizenship as a means of protecting that liberty. This focus on individual liberty is what sets liberal citizenship apart from the other conceptions of citizenship discussed here, each of which places a higher emphasis on the broader common, social, or community good. Chandran Kukathas (1998) referenced this conception of liberal citizenship when he argued that liberalism, properly understood, mostly values ‘the freedom of individuals to associate or dissociate from others in pursuit of their diverse—although often shared—ends’ (696). Therefore, ‘a polity is a liberal political society if its institutions sustain this liberty; it is a less liberal society the greater the extent to which it draws its members—directly or indirectly—into collective endeavors with which they neither wish, nor need, to be concerned’ (697).

Defined this way, liberal citizenship conflicts with many aspects of the late 19th and early 20th Century citizenship crusade. First of all, public education itself is a quintessential collective endeavor. Setting aside the issue of whether or not compulsory education violates the liberty of children required to attend school, policies that restrict parents’ liberty in raising their children are in tension with the values of liberal citizenship. In several of the cases examined here, this conflict provided a cogent basis for striking down state policies vis-à-vis education. For example, in his opinions in Meyer and Pierce, Justice McReynolds roundly endorsed the values associated
with the liberal conception of citizenship and its emphasis on individual liberty. For McReynolds, citizenship was a means of protecting individual liberty and served as a bulwark against state intrusions on that liberty. While he acknowledged the state’s interest in promoting the development of children into ‘good citizens,’ that interest had to take a back seat to individuals’—in this case, parents’—‘orderly pursuit of happiness’ (626). To protect this pursuit of happiness, the Due Process Clause of the 14th Amendment provides individuals with a robust zone of liberty that the state must respect.

While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. (626)

In addition to this expansive vision of individual liberty, McReynolds’ opinions in Meyer and Pierce also reflected the concern that expansive state power, particularly the power to assert normative dominance through controlling children’s education, threatened that liberty. For example, in Meyer, Justice McReynolds referred to both the writings of Plato and the practices of Sparta to conjure up the image of state-controlled education in the extreme.

For the welfare of his Ideal Commonwealth, Plato put forward a law which should provide ‘That the wives of the guardians are to be common, and their
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children are to be common, and no parent is to know his own child, nor any child his parent.’...In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution. (401-402)

For the conservative Justice McReynolds, the expansive authority that the Progressive Era state vested in public schools was part and parcel with the broader social reform movement that threatened to upset traditional power relationships in society. In siding with parents and private schools, he struck a blow against those who sought to reshape society through education and other means.33

That does not mean that McReynolds was generally hostile to state authority. In fact, when the Supreme Court was asked to strike down mandatory flag salute and pledge of allegiance policies in 1940, McReynolds sided with the state. However, the liberal conception of citizenship heralded by McReynolds in Meyer and Pierce provided support to those who, unlike McReynolds, found such policies troubling. For example, in the first decision that ruled against

33 Barbara Woodhouse (1992) has pointed out the irony that the Meyer and Pierce decisions, largely applauded for the libertarian principles they endorse, both were penned by the conservative, bigoted, Justice McReynolds. Woodhouse writes, “one of the great anomalies of Supreme Court history is that the only enduring opinions authored by the archconservative Mr. Justice McReynolds should be the liberal icons [Meyer and Pierce]” (p. 1084). However, for Woodhouse, McReynolds’ role makes sense. “The explanation may lie in the fact that, although Meyer’s result was pluralist and libertarian, its underlying philosophy was emphatically reactionary….As crafted by Justice McReynolds, the thrust of the new constitutional theory of child, parent, and state was deeply conservative, to sustain traditional patriarchal structures, and the property interests of schools and teachers, in a society threatened by radical social reform” (p. 1084 and 1085).
mandatory flag ceremonies on the basis of individual rights, Federal District Judge Maris appealed to the inviolable nature of individual liberty in holding that mandatory flag ceremonies violated Pennsylvania’s constitution.

The provisions of [Pennsylvania’s] Constitution to which we have referred were undoubtedly intended to secure to its citizens that religious freedom which had been denied their ancestors in the countries from which they came. These constitutional provisions must be construed in the light of that history. In these days when religious intolerance is again rearing its ugly head in other parts of the world it is of the utmost importance that the liberties guaranteed to our citizens by the fundamental law be preserved from all encroachment. (Minersville v. Gobitis, 1937, 585-586)

Earlier in that opinion, Judge Maris put forward a legal framework that preserved a robust sphere of individual liberty and required the state to meet a highly demanding standard in justifying restrictions on that liberty.

No man, even though he be a school director or a judge, is empowered to censor another’s religious convictions or set bounds to the areas of human conduct in which those convictions should be permitted to control his actions, unless compelled to do so by an overriding public necessity which properly requires the exercise of the police power. (584-585)

When the US Supreme Court finally struck down mandatory flag ceremonies in 1943, Justice Jackson’s opinion for the Court also put forward a vision of citizenship rooted in the robust protection of individual liberty. For Justice Jackson, the ground rules of citizenship required that the state show that an infringement on rights be justified by a ‘clear and present
danger.’ Under this approach, state action that limited individual liberty was presumed to be unlawful absent a showing that the limitation was necessary to prevent ‘a clear and present danger of action of a kind the State is empowered to prevent and punish’ (633). This framing of the legal conflict by Justice Jackson in Barnette, as well as by Judge Maris in Gobitis, stands in stark contrast with the approach of judges who started with the presumption that restrictions on liberty are lawful and required individuals challenging such restrictions to show that they violated a specific right and were not a reasonable means of furthering an interest of the state.⁹

When judges began to consistently restrict public schools’ authority over students in the 1960s, the liberal conception of citizenship provided the justification for striking down school policies governing students’ hairstyles and dress and written and spoken expression.

In my view, with respect to adults, freedom to wear one’s hair at a certain length or to wear a beard is constitutionally protected, even though it expresses nothing but individual taste…. [T]he freedom of an adult male or female to present himself or herself physically to the world in the manner of his or her choice is a highly protected freedom. An effort to use the power of the state to impair this freedom must also bear ‘a substantial burden of justification’, whether the attempted justification be in terms of health, physical danger to others, obscenity, or ‘distraction’ of others from their various pursuits. For the state to impair this freedom, in the absence of a compelling subordinating interest in doing so, would offend a widely shared concept of human dignity, would assault personality and individuality, would undermine identity, and would invade human ‘being’. It would violate a basic value ‘implicit in the concept of ordered liberty’, Palko v. Connecticut (1937). (pp. 705-706; citations removed)

In the Supreme Court’s milestone decision in Tinker, Justice Fortas pointed to both the values of liberal citizenship and the importance of teaching children those values.

The classroom is peculiarly the “marketplace of ideas.” 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
The liberal conception of citizenship reached its highpoint with the Court’s decision in *Tinker*. While the liberal conception surfaced in opinions issued in the student speech cases following *Tinker*, it had to share the spotlight with and was somewhat supplanted by another conception: civic republican citizenship.

**Civic Republican Citizenship: Participation and the Pursuit of the Common Good**

Unlike the liberal conception of citizenship, civic republican citizenship primarily has provided a basis for supporting restrictions on student speech. The civic republican conception of citizenship emphasizes ‘rights and practices of political participation to achieve common goods’ (Smith, 2002, 109). Thus, on the one hand, civic republicanism emphasizes participation in self-government or government ‘by the people’ (Dagger, 2002, 146). At the same time, however, as alluded to by Smith, civic republicanism has a civic aspect, an emphasis on the value of the common good. As Richard Dagger (2002) has explained:

> [Within a republican system], as members of the public, people must be prepared to overcome their personal inclinations and set aside their private interests when necessary to do what is best for the public as a whole. (147)

In the earlier cases examined here, the civic republican conception of citizenship primarily surfaced in two somewhat distinct ways. First, at times a judge sided with upholding a policy because it furthered the common good. For example, Justice Holmes, in his dissent in *Meyer* (1923), pointed to the common good associated with having members of society speak a common language. Other judges argued that the primacy of the common good justified policies
designed to maintain order in schools. Mandatory flag ceremonies, although primarily justified on the basis of the importance of instilling patriotism, also were justified by an appeal to the common good. For example, in his dissent in *Barnette* (1943), Justice Frankfurter wrote:

> 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. Compulsory vaccination, food inspection regulations, the obligation to bear arms, testimonial duties, compulsory medical treatment—these are but illustrations of conduct that has often been compelled in the enforcement of legislation of general applicability even though the religious consciences of particular individuals rebelled at the exaction. (655)

Decades later, Chief Justice Roberts pointed to society’s problem with drug use to justify upholding the punishment of a student who held up a banner reading “Bong Hits 4 Jesus” at what the Court characterized as a school event.

> The "special characteristics of the school environment," Tinker, 393 U.S., at 506, 89 S.Ct. 733, and the governmental interest in stopping student drug abuse-reflected in the policies of Congress and myriad school boards, including JDHS-allow schools to restrict student expression that they reasonably regard as promoting illegal drug use.

In these examples and others, judges drew on and enacted the civic republican conception of citizenship by requiring that those objecting to a state policy set aside their objection for the sake of the greater good. Although such examples appeared more frequently in opinions upholding
state education policies, some opinions striking down such policies also acknowledged the legitimacy of state policies designed to promote the common good.12

In addition to supporting some policies on the grounds that they would further the common good, some opinions from these cases supported policies because they would teach children to value the common good. For example, in Gabrielli v. Knickerbocker (1938), Justice Seawell, quoting Thomas Jefferson, noted the need to teach children how to balance their rights with the needs of society: ‘I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties’ (91). Judges also drew on the civic republican conception of citizenship when they emphasized the importance of teaching children appropriate civic skills, even when doing so restricted their liberty. An example of this is found in Chief Justice Burger’s majority opinion in Bethel v. Fraser.

The role and purpose of the American public school system were well described by two historians, who stated: "[P]ublic education must prepare pupils for citizenship in the Republic....It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation." C. Beard & M. Beard, New Basic History of the United States 228 (1968). In Ambach v. Norwich, 441 U.S. 68, 76-77, 99 S.Ct. 1589, 1594, 60 L.Ed.2d 49 (1979), we echoed the essence of this statement of the objectives of public education as the "inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system."
In addition to calling for the promotion of the common good and teaching children to value the common good, the civic republican value of participation provided an additional basis for some opinions that upheld restrictions on student speech. For example, the *Pico* dissenters emphasized the importance of adults, particularly parents, using the political process to pressure school board members to change policies rather than turning to the courts.

The plurality fails to recognize the fact that local control of education involves democracy in a microcosm. In most public schools in the United States the parents have a large voice in running the school. Through participation in the election of school board members, the parents influence, if not control, the direction of their children’s education. A school board is not a giant bureaucracy far removed from accountability for its actions; it is truly “of the people and by the people.” A school board reflects its constituency in a very real sense and thus could not long exercise unchecked discretion in its choice to acquire or remove books. If the parents disagree with the educational decisions of the school board, they can take steps to remove the board members from office. (p. 891)

**Critical Citizenship: Getting Our Beliefs Right**

The final conception of citizenship found within the opinions is critical citizenship, a conception in tension with not only the ascriptive-patriotic conception but also those aspects of the civic republican conception that calls for the promulgation of common norms and values. Critical citizenship emphasizes what Dewey (1910, 1997) called reflective thought: ‘active, persistent, and careful consideration of any belief or supposed form of knowledge in the light of
grounds that support it and the further conclusions to which it tends’ (6). As I am using the term here, critical citizenship encompasses aspects of both liberal citizenship and civic republican citizenship, adding a critical perspective to each. In the private sphere, critical citizenship starts with liberal citizenship’s focus on individuals’ right to make free choices and live according to their beliefs. To this, critical citizenship adds the notion that individuals’ ‘most essential interest is in getting [their] beliefs right’ (Kymlicka, 1991, 13). This notion reflects what Meira Levinson (2002) has called ‘individual autonomy’ (6): ‘a substantive (as opposed to formal or procedural) notion of higher-order preference formation within the context of plural constitutive values and beliefs, openness to others’ evaluations of oneself, and a broadly developed moral, spiritual or aesthetic, intellectual, and emotional personality’ (58).

In the public sphere, critical citizenship starts with the sense of civic responsibility or obligation reflected in civic republican citizenship. To that, critical citizenship adds particular qualities including ‘the ability to question authority’ (Kymlicka and Norman, 1994, 365) and challenge commonly held beliefs, values, and norms. The critical citizen brings a comprehensive critical stance to the public sphere, a stance that targets policies, institutions, traditions, and practices. For critical citizenship theorists, this stance encompasses several things, including: examining and questioning relationships within both the public sphere (i.e. the relationship between individuals and the state) and private sphere (e.g. a critical stance regarding the sanctity of the family); not only being active within established institutions but also challenging the form of those institutions and the ideals upon which they rest; advocating on behalf of difference and the particular as opposed to the common and the universal; and resisting structural inequalities and injustices. Thus, as I am using the term, critical citizenship encompasses what has been called ‘transformative citizenship’ (Banks, 2008, 135), ‘radical citizenship’ (Isin and Wood,
1999, 153), ‘radical democratic citizenship’ (Rasmussen and Brown, 2002), and, simply, ‘critical citizenship’ (Giroux and McLaren, 1989, xi).

Overall, the ideal critical citizen is capable of independent, reflective thought and brings it to bear in both the determination of her own conception of the good life and her participation in the formulation of the common good. Thus, just as reflective thought helps the critical citizen ‘get her beliefs rights,’ reflective thought allows the critical citizen to help the state get its policies right and society get its norms and values right. Therefore, in the public sphere, critical citizenship values diversity of opinion and the ability and willingness to dissent. Although one might argue that there is a distinction between applying critical thought to one’s own views and applying critical thought to the policies of the state and the norms and values of society, the fact that critical reflection is central to both processes means that the two often go hand-in-hand.  

Within the citizenship crusade cases, critical citizenship surfaced most often in opinions opposing mandatory flag ceremonies. For example, in Gobitis (1938), Judge Maris contrasted the needs of a liberal democratic system with the needs of a totalitarian one, suggesting that the ideal citizen does not simply support the state but, instead, brings an independent and critical perspective to the public sphere.

We need only glance at the current world scene to realize that the preservation of individual liberty is more important today than ever it was in the past. The safety of our nation largely depends upon the extent to which we foster in each individual citizen that sturdy independence of thought and action which is essential in a democracy. The loyalty of our people is to be judged not so much by their words as by the part they play in the body
politic. Our country’s safety surely does not depend upon the totalitarian idea of forcing all citizens into one common mold of thinking and acting or requiring them to render a lip service of loyalty in a manner which conflicts with their sincere religious convictions. Such a doctrine seems to me utterly alien to the genius and spirit of our nation and destructive of that personal liberty of which our flag itself is the symbol. (274)

In his dissent to the US Supreme Court opinion that overturned Judge Maris’s decision, Justice Stone similarly argued that the system of government reflected in the Constitution encompassed more than just democratic institutions and processes.

The Constitution expresses more than the conviction of the people that democratic processes must be preserved at all costs. It is also an expression of faith and a command that freedom of mind and spirit must be preserved, which government must obey, if it is to adhere to that justice and moderation without which no free government can exist. (Gobitis, 1940, 606-607)

Of all the opinions issued in the flag cases, the most important from a jurisprudential perspective was Justice Jackson’s opinion for the Court in Barnette. That opinion was also the one most replete with references to the critical conception of citizenship. Justice Jackson argued that constitutional rights were not merely a means of protecting the individual’s interest in liberty. Rather, enforcing those rights is ‘to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end’ (637). In the context of schools, enforcing students’ rights was particularly important ‘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’ (637). The right to free
speech ‘is not limited to things that do not matter much’; rather, ‘the test of its substance is the right to differ as to things that touch the heart of the existing order’ (642). ‘Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. … Compulsory unification of opinion achieves only the unanimity of the graveyard’ (636-637, 641).

In more modern cases, the critical conception of citizenship also appears, albeit less often than the liberal and civic republican conceptions. In his dissent in Hazelwood v. Kuhlmeier, Justice Brennan argued,

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." 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.

(citation removed)

Justice Alito also draws on the critical conception of citizenship in his concurring opinion in Morse, when he points to the dangers of allowing public schools the authority to restrict speech because the speech interferes with their mission.

This argument can easily be manipulated in dangerous ways, and I would reject it before such abuse occurs. The "educational mission" of the public schools is defined by the elected and appointed public officials with authority
over the schools and by the school administrators and faculty. As a result, some public schools have defined their educational missions as including the inculcation of whatever political and social views are held by the members of these groups.

Part 2: Judicial Conceptions of Citizenship and the Convoluted Nature of Student Speech Rights Law

As suggested by Justice Thomas as well as other judges and many scholars (e.g. Bartlett and Frost, 1990; Yudof, 1995; Chemerinsky, 2000; Pyle, 2002; Chemerinsky, 2008; Waldman, 2008; West, 2008; Dupre, 2009; Sekulow & Zimmerman, 2009), the law that governs student speech rights in public schools is unsettled and unclear. Cases dealing with children’s speech on the internet34 and speech in school related to homosexuality,35 demonstrate the degree to which the Supreme Court’s decisions are subject to interpretation and thus provide less than complete guidance for lower courts. While the opinions examined here support the notion that American judges have drawn on and endorsed multiple conceptions of citizenship in their opinions, the opinions also demonstrate that these multiple conceptions are tied to the complex and convoluted framework that governs student speech rights law. Specifically, Conceptions of citizenship have impacted student speech rights jurisprudence in two ways. First, conceptions of citizenship played a crucial role in the establishment of individual rights that placed restrictions on the state’s authority vis-à-vis education. Second, as those restrictions became tied to the rights of students and the learning of citizenship, judges have drawn on different conceptions of citizenship in their opinions. Because of the central role that citizenship and the learning of

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citizenship have played in judicial responses to restrictions on student expression, the tensions and contradictions reflected within American citizenship have translated into tensions and contradictions within student speech rights law.

The Establishment of Student Speech Rights: Liberal Citizenship as a Restriction on the Educational Authority of the State

In discussing the relationship between conceptions of citizenship and student speech rights law, I start with the first part of the quote from Justice Thomas that provides the title for this paper: “students have a right to speak in schools.” In the next part of the paper, I turn to the second part of the quote: “except when they don’t.” The story connected with the first part is the story of liberal citizenship pushing to the surface and across the school threshold starting in the late 1800s through the Supreme Court’s decision in Tinker in 1969. The story connected to the second part is the story of civic republican and a milder version of ascriptive-patriotic citizenship curtailing the predominance of liberal citizenship between 1986 and 2010. In between these two stories, there is an interregnum of sorts, typified by the Court’s splintered decision in Pico in 1982.

Through the Citizenship Crusade, states, districts, and schools sought to define the American polity and instill particular values and beliefs within that polity. The definition of “American,” along with the values and beliefs promoted as “American,” were rooted in the ascriptive-patriotic conception of citizenship. While the discriminatory definition of who was truly and fully included in the American polity was not rejected until much later, in the 1920s-1940s, courts placed restrictions on the promotion of the values and beliefs reflected in the ascriptive-patriotic conception of citizenship. From a jurisprudential standpoint, the most
important examples of the restrictions from this period are the US Supreme Court’s decisions in *Meyer, Pierce, and Barnette*.

In *Meyer* and *Pierce*, the Court struck down two policies that many Americans today would see as clear examples of state overreach: a policy designed to promote English as children’s “mother tongue” by prohibiting instruction in the foreign languages many immigrant families spoke at home; and a policy that required all children to attend public schools. In siding with parents and educators who objected to these policies, Justice McReynolds, in his opinions for the Court, drew on the liberal conception of citizenship to reject these intrusions of the state into the private sphere. The opinions read as ringing endorsements for muscular individual rights enforceable against the state. They also read as somewhat more mild rejections of many aspects of the ascriptive-patriotic conception of citizenship and foreshadow more vigorous rejections to come.

In the final chapter of the Citizenship Crusade litigation, courts were again called upon to reject policies rooted in the ascriptive-patriotic conception. Decisions in which judges supported or struck down flag ceremonies requiring students to salute the American flag and/or recite the pledge of allegiance are a microcosm of a debate that continues to cause ripples today. On the one hand, many argue that the flag is an embodiment of the nation that must be revered by citizens. On the other hand, others argue that the flag is a symbolic representation of the state. For those who promoted them, flag ceremonies instilled in children, especially immigrant children, a sense of loyalty to the American nation. Most opinions in which judges upheld requiring children to participate in such ceremonies embraced the values reflected in the ascriptive-patriotic conception of citizenship.
However, making such ceremonies mandatory, particularly at a time when ascriptive and patriotic values were being promoted by anti-democratic governments across the globe, crossed a line for many judges. While instilling patriotism was seen as a legitimate interest for public schools, forcing children to demonstrate their loyalty against their will smacked too much of authoritarianism. For judges wanting to reject mandatory flag ceremonies, the liberal conception of citizenship provided a basis. In a series of opinions that culminated with the US Supreme Court’s decision in *Barnette*, judges drew on and endorsed an image of citizenship rooted in liberty.

With the rejection of mandatory flag ceremonies in *Barnette*, the Supreme Court had opened the schoolhouse door to the liberal conception of citizenship in ways that it had not with its decisions in *Meyer* and *Pierce*. Unlike its opinions in *Meyer* and *Pierce*, which rested on the liberal conception of citizenship but did not extend rights to students, *Barnette* established that students themselves had rights enforceable against public schools. Doing so was necessary to some degree because of the establishment by *Pierce* that parents could opt their children out of public schools and send them to private schools. That decision weakened the argument that requiring children to participate in flag ceremonies infringed upon the rights of parents. However, for children whose parents “chose”\textsuperscript{36} to send them to public school, participating in flag ceremonies was not optional. Thus, the compulsion to declare loyalty through saluting and/or pledging allegiance to the flag fell upon students and rejecting that compulsion rested upon the rights of students.

\textsuperscript{36} I place chose in quotations in reference to the fact that most parents then, as now, could not afford to send their children to private school.
The *Barnette* decision thus tied student speech rights to conceptions of citizenship in two somewhat contradictory ways. First, the decision’s rejection of mandatory flag ceremonies partly rested on children’s rights as citizens (or at least persons or junior citizens, see Buckley, 2014). In this way, restrictions on student speech, like restrictions on the speech of adults outside of the school context, became conflicts between the authority of the state and the rights of individuals. Second, the decision’s rejection of mandatory flag ceremonies also rested on children’s learning of citizenship. Specifically, since the state’s argument in favor of mandatory flag ceremonies was based on the state’s interest in developing children into good citizens, the Court had the opportunity to consider what citizenship means. In the line that is perhaps the best-known part of the Barnette opinion, Justice Jackson connected the learning of citizenship to the liberal conception of citizenship.

That [Boards of Education/Schools] 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)

The connections between conceptions of citizenship, the rights of students, and the learning of citizenship were cemented in the next major Supreme Court case dealing with student speech: *Tinker*. Like *Barnette*, the court’s decision in *Tinker* drew on and endorsed primarily the liberal conception of citizenship. However, in contrast with *Barnette*, where the students were seeking to be shielded from compulsory speech, the students in *Tinker* were asserting an affirmative right to speak. In upholding that right, *Tinker* more clearly established that the rights conferred on citizens extend to students and are enforceable against public schools. Since the liberal conception of citizenship was drawn on in the decision, those rights were robust.
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. (p. 511, emphasis added)

While Justice Fortas firmly established that students have speech rights in school, he also acknowledged that those rights, like all rights, may be restricted given sufficient justification. Since these cases involve speech in schools, the primary justifications are related to learning. In balancing student speech rights with the interest of the school, Justice Fortas put forward the first primary principle of student speech rights law: schools must tolerate private student speech under some circumstances. Unfortunately, Fortas did not clearly define those circumstances (See Buckley, 2011). For example, Fortas talked about the authority to limit speech that “disrupts classwork or involves substantial disorder.” He also referred to Judge Gewin’s standard from Burnside (“materially and substantially interfere with the requirements of appropriate discipline in the operation of the school”). In addition, Justice Fortas framed the standard in many other ways.

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

37 “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).

38 “In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would ‘materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,’ the prohibition cannot be sustained. Burnside v. Byars, supra, 363 F.2d at 749.” (p. 509)
concern speech or action that intrudes upon the work of the schools or the rights of other students…. There is no indication that the work of the schools or any class was disrupted. (p. 509, emphasis added)

Our independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students.” (p. 509; emphasis added)

Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible. (p. 511; emphasis added)

If a regulation were adopted by school officials forbidding discussion of the conflict in Vietnam, or the expression by any student of opposition to it anywhere on school property except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the constitutional rights of students, at least if it could not be justified by a showing that the students’ activities would materially and substantially disrupt the work and discipline of the school. (p. 513; emphasis added)

The lack of clarity around the Tinker standard partly explains the lack of clarity associated with student speech rights law. Nonetheless, Tinker put to rest (nearly completely) the argument that students do not have rights vis-a-vis public schools because those schools act in loco parentis. However, Tinker also confirmed that those rights are not the same as the rights adult citizens exercise outside of the school context. Rather, those rights must be balanced with the interests of the school, including the school’s interest in teaching students good citizenship. In the aftermath of Tinker, then, the validity of restrictions on student speech hinged on whether the restriction could be justified because it interfered with the school’s ability to teach in general or with the school’s ability to teach citizenship. Thus, a judge’s response to a public school’s restriction on student speech may depend on the extent to which free speech is valued under that judge’s conception of citizenship.
Pico: Transitioning from Liberal Citizenship to Civic Republican and Ascriptive Citizenship

While the Supreme Court in Pico technically ruled against the school board that had removed books from a school library, the decision provided little guidance on the merits of the case. This was due in part to the lack of a majority opinion and in part to the decision of one justice to uphold the appellate court’s decision that overturned the motion for summary judgment granted to the Board’s by the district court. In that way, Pico did not significantly alter the status quo in terms of the speech rights of students. Nonetheless, the opinions issued in the case nicely illustrate the liberal-conservative divide within the Court regarding student speech rights and the role that citizenship has played in that divide. What’s more, the dissenting opinions in the case provide a preview of the perspectives on student speech rights and citizenship that will predominate in the three major Supreme Court student speech cases to come.

With nine presiding justices, the Court produced seven opinions in the Pico case: a plurality opinion authored by Justice William Brennan and joined fully by Justices Thurgood Marshall and John Paul Stevens and partially by Justice Harry Blackmun; an opinion by Justice Blackmun concurring in part and concurring in the judgment; an opinion by Justice Byron White concurring in the judgment but not addressing the merits of the case; a dissenting opinion by Justice Lewis Powell; a second dissenting opinion by Justice Sandra Day O’Connor; a third dissenting opinion by Justice William Rehnquist, joined by Chief Justice Warren Burger and Justice Powell; and a final dissent by Chief Justice Burger, joined by all of the other three dissenters.
In his plurality opinion in *Pico*, Justice Brennan drew on both liberal and critical conceptions of citizenship. conjuring up a vision of the free individual exploring the world amongst the library stacks.

A school library, no less than any other public library, is "a place dedicated to quiet, to knowledge, and to beauty." Keyishian v. Board of Regents (1967), observed that "students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding." The school library is the principal locus of such freedom. As one District Court has well put it, in the school library "a student can literally explore the unknown, and discover areas of interest and thought not covered by the prescribed curriculum.... Th[e] student learns that a library is a place to test or expand upon ideas presented to him, in or out of the classroom." (868-869, citations removed)

Brennan’s suggestion that students have a right to receive information, particularly information that exposes them to different perspectives, is what drove Justice Blackmun to not join parts of Brennan’s opinion. An examination of Justice Blackmun’s opinion suggests that, while he embraced some of Justice Brennan’s views, he rejected others, particularly Brennan’s invocation of critical citizenship and the connection between independent, critical thought and the pursuit of a meaningful life. This is first suggested by considering how Justice Blackmun responded to Justice Brennan’s opinion. In the parts of Justice Brennan’s opinion with which Justice Blackmun concurred, Justice Brennan put forward the relatively uncontroversial notions that schools did not have unlimited power over the flow of ideas (and thus the school board’s policy was subject to judicial review) and that the trial court should determine whether the
school board’s motives were improper motives for the suppression of information by the state. In the part of Justice Brennan’s decision that Justice Blackmun did not join, Part II-A(1), Justice Brennan fleshed out the balancing test that should be applied in children’s free speech rights cases and applied that test to the facts in Pico. Part II-A (1) also contained Justice Brennan’s discussion of the right to receive information and the particular nature of school libraries. Most importantly, the part with which Justice Blackmun did not concur is the part in which Justice Brennan put forward much of his conception of citizenship.

Given that Justice Blackmun did not concur with these parts of Justice Brennan’s opinion suggests that Justice Blackmun did not agree with Justice Brennan’s articulation of a right to receive information or the importance of the library for purposes of developing autonomy. Rather, for Justice Blackmun, the Pico case was more about whether or not the school board had overstepped its authority than about whether or not the school’s policy infringed on children’s rights. Not that he did not think the policy had potentially violated the rights of the children in the school; he simply framed those rights in a different way, a way that stressed liberal rights-based principles and the limited power of the state rather than the principles of autonomy and independent/critical thought. As Justice Blackmun wrote, “the State may not suppress exposure to ideas—for the sole purpose of suppressing exposure to those ideas—absent sufficiently compelling reasons” (p. 877). Doing so would limit the individual’s ability to seek out the ideas of others, thus hindering free expression. This did not mean that the policy had infringed upon anyone’s “right to hear” or “right to receive information” regarding different views. Rather, the policy infringed upon the right to access information that otherwise would be available. In Blackmun’s words:
In my view, then, the principle involved here is both narrower and more basic than the “right to receive information” identified by the plurality. I do not suggest that the State has any affirmative obligation to provide students with information or ideas, something that may well be associated with a “right to receive.” See post, at 2819 (BURGER, C.J., dissenting); post, at 2833-2834 (REHNQUIST, J., dissenting). And I do not believe, as the plurality suggests, that the right at issue here is somehow associated with the peculiar nature of the school library, see ante, at 2809; if schools may be used to inculcate ideas, surely libraries may play a role in that process. Instead, I suggest that certain forms of state discrimination between ideas are improper. In particular, our precedents command the conclusion that the State may not act to deny access to an idea simply because state officials disapprove of that idea for partisan or political reasons. (pp. 878-879)

While Justice Blackmun’s and Justice Brennan’s conceptions of citizenship departed from each other, a much wider gulf separated their views from those of the dissenters. One line of reasoning put forward by the dissenters was that schools were, in fact, charged with controlling the ideas to which children are exposed, at least inside schools during the school day, and ensuring that those ideas reflect the values of the community. In making this argument, Chief Justice Burger gestured toward the values embodied in ascriptive-patriotic citizenship, albeit a version less rooted in racial and cultural domination than the version put forward around the time of the Citizenship Crusade.

If, as we have held, schools may legitimately be used as vehicles for “inculcating fundamental values necessary to the maintenance of a
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democratic political system,” Ambach v. Norwick, school authorities must have broad discretion to fulfill that obligation….How are “fundamental values” to be inculcated except by having school boards make content-based decisions about the appropriateness of retaining materials in the school library and curriculum. In order to fulfill its function, an elected school board must express its views on the subjects which are taught to its students. In doing so those elected officials express the views of their community; they may err, of course, and the voters may remove them. (p. 889)

In other words, schools, and in particular, school boards, are charged with the responsibility of inculcating those values and norms embraced by the wider community. In the process of inculcating certain values and disparaging others, schools are fulfilling their responsibility to develop students into good citizens who share common values with other citizens.

As suggested in the previous excerpt, Chief Justice Burger, and the other dissenters, also drew on civic republican citizenship in justifying their position in support of the removal of the books from the school library. Through the quintessential civic republican value—participation—parents and other citizens provide a check on the power of school boards. This argument is fleshed out in Justice Powell’s dissenting opinion.

School boards are uniquely local and democratic institutions. Unlike the governing bodies of cities and counties, school boards have only one responsibility: the education of the youth of our country during their most formative and impressionable years. Apart from health, no subject is closer to the hearts of parents than their children’s education during those years. For these reasons, the governance of elementary and secondary education traditionally has been placed in the hands of a local board, responsible locally to the parents and citizens of school districts. Through parent-teacher associations (PTA’s), and even less formal arrangements that vary with schools, parents are informed and often may influence decisions of the board. Frequently, parents know the teachers and visit classes. It is fair to say that
no single agency of government at any level is closer to the people whom it serves than the typical school board. (p. 894)

_The Curtailing of Student Speech Rights: Civic Republican Citizenship_

The lack of a clear pro-student speech decision in Pico was an indication that the views of the justices of the Supreme Court were changing. In the last three Supreme Court cases dealing with student speech rights, the Court upheld restrictions placed on those rights. In crafting their arguments in support of these restrictions, the justices primarily drew on the civic republican conception of citizenship, justifying restrictions on student speech when those restrictions advanced the public good or taught students the values needed for civic republican citizenship.

In _Bethel School District No. 403 v. Fraser_ (1986), a high school student “delivered a speech nominating a fellow student for student elective office.” As a result of the “lewd” speech, Fraser was “removed from the list of candidates for graduation speaker at the school's commencement exercises” (p. 675) and ultimately served a two-day suspension. The majority opinion, authored by Chief Justice Burger and endorsed by a total of five of the justices, drew on civic republican principles related to developing common values and norms, particularly common views on what constitutes appropriate speech. While Chief Justice Burger seems to have been concerned about the harm that other students could experience at the hands of

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39 Justice Brennan included the words of the speech in his opinion:

I know a man who is firm—he’s firm in his pants, he’s firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he’ll take an issue and nail it to the wall. He doesn’t attack things in spurts - he drives hard, pushing and pushing until finally - he succeeds. Jeff is a man who will go to the very end—even the climax, for each and every one of you. So vote for Jeff for A. S. B. vice-president—he’ll never come between you and the best our high school can be. (p. 687)

40 Justice Brennan “concurred in the judgment” and Justice Blackmun “concurred in the result” (but did not write a separate opinion). In other words, four justices declined to join Chief Justice Burger’s opinion: Brennan, Blackmun, Marshall, and Stevens.
language like that used in the speech, the overarching theme of his opinion is the need to teach students civility.

The role and purpose of the American public school system were well described by two historians, who stated: “[P]ublic education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.” These fundamental values of “habits and manners of civility” essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these “fundamental values” must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society’s countervailing interest in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences. (p. 681; emphasis added)

For Burger, schools were the place where children are to learn such “habits and manners” and “the boundaries of social behavior”: “Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse….The inculcation of these values is truly the ‘work of the schools’” (p. 681). He then went to further explain the connection between restricting “lewd” speech in schools and the mission of schools to foster “civility”:

The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers - and indeed the older students - demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models. 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. (p. 682; emphasis added)
Perhaps more striking is the sweeping, exclusive power that Burger granted schools in deciding what is and is not an “appropriate form of civil discourse”: “The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board” (p. 682).

From a jurisprudential perspective, Justice Brennan’s opinion objected to the creation of a new standard applicable to “lewd speech” in schools, preferring to, instead, apply Tinker. While Justice Brennan did not join Chief Justice Burger’s opinion in Fraser, his concurring opinion shows that he saw Fraser’s speech as problematic from a civic republican perspective, albeit from a somewhat different conception of civic republican citizenship. First of all, Justice Brennan’s application of the Tinker approach emphasized the extent to which the common good depends on schools being able to limit disruptive speech in schools. Secondly, Justice Brennan added an additional civic republican dimension: the need to teach children how to participate in public discourse. These two aspects of Brennan’s perspective are interwoven throughout his opinion.

The State has interests in teaching high school students how to conduct civil and effective public discourse and in avoiding disruption of educational school activities. Thus, the Court holds that under certain circumstances, high school students may properly be reprimanded for giving a speech at a high school assembly which school officials conclude disrupted the school’s educational mission. Respondent’s speech may well have been protected had he given it in school but under different circumstances, where the school’s legitimate interests in teaching and maintaining civil public discourse were less weighty. (pp. 688-689)

In other words, while both Burger and Brennan connected civility to citizenship, Chief Justice Burger emphasized the importance of teaching children how to avoid offending other members of the community—in other words, the importance of being civil for civility’s sake—and Justice
Brennan emphasized the importance of teaching children how to participate in the public sphere—in other words, the importance of being civil for the sake of being *civic*.

Regardless of Justice Brennan’s call to apply Tinker in Fraser, the case nonetheless provided the first exception to the Tinker standard, an exception that narrowed the speech rights of students. The Court proceeded to further narrow those rights in Hazelwood v. Kuhlmeier. In this case, high school students had objected to the decision by their school’s principal to remove some articles from the student newspaper, Spectrum. The majority and dissenting opinion in Kuhlmeier illustrate the impact that a judge’s conception of citizenship may have on how that judge reacts to a restriction on student speech. Justice White, who authored the majority opinion, and Justice Brennan, who authored the dissent, both framed the case in terms of the school’s important mission to teach students citizenship. However, how they understood citizenship impacted whether or not they believed that restricting the students’ speech in the case was justified by that need.

For Justice White, schools had a stronger interest in restricting student speech that could be seen as “school-sponsored.” When restricting such speech, that interest is weightier than the interest that a student has in expression. Thus, the school must be given greater authority to restrict that the expression. Specifically, Justice White’s opinion established White’s decision held “that 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” (p. 273). Here, the restriction on speech met this standard because it would teach students important lessons related to citizenship. In particular, the restrictions would demonstrate that not all speech is created equal.
from the perspective of civic participation. Some speech, including that of journalists, does not belong in the public sphere. According to Justice White,

[The principal] could reasonably have concluded that the students who had written and edited these articles had not sufficiently mastered those portions of the Journalism II curriculum that pertained to the treatment of controversial issues and personal attacks, the need to protect the privacy of individuals whose most intimate concerns are to be revealed in the newspaper, and “the legal, moral, and ethical restrictions imposed upon journalists within [a] school community” that includes adolescent subjects and readers. (p. 276)

In his dissent, Justice Brennan strongly objected to Justice White’s reasoning. Like White, Brennan presented the case through the lens of learning good citizenship; however, his conception of citizenship, and thus what students should be learning when they are learning about citizenship, fundamentally clashed with that of Justice White. Brennan’s conception of citizenship is pointed to near the beginning of his 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....” (p. 277; citations removed)

Like his concurrence in Fraser, Brennan’s dissent in Kuhlmeier insisted that the Tinker standard be applied to all student speech, regardless of whether the speech of a student is “sponsored” by the school. For Brennan, “school officials may censor only such student speech as would ‘materially disrupt[1]’ a legitimate curricular function.” In Brennan’s view, the line was drawn between the sort of speech that “prevent[s] the school from pursuing its pedagogical mission” and speech that “frustrates the school's legitimate pedagogical purposes merely by expressing a
message that conflicts with the school’s.” The former could be restricted under *Tinker*; the latter could not.

What was the basis for where Brennan drew this line? Citizenship. Specifically, granting schools the power to censor student speech that is “school sponsored” would allow schools the power to reach a broad swath of speech, giving the school/state too much control over the flow of ideas. In Brennan’s words, “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 in the [hypotheticals listed in the previous excerpt].” This would convert “our public schools into ‘enclaves of totalitarianism,’ that ‘strangle the free mind at its source,’ West Virginia Board of Education v. Barnette” (p. 280). Brennan later reiterated this message.

*Tinker* teaches us that 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. See also *Epperson v. Arkansas*; *Meyer v. Nebraska*. Otherwise educators could transform students into “closed-circuit recipients of only that which the State chooses to communicate,” *Tinker*, and cast a perverse and impermissible “pall of orthodoxy over the classroom,” *Keyishian v. Board of Regents*. (pp. 285-286; citations removed)

In this way, Justice Brennan tied the protection of student speech to the need to preserve diverse views and independent thinking, both of which are valued under critical citizenship.
The US Supreme Court upheld yet another restriction on student speech in Morse v. Frederick, leading Justice Thomas to suggest that the Court’s student speech rights jurisprudence failed to provide any clear and workable standard for resolving conflicts over student speech. In his majority opinion in the case, Chief Justice Roberts summarized the facts.

On January 24, 2002, the Olympic Torch Relay passed through Juneau, Alaska, on its way to the winter games in Salt Lake City, Utah. The torchbearers were to proceed along a street in front of Juneau-Douglas High School (JDHS) while school was in session. Petitioner Deborah Morse, the school principal, decided to permit staff and students to participate in the Torch Relay as an approved social event or class trip. App. 22-23. Students were allowed to leave class to observe the relay from either side of the street. Teachers and administrative officials monitored the students’ actions.

Respondent Joseph Frederick, a JDHS senior, was late to school that day. When he arrived, he joined his friends (all but one of whom were JDHS students) across the street from the school to watch the event. Not all the students waited patiently. Some became rambunctious, throwing plastic cola bottles and snowballs and scuffling with their classmates. As the torchbearers and camera crews passed by, Frederick and his friends unfurled a 14-foot banner bearing the phrase: “BONG HiTS 4 JESUS.” App. to Pet. for Cert. 70a. The large banner was easily readable by the students on the other side of the street.

Principal Morse immediately crossed the street and demanded that the banner be taken down. Everyone but Frederick complied. Morse confiscated the banner and told Frederick to report to her office, where she suspended him for 10 days….Frederick administratively appealed his suspension, but the Juneau School District Superintendent upheld it, limiting it to time served (8 days). (p. 2623)

In the remainder of his opinion, Chief Justice Roberts argued that the public interest in discouraging youth drug use outweighed Frederick’s interest in his expression. In other words, Frederick’s individual interest (to express himself and appear on television) had to take a backseat to the school’s fight against drug use: civic republicanism par excellence.

In his dissent, Justice Stevens rooted his objection to the restriction on Frederick’s speech in liberal and critical conceptions of citizenship. Stevens, referring back to the Tinker
case and the Vietnam War, as well as Prohibition, alluded to the importance of critical citizens who challenge and dispute prevailing beliefs and opinions.

The Vietnam War is remembered today as an unpopular war. During its early stages, however, “the dominant opinion” that Justice Harlan mentioned in his Tinker dissent regarded opposition to the war as unpatriotic, if not treason. In 1965, when the Des Moines students wore their armbands, the school district’s fear that they might “start an argument or cause a disturbance” was well founded. Given that context, there is special force to the Court’s insistence that “our Constitution says we must take that risk; and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.” As we now know, the then-dominant opinion about the Vietnam War was not etched in stone. Reaching back still further, the current dominant opinion supporting the war on drugs in general, and our antimarijuana laws in particular, is reminiscent of the opinion that supported the nationwide ban on alcohol consumption when I was a student. While alcoholic beverages are now regarded as ordinary articles of commerce, their use was then condemned with the same moral fervor that now supports the war on drugs. Just as prohibition in the 1920’s and early 1930’s was secretly questioned by thousands of otherwise law-abiding patrons of speakeasies, today the actions of literally millions of otherwise law-abiding users of marijuana, and of the majority of voters in each of the several States that tolerate medicinal uses of the product, lead me to wonder whether the fear of disapproval by those in the majority is silencing opponents of the war on drugs. Surely our national experience with alcohol should make us wary of dampening speech suggesting—however inarticulately—that it would be better to tax and regulate marijuana than to persevere in a futile effort to ban its use entirely. (p. 2651)

Conclusion: Citizenship’s Multiplicity and Student Speech Rights Jurisprudence

While judicial conceptions of citizenship are not the only factor that shapes how a judge responds to a conflict involving student speech, the link between conceptions of citizenship and student speech rights jurisprudence is palpable. On one level, that connection was made external to the courts. As states and school districts sought to justify educational policies on the grounds

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41 For example, in some instances, judicial conceptions of childhood and the relationship between students and schools have also played a large role (Buckley, 2014).
that those policies fostered good citizenship, judges drew on conceptions of citizenship in responding to challenges to such policies. Requiring that students not be taught foreign languages even outside the school walls or requiring them to salute the flag and pledge allegiance to the government and nation may be effective means for assimilating children and instilling feelings of patriotism and loyalty. However, such policies conflict with other conceptions of citizenship, particularly the liberal and the critical conceptions. Promoting values that conflict with liberal and critical conceptions is problematic under these conceptions of citizenship, especially if doing so violates the rights of students. In other words, either because forcing students to recite the pledge of allegiance instills empty loyalty at the expense of critical thinking or because forcing them to do so violates the students’ rights, mandatory flag ceremonies are problematic. In rejecting mandatory flag ceremonies and other ascriptive-patriotic policies, the Court turned to other conceptions, particularly the liberal conception, for support.

Once courts accepted that students have rights, the connection between conceptions of citizenship and student speech rights was further strengthened. In cases decided mainly in the 1960s, courts, including the US Supreme Court, could object to restrictions on student speech on two main grounds. First, a judge could object that the restriction is not justified on the basis of the school’s aim of teaching good citizenship since the restriction would teach values that contradict liberal and/or critical citizenship. Second, a judge could object that the restriction violates the rights of students, regardless of what the restriction might teach those students.

However, by the 1980s, many judges, including many Supreme Court justices, saw the need to restrict student freedom within schools. Extending too much autonomy to students had been a concern of judges throughout the period during which these cases were decided.
However, in the context of the pledge of allegiance cases and, more so, the student rights cases of the 1960s, that concern had been displaced by a concern with authoritarianism in public schools. The perceived need to limit student rights, perhaps fueled by a broader concern with social order, surfaced again over the 1970s and helped lead the Supreme Court to uphold restrictions on student speech in the 1980s-2010. The ascriptive-patriotic conception of citizenship had slid to the background, in part because that conception, especially the muscularly nationistic and assimilationist version of it, was not fervently promoted in schools. However, the students rights cases decided in the 1980s-2010 largely rejected the liberal conception of citizenship in favor of the civic republican conception.

While all of these conceptions of citizenship assume the existence of rights, they differ in terms of how important rights are vis-à-vis other civic values including patriotism, common norms, participation, and the pursuit of the common good. The patriotic-ascriptive conception of citizenship provided justification for policies that extensively interfered with individual liberty, be it the liberty of students or the liberty of parents. For judges concerned about these intrusions upon rights, the liberal conception of citizenship provided a logical source of support for striking down these intrusions. In turn, for judges concerned about overly restricting schools’ authority, the civic republican conception of citizenship provides support for upholding some intrusions into students’ rights. If a policy or action furthers an important state interest, such as maintaining order in schools, a judge may point to civic republicanism’s emphasis on the common good. The same goes if a policy or action by schools or the state seeks to teach children the importance of pursuing the common good over their own individual interests. The civic republican vision of the importance of common civic values and norms provides support for upholding restrictions on student speech that are designed to promote those common values and norms. In contrast, for
judges concerned about schools having too much power over the development of children’s values and beliefs, the critical conception of citizenship supports restricting school authority to limit student speech in ways that go beyond the support provided by the liberal conception.

When faced with a conflict over student expression today, we are faced with a framework established by the Supreme Court in Barnette, Tinker, Fraser, Kuhlmeier, and Morse. The majority opinions in these cases draw on three of the four conceptions of citizenship. In isolation, each of those cases produced a legal standard applicable to particular kinds of student speech. Student demonstrations and utterances of loyalty and allegiance may not be coerced. Independent or private student speech may not be restricted unless it materially and substantially disrupts the work of the school or interferes with the rights of others. “Lewd” speech may be restricted. Student-sponsored speech may be restricted when the restriction is reasonably related to a legitimate pedagogical concern. Finally, speech that could be perceived as promoting drug use may be restricted. Viewed collectively, these cases and standards suggest that Justice Thomas has a point: the framework is vague and full of contradictions. One reason for this is that judges have drawn on and endorsed competing conceptions of citizenship in their decisions. This has led judges to different outcomes. It also makes interpreting the opinions and applying them to new contexts difficult.

Cases


_Bartels v. Iowa_, 262 U.S. 404 (1923).

_Bolling v. Superior Court for Clallam County_, 133 P.2d 803 (1943).
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*Dritt v. Snodgrass*, 66 Mo. 286 (1877).


*Hobbs v. Germany*, 94 Miss. 469 (1909).


*Pugsley v. Sellmeyer*, 158 Ark. 247, 250 S.W. 538 (Ark. 1923)

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1 Morse v. Frederick, 127 S.Ct. 2618, 2641 (2007). These sentiments regarding the lack of clarity and consistency within American student speech rights law jurisprudence have been echoed by several legal scholars (e.g. Chemerinsky, 1999–2000, 2008; Dupre, 2009; Waldman, 2008; West, 2008; and Yudof, 1995). Also see Author, 2014.
2 p. 2634.
4 Elsewhere, I have argued that another important factor is….
6 This is not to say that liberalism is not understood by some as placing significant value on collective endeavors, at least those that perpetuate the flourishing of a liberal system. For example, Kymlicka and Norman (1994) have described what they call ‘liberal virtue theory,’ which emphasizes participation in public deliberation and a commitment to public reasonableness and tolerance. However, for purposes of this analysis, I am restricting the term ‘liberal citizenship’ to citizenship founded on the centrality of individual choice and flourishing.
Although the California Court of Appeals’ struck down mandatory flag ceremonies in *Gabrielli v. Knickerbocker* (1937), it did so on the grounds that the school had violated statutorily mandated rules and procedures regarding the expulsion of children from school.

All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences;…no human authority can, in any case whatever, control or interfere with the rights of conscience’ (*Gobitis*, 1937, 584).

This approach is reflected in many of the opinions that upheld mandatory flag ceremonies. For example, in *Gobitis v. Minersville* (1940), Justice Frankfurter pointed out that parents still had children for more of the day than schools did. Given that, Frankfurter did not feel like parents’ rights were all that infringed.


See dissent in *Wright v. Board of Education of St. Louis* (1922).

See *Barnette v. West Virginia State Board of Ed.* (1942): “He may not refuse to bear arms or pay taxes because of religious scruples, nor may he engage in polygamy or any other practice directly hurtful to the safety, morals, health or general welfare of the community” (253).

As William Galston (2002) has noted, ‘liberal autonomy is frequently linked with the commitment to sustained rational examination of self, others, and social practices’ (2002, 21).