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

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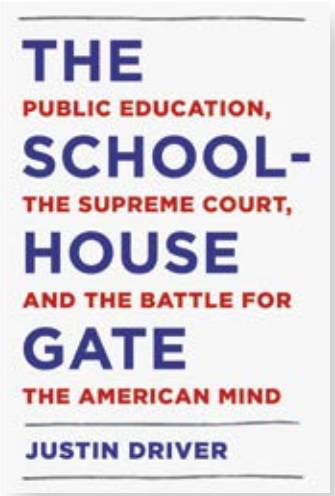
As reviewed by Michael W. McConnell



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 disengaged 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 benefitted 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 educators 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 students 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 one of the best chapters in the book. It provides factual details about the underlying controversy that I, for one, had never heard—even though I have been teaching the case in law school First Amendment classes for decades. Although most modern discussions of *Tinker,* like the Supreme Court's own opinion, tend to downplay the potentiality of the armband-wearing for disrupting the school's operations, making the case seem easy and therefore trivial, Driver provides a more balanced perspective, showing why it was a genuinely difficult case, with real potential for violence and disruption. 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 communicate 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."

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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

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Mary Beth Tinker and her brother, John, display armbands they were suspended from high school for wearing. The Supreme Court ruled in favor of the free speech rights of the students in the Vietnam-era case **Tinker v. Des Moines Independent Community School District.**

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 in to "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 orientation." 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 student, 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 progressive 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-remembered decision in *Westside School District v. Mergens,* a 1990 case upholding a congressional statute, the Equal Access Act, allowing high school students to form student clubs and meet on campus without discrimination based on the religious, philosophical, or ideological 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 students retain free exercise rights within schools and that implementing those rights should not be misconstrued as automatically raising Establishment Clause concerns."

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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? The book provides not a hint. In fact, prior to the Equal Access Act, every appellate court to consider the question held that religious student groups do not have the right to meet voluntarily on school premises and that the Establishment Clause would forbid it. The courts thought this was a straightforward application of the Supreme Court's so-called *Lemon* test, which asks if government action has a secular purpose, produces the effect of advancing religion, or causes "excessive entanglement" between church and state. Lower courts routinely found that the recognition of student religious clubs, and allowing them to meet on school premises, 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 responsibility 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 decisions 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 discrimination," even though all the other students were allowed to write on their own chosen "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

activism that it is the main theme of the book to deride. One doubts he would reach the same conclusion if a student had chosen Malcolm X as her hero.

In another refreshingly non-ideological turn, the book praises the Supreme Court's 2002 decision in *Zelman v. Simmons-Harris,* which upheld an Ohio program of tuition vouchers for students in inner-city Cleveland. This was a clear clash between the court's liberal and conservative wings. Chief Justice William Rehnquist wrote the majority opinion over dissents from the four more liberal justices. Driver approvingly cites Rehnquist's view that the Establishment Clause stands for "neutrality" toward religion, rather than "strict separation," and he demolishes each of the three arguments made by the liberal dissenters against the program. He even notes the powerful argument, associated with Justice Clarence Thomas, that educational choice programs like vouchers and charter schools are the most promising avenue today for poor, largely minority student populations to escape the dreadful inner-city schools that would otherwise be their only alternative, and gives a shout-out to the libertarian litigator Clint Bolick (now a justice of the Arizona Supreme Court), who did much to advance this argument.

It may be churlish to complain about this surprisingly non-dogmatic chapter, but it does fall short in some respects. First, much like the *Mergens* discussion, the *Zelman* discussion fails to provide the historical context, making the pro-voucher decision appear merely commonsensical. One would never know, from reading this chapter, that *Zelman* was a sharp break from Supreme Court decisions striking down schemes of neutral aid to religious and secular schools, such as *Lemon v. Kurtzman* (1971), *Committee for Public Education and Religious Liberty v. Nyquist* (1973, *Meek v. Pittenger* (1975), and *Aguilar v. Felton* (1985). Nor would readers discover the anti-Catholic origins of the argument against neutral aid. In a book whose thesis is that the court's interventions in education policy have almost always been salutary—except when they do not go far enough—it would have been a helpful counterweight to catalog the court's 55 years of benighted decisions striking down state legislative attempts to move toward greater neutrality toward Catholic schools.

Second, the book fails to discuss current legal efforts to press the constitutional principle of neutrality beyond merely *permitting* neutral funding to *requiring* it. As Driver points out, very few states have programs of neutral funding for religious and secular schools, and most of those programs are small. The Supreme Court recently held it unconstitutional for a state to pay for upgrading the playgrounds of secular but not religious preschools, over a ferocious dissent by Justice Sonia Sotomayor. Does Driver think that decision was correct? Is neutrality merely one permissible policy under the Establishment Clause, or is it actually required under the Free Exercise Clause? These are the questions facing the lower courts today, 15 years after *Zelman*, and it is unfortunate that Driver does not address them.

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Driver recognizes that neutrality in educational funding is necessary to achieve the promise of one of the court's earliest interventions: its holding in *Pierce v. Society of Sisters* (1925) that states cannot outlaw private education, with its ringing statement that states do not possess "any general power . . . to standardize [their] children by forcing them to accept instruction from public teachers only." Driver comments: "If wealthier families can choose to educate their children in religious schools, why should indigent families necessarily be prohibited from doing so?" He further 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. Some 38 states, moreover, have state constitutional amendments prohibiting the use of public funds to benefit religious schools, making it "improbable" that "vouchers will soon be poised for widespread adoption." The chapter ends on that pessimistic note.

Oddly, the author does not mention the legal arguments now being marshaled by religious freedom groups to establish a constitutional right to neutral funding. *The Schoolhouse Gate* thus begins with the author's praise for judicial activism and complaints about the occasional timidity of the courts in pursuit of constitutional principle, and it ends with the author's resignation in the face of political and legal obstacles to reform. Maybe he should have more of the courage of his convictions, and join the battle for freedom of speech across the board, for voluntary religious exercise by students in the schools, and for fair and neutral funding alternatives to the public school monopoly. Maybe then he will find support from the "broad coalition that bridges liberalism with the libertarian-inflected vision of limited government now ascendant in some right-leaning circles" that he hopes to achieve with this book.

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