
**THIS COURT DOESN'T DESERVE THIS BOOK:
A REFLECTION ON JUSTIN DRIVER'S
*THE SCHOOLHOUSE GATE***

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Justin Driver's *The Schoolhouse Gate: Public Education, the Supreme Court, and the Battle for the American Mind* offers a portrait of a century of dynamic interaction between the Supreme Court, the American public school system, and the American public that is elegantly written, well-paced, deeply researched, highly opinionated, sometimes disputatious, and ultimately a little romantic about the Supreme Court.¹ The romance is not so much about the Court we have, but the Court as it could be. The Court's general failure, in recent decades, to live up to Driver's forceful vision of what the Court could be—a genuine guardian and architect of constitutional protections for American public school students—lends the book a kind of pathos and raises difficult and interesting questions about how we, as scholars and as Americans, ought to think and speak about this Supreme Court. Those questions are ultimately my topic in this short essay. But first it seems useful to explain what Driver is up to.

The Schoolhouse Gate is that unusual nonfiction book that has a distinctive and compelling rhythm. It unfolds as a series of vignettes. Most of these vignettes open with an ordinary public school parent or student. Driver tells their story sparsely, with a few telling details, and tends to particularly emphasize the courage it takes to be a plaintiff in a lawsuit that will stretch for years and will often incur the wrath of one's own community. From there we move swiftly to court. We are not long detained in the lower courts. Instead we leap to the nine Justices and the deliberations in their temple of American legal power.

The Court issues its opinion, elevating one student's local dispute with one school into a thing of national significance. Driver quotes judiciously from the opinions and offers analysis and his own views. Almost every vignette in the book then opens out to the reactions of the public, which Driver obtains primarily by extensively quoting newspaper articles, columns, and editorials. There's more, of course—we also read of the occasional public opinion poll, reactions of elected officials, and reactions of the parties themselves—but it is hard to overstate the degree to which this book is brimming with words from newspapers. We hear not only from the *New York Times*, *Washington Post*, and *Wall Street Journal* but also from Southern papers, regional papers, black

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¹ JUSTIN DRIVER, *THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND* (2018).

papers, Christian papers, and even (where especially relevant) a Jewish paper and a Japanese paper.

Driver quotes these newsprint reactions to the Supreme Court's opinions so consistently that the reader begins to feel that America really has something like a public sphere. The Justices speak loudly in that sphere, but they share it with other important voices. For instance, the book quotes so many columns by right-wing syndicated columnist James Kilpatrick that Kilpatrick becomes a familiar, almost reassuring, recurring character, anchoring his end of many a debate. Later, we also read the reactions of legal academics. They, too, are portrayed as specialized participants in public, national debates about constitutional rights. Along the way we may also hear how lower courts applied the decisions or how schools around the country responded.

Driver's method emphasizes ordinary plaintiffs, the Justices of the Court, and the public reaction to the Court's decisions. It radically decenters lawyers. There are minor exceptions, such as Driver's discussion of Clint Bolick's innovative campaign to reframe the cause of school vouchers as the new *Brown v. Board of Education*² (a reframing whose legal and political success Driver finds as striking and worthy of recounting as he finds the analogy itself dubious). But in general, we hear very little about attorneys and their strategies—far less than, for instance, in Richard Kluger's book *Simple Justice*, the celebrated deep dive into *Brown v. Board of Education* that Driver cites as an inspiration for his book.³ In *The Schoolhouse Gate*, plaintiffs initiate, Justices respond, and the rest of us react. We never hear of an impact litigator seeking out plaintiffs, signing them up for a starring role in a cause the lawyer has conceived and framed. Indeed, litigators rarely appear at all. This narrative choice reaches its apotheosis in the chapter centered on *Brown*. Generations of impact litigators of all stripes have attempted since 1954 to replicate the strategically brilliant legal campaign by Thurgood Marshall that culminated in *Brown*. *The Schoolhouse Gate* manages to tell the story of *Brown* without mentioning it. The chapter explains with sensitivity and nuance exactly what “motivated the Browns, with the assistance of the NAACP's Legal Defense and Educational Fund (LDF), to initiate a lawsuit challenging racial segregation in Topeka's public schools.”⁴ That one phrase between the commas is all we hear of Marshall's campaign.

Even more surprisingly, for a book about the Court and the public schools, *The Schoolhouse Gate* somewhat decenters politics (albeit not as radically as it decenters lawyers). Many readers will come to this book with a political narrative firm in their minds: *Brown* and other fleeting triumphs of the Warren Court provoked intense popular-constitutional opposition (especially opposition to busing) which helped elect Presidents Nixon and Reagan, whose judicial appointments, in turn, shifted the Court so decisively to the right that it ended

² 347 U.S. 483 (1954).

³ RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (2004).

⁴ DRIVER, *supra* note 1, at 244.

up utterly dismantling desegregation, eventually even blocking schools from voluntarily attempting to achieve racial integration. Driver indeed tells that story, but he cleverly buries it more than halfway into the book. As the first chapters unfold, the liberal-conservative ideological conflict seems muted, fragmented, or scrambled by the issues of student rights the Court confronts, while the high politics of judicial appointments and confirmation fights is largely absent.

These emphases and de-emphases have a purpose. This book is about public schools, but it is really about a vision of what the Supreme Court could be. In Driver's view, the Court is a unique American institution that has a particular power to intervene in our ongoing national debates about the scope of constitutional protections—not merely to reflect that debate, but to frame it and shape it. This power comes from the unique way the Court can elevate an injustice done to just one student at one school—a person with no particular power or connections, whose individual voice in our national dialogue would otherwise be so faint as to be inaudible—and make that person's story the fulcrum of a new understanding of the meaning of the Constitution as applied to the schools, an understanding that will then be enforced by the entire august power of the federal judiciary.

This is a powerful vision of what the Court can do. And it is one that runs squarely against the academic position that is Driver's real target in the book: the view, especially common among political scientists and somewhat common among legal scholars, that the Supreme Court is essentially a trailing indicator of public opinion, an institution that does little other than enforce existing elite consensus, often by invalidating the retrograde practices of outlier jurisdictions that had already lost the support of the nation (or at least of its elite).

Driver is convinced to his bones that this view has it wrong. And he makes a persuasive case. To cite just one particularly striking example: in *Vorchheimer v. Philadelphia*,⁵ the Court deadlocked 4-to-4 over the constitutionality of single-sex public schools. Those schools were in decline in any event—by the 1990s there were only three in the country—so a decision striking them down would have read to many scholars as outlier-policing. But the Court's inaction left a door open, and after some new guidelines from the George W. Bush Administration, single-sex schools have roared back to life, exploding in number to over 1000 today.⁶ In a similar vein, Driver notes that *Plyler v. Doe*,⁷ which struck down Texas's policy of barring undocumented immigrants from school unless they paid tuition, is often viewed as outlier-policing because Texas was the only state with this policy at the time. But are we really so sure that today, if the Court had blessed Texas's policy instead of invalidating it, that it would not

⁵ 430 U.S. 703 (1977).

⁶ DRIVER, *supra* note 1, at 339-40; *see also Single-Gender Public Schools in 5 Charts*, EDUC. WEEK (Nov. 2, 2017), <https://www.edweek.org/ew/section/multimedia/single-gender-public-schools-in-5-charts.html> [<https://perma.cc/TBB5-L3E3>].

⁷ 457 U.S. 202 (1982).

have spread to more states? Driver argues that many Court cases in the educational sphere have been countermajoritarian in the sense that majorities at the time opposed the outcome the Court chose. But his deeper interest is in showing that the Court's decisions help *shape* future public opinion, not always successfully but with considerable force, and are capable of bending it in the direction of greater constitutional protection for students' individual liberties.

The deep tension in *The Schoolhouse Gate* comes from the fact that the present Supreme Court does precious little to live up to this compelling, even inspiring vision of what the Court could be. Also, there is little immediate prospect for improvement. This Court doesn't deserve this book.

Driver knows this. But he doesn't always inform the reader. In one striking passage, he discusses the lawsuit filed in 2016 by Detroit public school children, which seeks to pursue a path that *San Antonio v. Rodriguez*⁸ left open forty years earlier: The students argue that Michigan has violated their fundamental rights by abjectly failing to provide "an opportunity to acquire the basic minimal skills necessary" to participate in democratic society.⁹ Driver notes the "grim" conditions of some Detroit schools, states that the dispute "seems almost certainly headed to the Supreme Court," and concludes: "If the Court acknowledged a fundamental constitutional right to literacy, that decision could well have momentous consequences for failing public schools, not only in Detroit, but around the country."¹⁰ All of that is entirely true, but it omits one critical fact: the lawsuit will lose, its outcome having been determined decisively by the 2016 presidential election. At the time the suit was filed in September 2016, there was every reason to think the swing Justice of the Court that would hear it would be Merrick Garland or Stephen Breyer. Instead, because of Senator Mitch McConnell's constitutional hardball and the surprise result of the 2016 presidential election, that Justice is John Roberts. Had this been clear at the time, there is little reason to think Public Counsel, the pro bono law firm that brought the case, would have even filed it. By 2018, when *The Schoolhouse Gate* was published, to treat it as a serious possibility that the present Court would give this lawsuit a fair hearing was to ignore the high politics of judicial appointments that have given us the present Court.

To be clear, Driver is no apologist for the present Court. Far from it. He criticizes a wide array of its decisions, often with blunt eloquence. A central thesis of *The Schoolhouse Gate* is that the Court was wrong to withdraw, as it largely has withdrawn in recent decades, from the project of building the edifice of protections for students' rights. And at times he writes insightfully about the interaction between politics and constitutional litigation—for example, the positions taken by different presidential administrations as *amicus curiae*.

But the book does not foreground the hardening of ideological divisions on the Court, which now fall neatly along partisan lines in a way that they have not

⁸ 411 U.S. 1 (1973).

⁹ See Gary B. v. Snyder, 329 F. Supp. 3d 344, 362 (E.D. Mich. 2018).

¹⁰ DRIVER, *supra* note 1, at 320-30.

for generations. Had the book more squarely confronted this phenomenon, it might well have had a different ending: one that imagined the future of students' constitutional rights primarily in terms of state constitutions and state courts (and the politics of judicial appointments to those courts); federal legislation; or even state legislation, ballot initiatives, and other forms of politics and legal action outside the Supreme Court. It might also have offered readers a sharper rendering of just how far apart the two major parties' judges now sit when it comes to many questions about the role of the Constitution inside the schoolhouse gate. Such an account has value because it is one important facet of the stakes of future presidential elections and judicial appointments. There are many fronts in the "battle for the American mind," many of them far from One First Street, even though the goings on at that address do, as Driver persuasively argues, indelibly affect what happens on every other front.

In this way, the book raises profound questions about the future of legal scholarship and commentary about the present Court. There will always be cases in which the violations of individual rights are sufficiently egregious that even the present Court might make law to strike them down. Driver avers that there are likely significant areas of common ground between his own positions and those of "the libertarian-inflected vision of limited government now ascendant in some right-leaning circles."¹¹ Perhaps, for instance, the Court may yet strike down the practice of corporal punishment of students in school, a barbarity on which Driver deliberately shines a bright spotlight in *The Schoolhouse Gate* in the hope of provoking more of a national conversation.

Such a conversation could have real value. Driver, too, is a speaker in the national dialogue about constitutional rights inside the schoolhouse gate. But focusing too exclusively on the limited remaining range of possibilities for new and valuable doctrine that could yet emerge from even *this* Supreme Court carries a risk. The risk is that we permanently set our horizons too small, allowing them to be bounded artificially by the views of the Court's conservative bloc. There ought to be a place, for instance, for a national conversation about the underlying substantive claim of that lawsuit in Detroit. My hope is that Driver will use his formidable powers as a writer and scholar to advance that sort of conversation too, even if its institutional focus must lie, for now, outside the Supreme Court. At least, that is, until the future day when the Supreme Court again comes to deserve this book.

¹¹ *Id.* at 23.