The Supreme Court and the Schools
“A dazzling success”—but a “highly selective” one

The Schoolhouse Gate: Public Education, the Supreme Court, and the Battle for the American Mind
by Justin Driver
Pantheon Books, 2018, $35; 564 pages.

As reviewed by Michael W. McConnell

THE SCHOOLHOUSE GATE, by University of Chicago law professor Justin Driver, is the first book to provide close descriptions of the U.S. Supreme Court’s major cases involving public education across the issues of race, religion, speech, funding, gender, and student discipline. Each chapter addresses one or more of those areas, bringing to life the people and principles involved in those cases. In that light, the book is a dazzling success. It combines the lively writing more typical of a good novelist with the legal insights of a keen constitutional scholar. It quotes leading figures and commentators at the time of the disputes—including in most cases voices on both sides of the controversy—giving the book a historical dimension unusual in the genre of legal case analysis, and a sense of urgency and balance.

But The Schoolhouse Gate is not merely a series of descriptive essays. It is an argument, an attempt to persuade the reader that, with a few missteps along the way, the Supreme Court’s interventions in public education “have benefitted both American education and American society” in countless ways, from requiring racial desegregation to enabling students to express controversial ideas to protecting them from arbitrary discipline. Moreover, it warns that “in recent decades” the tide has turned against judicial intervention in educational issues. The author pours scorn on the idea that, for reasons such as lack of expertise, concerns about federalism and local control, or the possibility of disruptive consequences, federal judges should defer to local authorities.

No one would deny that many of the court’s interventions, even some of the most unpopular, were salutary and necessary. But a critical reader cannot help but observe that the argument proceeds from a highly selective set of examples. Although the author includes commentary on both sides of most cases, the book is systematically loaded in favor of an activist role for the federal courts in this arena. To be sure, the author sometimes criticizes the court, but his criticism is almost invariably that the court did not go far enough. Is it unthinkable that, at least in some areas, the court may have gone too far, and made things worse?

For a book by a law professor, The Schoolhouse Gate is surprisingly disinclined to engage from traditional legal analysis. When confronted by disputes about legal doctrine—for example, whether the Fourteenth Amendment forbids intentional segregation or mandates integration—the author takes sides, but without putting forth any analysis from constitutional text, history, or precedent, the usual building blocks of legal argument. At the same time, he fails to present actual empirical social science evidence on the consequences of one legal policy over another, which is the usual alternative to text/history/precedent. For example, the author deeply regrets that the courts flinched from imposing a more aggressive policy of mandatory busing for purposes of racial integration throughout the nation, in schools that never practiced legal segregation. But would such a policy have benefited minority schoolchildren? Or might it have had the opposite consequences: accelerating white flight, undermining support for public education, and reinforcing the notion that black children need to be in proximity to white children in order to learn? There are multiple attempts by researchers to answer those questions, but they do not inform the book’s analysis.

For another example, the author is indignant that students can be disciplined by school authorities with only cursory due process, and their lockers can be searched for drugs, knives, and other contraband, without judicial warrant. But would making it more difficult for teachers and school authorities to impose prompt discipline for school misbehavior make the schools better? Here, the author may be forgiven a personal bias. He candidly recounts his own three-day suspension from 9th grade when he and some friends got “rip-roaring drunk” on an overnight field trip. He still sides with “adolescents making regrettable, but classically adolescent, mistakes” over what he perceives as the schools’ “ill-conceived, pathologically punitive disciplinary system.” (Oddly, Driver makes no mention of the problematically frequent use of Ritalin and other drugs to combat rambunctious, usually male, behavior. He
seems more attuned to the racial than
the gender dynamics of disciplinary policy issues.)

The author is also unremittingly
hostile to allowing inner-city school
districts to try the experiment of single-sex
schools, but his reasons seem
thin. He acknowledges “the abysmal
record of academic achievement and alarming rates of social dysfunction
that plague many urban areas,” which
hits minority male students especially
hard, with staggeringly high dropout rates and
low rates of learning of teenage boys compared to girls. One might
think the problem is at least somewhat
related to gender, and especially the all-too-frequent absence of father figures
from inner-city homes. But Driver is
strangely unwilling to give local educa
tors the flexibility to depart from sex-blind policies, even on an experimental
basis. He is probably right that “no
persuasive evidence indicates that the schools’ coeducational status plays
even an incidental role in their failure.”
But there does exist evidence—contested to be sure—that separate schools
specially appealing to the interests and needs of young men and women might
sometimes produce better outcomes for
both. (See, for example, Peter Meyer,
“Learning Separately,” features, Winter 2008.) How will we know if we do not
try? The author’s main practical
reason is his worry that “disconcertingly,
schools serving only black male stu
dents routinely offer patriarchal lessons
of racial uplift.” Is that necessarily bad?

These examples are not, however,
typical. One of the most appealing features of The Schoolhouse Gate is its
relative absence of ideological one
sidedness. The author is open about
his own left-progressive ideology, but
he makes a point of showing that the
constitutional rights he champions
protect students across the political
spectrum. In the introduction, Driver
expresses the hope that “many of the
positions I endorse could appeal to a
broad coalition that bridges liberalism
with the libertarian-inflected vision
of limited government now ascendant
in some right-leaning circles.” That
might well be so. Libertarians will find
much to agree with in his advocacy of
strong free-speech rights for students,
for due process in disciplinary contexts,
and for free exercise of religion even in
the schools.

Consider the chapter on student
free speech. It begins, appropriately,
with Tinker v. Des Moines Independent
Community School District, a case
involving Quaker students who wore
black armbands to school to protest
the Vietnam War. What follows is
an exercise in persuasion, and administrators of either
perspective, showing why it was a genu
ine difficult case, with real potential
for disruption and violence. Using
Tinker as his focus, Driver explores
“three different, competing approaches
for regulating student speech”: 1) that
school officials may prohibit student
expression if they have reasonable
grounds for thinking the speech will be
disruptive; 2) that they can do so only if
the speech in fact did prove disruptive;
or 3) that they may not prohibit student
speech if the source of disruption is the
reaction of other students to the speech
(the so-called “heckler’s veto”). Driver
leaves no doubt that his sympathies lie
with the third, most speech-protective,
rationale: “The Supreme Court should
make clear that students possess the
First Amendment right to communi
cate contentious ideas on campus, that
would-be student hecklers will not be
permitted to silence legitimate student
speech by issuing threats of violence,
and that students enjoy expansive
speech rights off campus.”

That will be welcome news to Driver’s
conservative and libertarian readers, who
are discovering that the promise of free
speech on campus is not often extended
across the board. But the ideological
valence of student speech disputes has
flipped in the decades since Tinker. In
today’s world, right-wing students are
far more likely to be the ones silenced
at school—not, I think, because right-wing
speech is more common today but
because educational administrators are
now more often of a generally left-wing
persuasion, and administrators of either
persuasion are more likely to regard as
dangerous speech that challenges their
own world view. It was easy enough for
liberals to support the right of anti-war
students to wear black armbands in
opposition to the Vietnam War, but what
will they do about speech that is anti
gay, nationalistic, or otherwise injurious
from their point of view? Will the same
free-speech principles hold when the
shoe is on the opposite ideological foot?

The answer is not pretty. In one
case discussed in the book, Dariano v.
Morgan Hill (2014), students in a rural/
suburban school south of San Jose,
California, decided to wear tee shirts
emblazoned with the American flag
to school on the day that the school
set aside to celebrate Cinco de Mayo.
Some of the Hispanic students took
umbrage and may have threatened
violence. But instead of protecting
the flag-wearing students’ freedom to express their views, as Driver advocates, the school administrators forced the boys either to turn their shirts inside out or remove them—or go home. The Court of Appeals for the Ninth Circuit upheld the school’s action, holding that it was “reasonable for school officials to proceed as though the threat of a potentially violent disturbance was real.” The message: that if you threaten schoolmates whose views you do not like, the school might force them to shut up (at least if the administrators share your politics). As Driver comments, “rewarding angry hecklers by silencing speakers incentivizes students in precisely the wrong manner.” The Supreme Court denied a petition for review.

By contrast, when a Rhode Island school tried to prevent a same-sex couple from attending the prom together, out of fear for their safety, a district court intervened, stating that the school’s action gave into “mob rule” and would “completely subvert free speech in the schools by granting other students a ‘heckler’s veto,’ allowing them to decide through prohibited and violent methods what speech will be heard.”

In another case, on the day in April 2004 that a California high school had designated as a “day of silence” in support of LGBT rights, a student dissenter wore a shirt containing the handwritten inscription “Be Ashamed, Our School Embraced What God Has Condemned” on the front and “Homosexuality Is Shameful Romans 1:27” on the back. The principal ordered him to remove the shirt, and when he refused, confined him to a conference room for the remainder of the day. Again, the Court of Appeals for the Ninth Circuit upheld the school’s action. This time, the court did not hide behind the fig leaf of worries about violence. Nor did the court mention any evidence that actual students were traumatized by the shirt, which was, after all, a lonely one-student dissent from a school-wide affirmation of LGBT rights. It was enough for the court that, as an abstract matter, the message was a “verbal assault[] that may destroy the self-esteem of our most vulnerable teenagers.” Interestingly, the court stated that students have the First Amendment right to express “derogatory and injurious” remarks about other students on the basis of political disagreement, but not...
on the basis of “students’ minority status such as race, religion, and sexual orienta-
tion.” MAGA hat wearers are fair game for insult, but not other kinds of minority.

Despite his distaste for the opinion expressed by the tee-shirt-wearing stu-
dent, Driver defends his right to express “opposition to the school’s embrace of
gay equality . . . without resorting to epithets,” and wonders how the student “could have expressed his particular view . . . in a way that educators would have
deemed permissible.” As to protecting certain vulnerable classes of students, Driver comments that “validating these bans sends the message that particular
groups of students may be more psychologically fragile and lacking in self-
control than actually seems warranted.” Rather than relying on “the audience’s
subjective reaction to speech,” Driver advocates that the question should be
whether “the speaker’s language itself passed an objective threshold,” such as
implying a threat of violence or employing derogatory epithets. In these days
of campus speech suppression, it is refreshing to hear a card-carrying pro-
gressive apply civil liberties principles unflinchingly to speech that offends
modern left sensibilities.

Another refreshing departure from progressive ideology comes in the last
chapter of the book, titled “The Quiet Detente over Religion and Education.”
The chapter begins with a detailed
and nuanced account of the Supreme
Court’s school prayer decisions, a helpful
reminder of just how widespread and
long-lasting was the opposition to these
decisions. Unfortunately, Driver writes
little about the opinions themselves,
which were characterized by sloppy
history and unnecessarily expansive
rhetoric. Then the book turns to recent
cases, headlined by the catchphrase
“Public Schools Need Not Be Religion-
Free Zones,” focusing on more recent
decisions permitting students to engage
in voluntary religious activity on school
premises and approving the use of tuition
vouchers at private religious schools.

The book gives welcome attention
to the Supreme Court’s rarely-remem-
bered decision in Westside School
District v. Mergens, a 1990 case uphold-
ing a congressional statute, the Equal
Access Act, allowing high school stu-
dents to form student clubs and meet on
campus without discrimination based
on the religious, philosophical, or ideo-
logical content of their expression. The
primary purpose of the statute was to
protect Bible study and prayer groups,
but as Driver points out, the second-
most-common type of group to seek
protection under the Act has been those
based on sexual orientation. The book
approvingly quotes “the most notable
passage” in the Mergens opinion as
recognizing that “public school stu-
dents retain free exercise rights within
school premises and that implementing
desired rights should not be misconstrued as
automatically raising Establishment
Clause concerns.”

Alas, we hear nothing about the
human drama behind the case, and little
about the legal background. The author
makes it seem obvious—“firmly within
the constitutional mainstream”—that
religious student groups should not
suffer discrimination and exclusion on
account of their religious viewpoint.
Why, then, was it necessary for Congress
to enact a statute protecting this right?
Why was the issue so controversial?

As to protecting students from
advancing religion, or causes “excessive
entanglement” between church and state.
Lower courts routinely found that the rec-
ognition of student religious clubs, and
allowing them to meet on school prem-
ises, violated all three of these principles.

The Supreme Court rejected that
reasoning in Mergens, which was to its
credit. But in a book about the court’s
interventions in public education, it
would have been pertinent for the
author to note that the court’s own prior
rulings bore a large part of the respon-
sibility for creating the notion that
schools must be “religion-free zones.”
By beginning with Mergens and leaving
out the prior caselaw, Driver’s account
portrays the High Court as the hero of
the story, leaving out its responsibility
for creating the problem to begin with.

And unlike most of the book’s other
case analyses, we hear nothing about the
controversies in the wake of Mergens:
cases where religious students continue
to suffer discrimination based on their
religious viewpoints, with only mixed
success in obtaining succor from the
courts. In other chapters, Driver urges
the court to pursue the logic of its deci-
sions to other similar cases, and criticizes
the courts for failure to do so. Not here.

In a footnote, the book even endorses
a lower court decision involving a young
student who was disciplined for writing a
research paper on Jesus Christ, where the
assignment was to write about a personal
hero. According to Driver, this was not
“unconstitutional viewpoint discrimina-
tion,” even though all the other students
were allowed to write on their own cho-

Without a “hero.” Suddenly, Driver worries that
“[i]f such claims were legally cognizable,
federal courts would find themselves in
the business of routinely invalidating
assignments on that basis”—essentially,
a version of the opposition to judicial
The author recognizes that there are “truly staggering” political obstacles to expanding educational choice programs, stemming from Democrats’ “association with teacher’s unions” and the “geographic impossibility of many rural Republicans to benefit” from them.