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## EDUCATION, MORALITY, AND HUMAN DEVELOPMENT IN CONSTITUTIONAL DECISIONS ABOUT STUDENTS' RIGHTS

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The encyclopedic character of Justin Driver's *The Schoolhouse Gate: Public Education, the Supreme Court, and the Battle for the American Mind* can obscure the most significant aspects of the author's pioneering volume.<sup>1</sup> The work is not only a history of constitutional doctrines that address students' rights in elementary and secondary public schools, although its main purpose is to provide a detailed account of the emergence and evolution of those doctrines. The work is also, and even more impressively, a book that recounts and explores the underlying moral values, theories of human development, and societal attitudes that the constitutional doctrines reflect.

A major premise of the book is that constitutional doctrines in the public school setting are not a microcosm of constitutional theories outside that setting. Virtually all parties (such as judges, educators, scholars, and other commentators) agree that elementary and secondary public schools are distinctive because they are critical settings both for shaping children's intellectual, moral, and emotional capacities and for developing young people's attitudes toward government and the constitutional values that will govern large parts of their private and public lives as adults. Public schools, in other words, largely shape "the American mind" in its formative stages. Accordingly, most parties also agree that the rights and responsibilities appropriate for adults are not necessarily appropriate for children because children are first developing the capacities and attitudes that in large measure will serve them as adults. Thus, not only are the capacities of children and adults different, which affects the content of the curriculum the former can absorb. Because children are works in progress, the purpose of enabling them to thrive as adults (at work, as part of families, as members of society) also determines much of what they are, or should be, taught in school. As *The Schoolhouse Gate* makes abundantly clear, at times these two broad educational objectives—forming student capacities and instructing about traditional academic topics—may pull in different directions.

Although virtually all agree that public schools have the dual educational purposes of imparting knowledge about traditional subjects and preparing children to live successfully as adults, many disagree about the best means to

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achieve these goals. This is the reason for the “battle for the American mind” referenced in the book’s title. And it is the reason that Driver’s discussion of what underlies the competing constitutional positions in landmark Supreme Court cases is so important.

Chapter 2, on free speech and expression, illustrates Driver’s approach well. On one level, the debate in the courts has been over the extent to which, as a matter of constitutional law, students have the right to free expression absent countervailing considerations, such as causing serious disruption (as in *Tinker v. Des Moines Independent Community School District*)<sup>2</sup> or otherwise undermining the educational environment of the classroom or school (*Bethel School District v. Fraser*).<sup>3</sup> Justice Thomas is the only Justice who believed that students should be accorded no First Amendment speech rights at all.<sup>4</sup> When the other Justices identify those countervailing considerations, it appears from Driver’s portrayals of the context in which each litigation arises that the other Justices are constitutionalizing what are really public policy limits on students’ speech rights, justified because of the special nature of elementary and secondary education (outlined above) and responsive to contemporary social and political pressures.

Driver portrays vividly the various public policy concerns animating individual Justices (and lower court judges). For some, it is the importance of preserving discipline, with differences among them as to whether educators or courts are best equipped to decide the amount and kind of discipline to maintain.<sup>5</sup> Arguably, this approach privileges the idea of education as instruction, conceived in terms of conveying information and academic skills. For others, education cannot be narrowed to instruction because public schools should also be developing students’ ability to think critically by grappling with competing, even controversial points of view.<sup>6</sup> This second approach bears a resemblance to the marketplace of ideas ideal that underlies much of the First Amendment analysis outside the schoolhouse. Several judicial opinions adopt a third approach, which, like the second, rejects the primacy of uniformity and discipline in education, but not in the name of the search for truth often associated with the marketplace-of-ideas metaphor. Rather, the battle for the students’ minds for these Justices and judges is grounded in the belief that public school, first and foremost, is the training ground for citizenship.

Driver’s selections from the opinions and dissents in landmark cases illustrate a wide range of views exhibited by those who adopt these three approaches and the consequences for their respective understandings of the boundaries demarcating students’ constitutional rights. To focus on the third approach, we

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<sup>2</sup> 393 U.S. 503 (1969).

<sup>3</sup> 478 U.S. 675 (1986).

<sup>4</sup> DRIVER, *supra* note 1, at 116-17.

<sup>5</sup> *Id.* at 5.

<sup>6</sup> *See, e.g., Tinker*, 393 U.S. at 511-14; *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

see that for some, patriotism is the core of citizenship, and this notion justifies constraining free speech rights in the name of ensuring national unity.<sup>7</sup> For others, citizenship is defined not by obedience to a unitary notion of the national or public good but by the inclination to view government as fair and the willingness to participate in civic life as adults. For example, Driver recounts Justice Stevens's dissent in *New Jersey v. T.L.O.*<sup>8</sup> expressing concern that rigid and intrusive school policies can alienate students and make them distrustful of government.<sup>9</sup> Or, as articulated by Justice Brennan in his *Hazelwood School District v. Kuhlmeier*<sup>10</sup> dissent, a school principal's action in deleting controversial articles from the student newspaper could well impair students' preparation for citizenship by depriving them of the opportunity to appreciate important freedoms "the Constitution guarantees."<sup>11</sup> Acknowledgement of the risk that public schools' failures to themselves model civility, respect for different points of view, and recognition of the rights of others will impede students' growth into tolerant and engaged citizens is a lesson as fitting for today's polarized climate as it was when these Justices wrote.

Perhaps the deepest underpinning of many of the landmark decisions portrayed by Driver is the concern of the Justices, shared by many members of the public and by commentators, about the breakdown of respect for authority in society as a whole. The arguments about discipline, disruption, and decorum in schools reflect this concern, as both the majorities and dissents freely admit. Illustrative is Justice Black's lament in *Tinker* about the "new revolutionary era of permissiveness," a concern clearly motivated as much by the activism and political unrest of the 1960s as by an interpretation of constitutional law.<sup>12</sup> Similarly, decades later, the holding in *Board of Education v. Earls*,<sup>13</sup> upholding suspicionless drug testing of students participating in all extracurricular activities, was rooted as much in "[t]he drug abuse problems among our Nation's youth" as in the Fourth Amendment as applied to the facts of the particular case.<sup>14</sup>

Driver's method is to embed each landmark decision in the controversies preceding the litigation and the reactions of the public, commentators, and other courts after the decisions were rendered. The book's wealth of detail, which could be ponderous in less artful hands, creates a series of powerful and coherent narratives that allow curious laymen, as well as scholars, to gain perspective from inside the schoolhouse gate. The result is to persuade the reader, more than

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<sup>7</sup> DRIVER, *supra* note 1, at 5.

<sup>8</sup> 469 U.S. 325 (1985).

<sup>9</sup> DRIVER, *supra* note 1, at 192.

<sup>10</sup> 484 U.S. 260 (1988).

<sup>11</sup> *Id.* at 277-91; *see also* DRIVER, *supra* note 1, at 105.

<sup>12</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 518 (1969) (Black, J., dissenting); *see also* DRIVER, *supra* note 1, at 78.

<sup>13</sup> 536 U.S. 822 (2002); *see also* DRIVER, *supra* note 1, at 212.

<sup>14</sup> *Earls*, 536 U.S. at 834.

any academic argument possibly could, of the reciprocal relationship between the judiciary and other parts of the nation, as sometimes the Supreme Court nudges public practices or popular opinion in a new direction, and sometimes popular pushback seems to cause the Court to moderate its initial posture in subsequent cases. Especially welcome are Driver's frequent descriptions of the ways in which lower courts (federal and state) enlarge or curtail Supreme Court rulings when they confront similar facts or changing circumstances. This not only adds to the richness of the book but also reminds the reader that the Supreme Court does not always have the last word and that it is critical to consider the importance of less glamorous lower-court decisions before concluding how Supreme Court holdings actually affect people's lives and the nation's institutions.

Making intermittent appearances throughout the book is Justin Driver the contrarian. For example, countering the general acclaim for Chief Justice Warren's ability to render a unanimous opinion in the controversial and watershed decision *Brown v. Board of Education*,<sup>15</sup> Driver opines that had Warren not made unanimity such a priority, he "could have written a more muscular opinion in *Brown*, adopting a harder line against school segregation."<sup>16</sup> Driver also repeatedly challenges conventional wisdom that certain judicial outcomes were inevitable.<sup>17</sup> Again, after describing a principal's "astoundingly poor judgment and flagrantly illogical" decision to delete articles on divorce and teen pregnancy from a student newspaper, Driver nonetheless concludes that the students' free speech rights were not violated and, thus, that *Hazelwood* was rightly decided.<sup>18</sup> And despite his support for the school district's voluntary desegregation program struck down in *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>19</sup> Driver carefully catalogues the "objectionable features" that the program possessed.

In the end, *The Schoolhouse Gate* makes a strong case that the battle for the American mind is ongoing and unlikely to cease in our lifetime. And despite the book's frequent examples of the positive impact of Supreme Court rulings on students' constitutional rights,<sup>20</sup> the larger teaching of Driver's engrossing work seems to this reader to be that the arc of the law at the schoolhouse gate is jagged and does not necessarily bend toward justice.<sup>21</sup>

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<sup>15</sup> 347 U.S. 483 (1954).

<sup>16</sup> DRIVER, *supra* note 1, at 253.

<sup>17</sup> *Id.* at 82-84, 253-55 (challenging wisdom behind *Tinker* and *Brown* respectively).

<sup>18</sup> *Id.* at 107-08.

<sup>19</sup> 551 U.S. 701 (2007).

<sup>20</sup> DRIVER, *supra* note 1, at 423-25.

<sup>21</sup> *See id.* at 4.