

# JUVENILES AND THE CONSTITUTION

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Our topics for today ask the question: “Are (should) juveniles (be) different from adults for purposes of the criminal law?” My Article for this presentation, “Juveniles and the Constitution,” is somewhat broader. I will explore how the Supreme Court treats youth in a great many areas: establishment of religion, free speech in school, free speech outside of school, search and seizure in school, personal autonomy, and, of course, the criminal justice system.

## I. ESTABLISHMENT OF RELIGION

Even a cursory look at establishment of religion cases tells us that the Supreme Court takes juvenile rights a lot more seriously than adult rights. For starters, in *Engel v. Vitale*, the Court invalidated a twenty-two-word prayer that began the school day in New York.<sup>1</sup> The prayer, if prayer it must be called, was: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.”<sup>2</sup> Immediately prior to announcing its decision, the Court had opened its session with the cry of, “God save the United States and this Honorable Court.”<sup>3</sup>

The similarities between the two openings are stark. The *Engel* opening asks for blessings upon the relevant people and institutions in the students’ lives. The Court’s invocation asks for salvation of the judicial institutions, which play substantially the same role in society as parents, teachers, and

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1. *Engel v. Vitale*, 370 U.S. 421, 424 (1962).

2. *Id.* at 422.

3. *The Court and Its Procedures*, SUPREME COURT U.S., <http://www.supremecourt.gov/about/procedures.aspx> (last visited Sept. 30, 2013).

schools play for the children. Surely, begging blessings is not significantly different in principle from asking to be saved.

The Court seemed especially troubled with the concept of officially composed prayer.<sup>4</sup> As the Court put it: “[I]t is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.”<sup>5</sup> But, as Justice Douglas’s concurring opinion reminds us, there is virtually no difference in principle between the opening of the school in New York and the opening of court in Washington, D.C.<sup>6</sup>

If anything, the passage of years has widened the dichotomy. Today, not only is school prayer—as an organized exercise—prohibited, even if not composed by the school board,<sup>7</sup> but so are graduation prayers<sup>8</sup> and prayers at football games.<sup>9</sup> On the other hand, prayers far less innocuous than the opening of court have been permitted in the halls of our legislatures.<sup>10</sup> Indeed, that same case, *Marsh v. Chambers*, not only upheld legislative prayer, but also permitted the State to fund a Chaplain at its own expense to minister to the legislators desiring such counsel.<sup>11</sup>

The difference has to be predicated on the “tender years” principle. An adult apparently can deal with prayer contrary to the adult’s belief, whereas a child cannot be expected to. *Lee v. Weisman*, the graduation prayer case, pretty clearly draws that dichotomy.<sup>12</sup> So, has the Court given juveniles more or fewer rights than adults in this area?

Some might say less: Adults have the right to pray in public. Why deny children? I think that the answer is the reduced ability of children to understand the limited religious competence of the State. Consequently, because an adult can understand the limited competence of government, the adult is less likely to see a religious practice as a governmental endorsement than a child, whose perception is not so well developed.

## II. FREE SPEECH IN SCHOOL

One way of looking at the free speech rights of students in schools is that they are watered-down versions of adult rights. Another way of looking at them is that they reflect a desire to protect other students who are captive auditors. Yet a third way of looking at them is that they attempt to balance the student’s rights of expression against the school’s mission to inculcate values.

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4. *Engel*, 370 U.S. at 425.

5. *Id.*

6. *Id.* at 442 (Douglas, J., concurring).

7. *See Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 205 (1963).

8. *See Lee v. Weisman*, 505 U.S. 577, 590 (1992).

9. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 295 (2000).

10. *See Marsh v. Chambers*, 463 U.S. 783, 823 (1983) (Stevens, J., dissenting).

11. *Id.* at 813 (Brennan J., dissenting).

12. *Lee*, 505 U.S. at 596.

Frankly, the cases seem to support all three. The fountainhead case, *Tinker v. Des Moines School District*, clearly required a material and substantial disruption and explicitly held that “students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate.”<sup>13</sup> Thus, the wearing of black armbands to protest the Vietnam conflict could not be forbidden even though the school itself wished to communicate a different view in regard to the wisdom of our Vietnam operations.

It soon became clear, however, that *Tinker* might not have meant all that it said, and that while schools “may not be enclaves of totalitarianism,”<sup>14</sup> neither were they fully open fora. For example, in *Bethel School District v. Fraser*, the Court held that in the interest of protecting younger students (some as young as fourteen), a speech with significant sexual innuendo could be punished.<sup>15</sup> And in *Morse v. Frederick*, the Court upheld an instance of viewpoint-based discrimination because the viewpoint, obliquely advocating the use of marijuana, was so contrary to the school’s message that it could be forbidden.<sup>16</sup> It was not completely clear whether the Court was primarily concerned with aiding the school in its mission of creating a drug-free environment or whether its primary concern was protecting children from hearing advocacy unfit for their tender ears. Either way, the Court significantly reduced the right of a schoolchild—in this case, actually an eighteen-year-old adult—to speak in the interest of shielding other children from ideas that the Court deemed inimical to their well-being.

### III. FREE SPEECH OUTSIDE OF SCHOOL

Outside of the school context, there are few limitations on juvenile speech. I suppose that under *Prince v. Massachusetts*, child labor laws could be employed to limit the time, place, and manner in which very young children could speak.<sup>17</sup> Beyond that, however, there do not appear to be too many limitations peculiar to children regarding what they can or cannot say.

What they can see, hear, or read is another matter. Probably nowhere is the Court more attuned to the foibles of minors than in the area of sexually explicit, but non-obscene, reading material. In *Ginsberg v. New York*, the Court, per Justice Brennan (of all people), held that a luncheonette owner could be convicted of selling “girlie” magazines to a sixteen-year-old boy, provided that the magazines “(i) predominantly appeal[ed] to the prurient, shameful or morbid interest of minors, and (ii) [were] patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable

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13. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

14. *Id.*

15. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986).

16. *Morse v. Frederick*, 551 U.S. 393, 397 (2007) (Frederick’s banner read “BONG HITS 4 JESUS”).

17. *See Prince v. Massachusetts*, 321 U.S. 158 (1944).

material for minors, and (iii) [were] utterly without redeeming social importance for minors.”<sup>18</sup>

Justice Fortas dissented, saying, “I agree that the State in the exercise of its police power—even in the First Amendment domain—may make proper and careful differentiation between adults and children. But I do not agree that this power may be used on an arbitrary, free-wheeling basis.”<sup>19</sup> Thus, Fortas would have been slower to allow special rules for juveniles than his colleagues in the majority.

Forty-three years later, the Court revisited the question in a case involving ultra-violent video games.<sup>20</sup> Certainly anyone familiar with Kevin Saunders’s work would know that ultra-violence is at least as bad for young children as explicit sex.<sup>21</sup> But the Court in *Brown v. Entertainment Merchants Ass’n* was either unfamiliar with Professor Saunders’s work, or did not care about it.<sup>22</sup> The Court emphasized that obscenity was about sex, and because there was already an adult standard for sexual obscenity, it was okay to use a watered-down one for minors.<sup>23</sup> However, because there was no “obscenity” standard for violence for adults, there was nothing to water down for children.

Specifically, the Court said: “No doubt a State possesses legitimate power to protect children from harm, but that does not include a *free-floating* power to restrict the ideas to which children may be exposed.”<sup>24</sup> The Court then concluded by citing everything from Grimm fairytales to Homer’s *Odyssey* to demonstrate that there is no tradition of shielding children from violence.<sup>25</sup>

One cannot help but be struck by the similarity of the *Brown* Court’s “free-floating” condemnation of California’s juvenile protection statute to Justice Fortas’s similar “free-wheeling” comment in his *Ginsberg* dissent. But I would have thought that the essence of *Ginsberg* was that there was a “free-floating” juvenile protection rule out there (however pejorative that might sound). Indeed, if there were not, it is hard to see why there needs to be a special rule for juvenile obscenity when there was already an in-place rule for obscenity in general—which, of course, was precisely Fortas’s point in dissent.<sup>26</sup>

Ultimately, California’s case foundered on its inability to prove direct causation between juvenile exposure to violent videogames and antisocial behavior.<sup>27</sup> Of course, for years this has been the case with exposure to

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18. *Ginsberg v. New York*, 390 U.S. 629, 633 (1968) (internal quotation marks omitted).

19. *Id.* at 673 (Fortas, J., dissenting).

20. *See Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2732–33 (2011).

21. Kevin W. Saunders, *Media Violence and the Obscenity Exception to the First Amendment*, 3 WM. & MARY BILL RTS. J. 107, 166 (1994).

22. *See Brown*, 131 S. Ct. at 2741–42.

23. *Id.* at 2734.

24. *Id.* at 2736 (emphasis added) (citation omitted).

25. *Id.* at 2736–37.

26. *Ginsberg v. New York*, 390 U.S. 629, 673 (1968) (Fortas, J., dissenting).

27. *Brown*, 131 S. Ct. at 2738–39.

obscenity (and *a fortiori* exposure to that which is obscene for children). Nevertheless, the Court, for good or ill, has concluded that children can be protected from sexual imagery that may not be good for them, but they cannot be protected from violent imagery that may not be good for them.

#### IV. SEARCH AND SEIZURE

So far as I can tell, there is no special rule for juveniles in regard to searches and seizures. It is plausible that in light of *J.D.B. v. North Carolina*, the Court will ultimately hold that the standards for a valid consent search will be more stringent for juveniles than they are for adults.<sup>28</sup> After all, the Court has emphasized that the validity of consent depends on a whole variety of factors, including age and maturity.<sup>29</sup> We do not, however, have such a case; thus, whether the Court will in fact so hold remains a matter of speculation.

What we do know is that the Court has permitted school searches without a warrant or probable cause.<sup>30</sup> This, of course, would suggest—at least on the surface—that the Court gives juveniles even fewer rights than adults. However, I do not so read the cases. At least I do not so read the leading case of *T.L.O. v. New Jersey*, which appears to be predicated more on the special needs of the school than the reduced expectation of children (although the two are surely interrelated).<sup>31</sup> *T.L.O.* held that reasonable suspicion would justify a search of a student’s purse in school, even though a similar search would have required probable cause outside of school.<sup>32</sup> *T.L.O.* was limited to ordinary searches by *Safford School District v. Redding*, which clearly held that an intrusive body search (bordering on a strip search) predicated upon reasonable suspicion that ibuprofen (a substance forbidden by the school) might be found, was unconstitutional.<sup>33</sup>

The Court’s drug testing cases do seem partially based on juvenile Fourth Amendment rights being treated less seriously than comparable adult rights. In *Vernonia School District v. Acton*, Justice Scalia, writing for the Court, emphasized the reduced nature of juvenile rights, opining that: “Traditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination—including even the right of liberty in its narrow sense, *i.e.*, the right to come and go at will.”<sup>34</sup> He then adds (alluding to *Tinker*): “Thus, while children assuredly do not ‘shed their constitutional rights . . . at the schoolhouse gate,’ the nature of those rights is what is appropriate for children in school.”<sup>35</sup>

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28. See *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011).

29. See, e.g., *Schneekloth v. Bustamonte*, 412 U.S. 218, 226 (1973).

30. See *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985).

31. *Id.* at 340–42.

32. *Id.* at 340–48.

33. *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 389 (2009).

34. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995).

35. *Id.* at 655–56 (alteration in original) (citation omitted).

The remainder of the opinion, and certainly the follow-up school drug-testing case of *Board of Education v. Earls*, like *T.L.O.*, seems to be predicated more on school needs than on the absence of juvenile rights.<sup>36</sup> But, of course, the two are interrelated.

## V. PERSONAL AUTONOMY

For the most part, the Court has been reluctant to extend personal autonomy rights to juveniles. For example, the *Lawrence v. Texas* right to sexual autonomy was clearly limited to adults, and the Court has done nothing to indicate that the right might be extended to minors.<sup>37</sup> In *Carey v. Population Services International*, the Court did hold that a minor had a constitutional right to purchase contraceptive devices as part of his or her right to privacy.<sup>38</sup> The Court went out of its way, however, to underscore that it was not holding that a minor had a right to engage in sexual intercourse.<sup>39</sup>

Of course, *Carey* significantly predated *Lawrence*, and the right to sexual autonomy, even for adults, had not yet been firmly decided. So, the Court's rationale was predicated on the disutility of minors in fact engaging in unprotected sexual intercourse, even if they could not do so lawfully. The Court considered, but did not hold, that even if adults had the right to engage in sexual intercourse (as *Lawrence* later held), the State might be able to limit a minor's right to similarly engage.<sup>40</sup>

Thus, minors have the constitutional right to buy contraceptives, but, at least as of now, no constitutional right to put them to their intended use. Indeed, as of now, despite my protestations in print, the Court has not even held that an honest and reasonable mistake of age should be a constitutionally required defense in a statutory rape prosecution.<sup>41</sup>

Minors do, however, have the right to obtain an abortion, even against their parents' wishes.<sup>42</sup> The Court's reasoning is that, unlike other autonomy rights that can be postponed, abortions are much more of the "now or never" category.<sup>43</sup> Consequently, unlike the right to sexual autonomy or marriage, which can be postponed, abortion cannot.

At the same time, the Court recognized the relevance of youth. Thus, rather than compelling the states to give a minor's choice to abort carte blanche,

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36. See *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822 (2002); *Acton*, 515 U.S. at 656–66.

37. *Lawrence v. Texas*, 539 U.S. 558, 564 (2003).

38. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 700 (1977).

39. *Id.* at 695 n.17.

40. *Id.*

41. See Arnold H. Loewy, *Statutory Rape in a Post Lawrence v. Texas World*, 58 SMU L. REV. 77, 88–90 (2005).

42. See, e.g., *Bellotti v. Baird*, 443 U.S. 622, 643–44 (1979); see also *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 72–74 (1976).

43. *Bellotti*, 443 U.S. at 642–43.

the Court permitted laws requiring parental notification or consent if, and only if, the minor has the opportunity for an appropriate judicial bypass.<sup>44</sup> That is, she must be able to go into court and argue that in her case, an abortion should be obtainable without parental notification or consent. In order for such a bypass procedure to pass constitutional muster, the judge must allow the abortion if the judge finds either that the young woman is sufficiently mature to make her own decision, or that it would be in her best interest to obtain an abortion without her parents' consent or knowledge, as the case may be.<sup>45</sup>

The Court was very clear that in announcing these rules, it was taking into account the importance of the autonomy or procreative right, the necessity for immediate action, and the possible immaturity of the child.<sup>46</sup> What the Court did not do was to create a categorical rule, either treating juveniles as miniature adults or denying the right altogether. Instead, it made age a factor in granting autonomy, allowing the states to partially limit autonomy (i.e., to make an abortion a decision between a woman, her doctor, and either her judge or her parents, rather than just between her and her doctor).<sup>47</sup>

## VI. JUVENILES AND THE CRIMINAL LAW

The Supreme Court's most recent decisions certainly seem to be moving away from any thought that juveniles are just miniature adults. Although to the best of my knowledge there are no Supreme Court decisions requiring that juveniles be tried in a juvenile court, there are decisions recognizing the importance of their minority, wherever they may be tried.

In *J.D.B. v. North Carolina*, for example, the Court held that the youth of a defendant must be taken into account in assessing his reasonable perception of custody, and thus his need for *Miranda* warnings.<sup>48</sup> Underscoring the immaturity of youth, as well as his or her dependence on authority, the Court noted that: "[Judges] simply need the common sense to know that a 7-year-old is not a 13-year-old and neither is an adult."<sup>49</sup>

The other area in which the Court clearly recognized the relevance of youth is in sentencing. As we will hear later this afternoon in our third panel, the Court has taken capital punishment off the table for juveniles,<sup>50</sup> has categorically forbidden life without parole for non-capital offenses,<sup>51</sup> and has only grudgingly permitted life without parole even for capital murder, insisting

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44. *Id.* at 643–44, 648.

45. *See id.* at 443 U.S. at 653 (Stevens, J., concurring).

46. *Id.* at 635–37 (plurality opinion).

47. *Id.*

48. *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2407 (2011).

49. *Id.*

50. *Roper v. Simmons*, 543 U.S. 551, 588 (2005). The Symposium's third panel was comprised of Joseph E. Kennedy, Kevin W. Saunders, and Michael L. Perlin; the articles arising from that discussion are contained in the first issue of Volume 46 of the Texas Tech Law Review.

51. *Graham v. Florida*, 130 S. Ct. 2011, 2049 (2010).

that it be reserved for the worst of the worst juvenile offenders.<sup>52</sup> In so holding, the Court has insisted on taking the possibility of rehabilitation seriously in the context of juveniles because, as the court put it in *Graham* and *Miller*: “Deciding that a juvenile offender forever will be a danger to society would require mak[ing] a judgment that [he] is incorrigible—but incorrigibility is inconsistent with youth.”<sup>53</sup>

Like so many other areas of the law, the Court has refused to allow the criminal law to treat juveniles as if they were miniature adults.

## VII. IS THE COURT CONSISTENT IN ITS TREATMENT OF JUVENILES?

For the most part, I think that the Court as a whole has been fairly consistent in its treatment of juveniles. The one outlier is *Brown v. Entertainment Merchants Ass’n*, where, as you recall, the Court rejected any State power to shield juveniles from ultra-violent material.<sup>54</sup> Apart from *Brown*, all of the Court’s decisions seem to recognize the immaturity of youth. To be sure, some of this recognition has resulted in fewer rights for juveniles (speech, personal autonomy, susceptibility to drug testing), while others have resulted in more rights for juveniles (ineligibility for capital punishment, substantially lessened possibility of life without parole, more expedient declaration of custodial status for purposes of *Miranda*). Still, for other rights, it may be debatable whether the juvenile gets more or less protection (e.g., school prayer). But what is consistent, except in *Brown*, is the Court’s recognition that juveniles are different, and as such, should be treated differently by the law.

One final note is that although the Court as a whole has been relatively consistent in this area, the individual Justices have not. Perhaps the least consistent Justice has been Justice Thomas. He has consistently railed against juvenile rights, arguing that, historically, they simply have not had rights. Thus, he would virtually eliminate juvenile free speech rights, clearly subordinating them to the will of their parents<sup>55</sup> and teachers.<sup>56</sup> On the other hand, he has consistently voted to hold juveniles to full adult responsibility for any crimes they may commit.<sup>57</sup>

Lest I be accused of picking on conservative inconsistency, I will note that the liberals have not done much better. Justice Brennan, for example, voted in

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52. *Miller v. Alabama*, 132 S. Ct. 2455, 2483 (2012) (Thomas, J., dissenting).

53. *Id.* at 2465 (majority opinion) (quoting *Graham*, 130 S. Ct. at 2029) (internal quotation marks omitted); *Graham*, 130 S. Ct. at 2029.

54. *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2741–42 (2011).

55. *Id.* at 2751 (Thomas, J., dissenting).

56. *See Morse v. Frederick*, 551 U.S. 393, 410 (2007) (Thomas, J., concurring) (arguing that *Tinker* was wrongly decided).

57. For example, he wrote or joined the dissenting opinions in *Miller*, *Graham*, and *Simmons*. *Miller*, 132 S. Ct. at 2482 (Thomas, J., dissenting); *Graham*, 130 S. Ct. at 2043 (Thomas, J., dissenting); *Roper v. Simmons*, 543 U.S. 551, 607 (2005) (Thomas, J., dissenting).



favor of special rules for juveniles in criminal cases even before it became popular to do so.<sup>58</sup> On the other hand, he would allow young girls virtually the same abortion rights as older women without regard to their immaturity.<sup>59</sup>

My bottom line is that while not all Justices have been consistent in their treatment of juveniles, for the most part, the Court has.

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58. See *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988).

59. *Bellotti v. Baird*, 443 U.S. 622, 652 (1979) (Stevens, J., concurring) (noting that Justice Brennan joined the concurring opinion); *Dandridge v. Williams*, 397 U.S. 471, 508 (1970) (Brennan, J., dissenting).