CONSTITUTIONAL LAW AND *THE SCHOOLHOUSE GATE*

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The list of impressive things about Justin Driver's *The Schoolhouse Gate: Public Education, the Supreme Court, and the Battle for the American Mind*—it's not a short list—begins with the subject of the book itself.[1] Traditionally, cases about public education are scattered throughout the constitutional law curriculum. Sometimes they are important cases: *Brown v. Board of Education*[2] is as important a constitutional law case as there is; *West Virginia Board of Education v. Barnette*[3] is celebrated for its rhetoric as well as its central principle about compelled expression. But *Brown* is, conventionally, an Equal Protection Clause case, and *Barnette* is presented as a case about the Free Speech Clause of the First Amendment; neither is treated as a case about schools in particular. And more often, cases that concern public education seem a bit marginal to constitutional law. Cases about the First Amendment rights of schoolchildren to speak in ways that school authorities do not like or the Fourth Amendment rights of schoolchildren to resist searches are a kind of sideshow, hard to rationalize with the central constitutional principles in those areas. And again, they are not treated as cases about public education.

The Schoolhouse Gate reconceives all of this. It treats the constitutional law of education as its own subject. The book shows that there are themes that run through these cases. Those themes are central not just to the development of the law but also to understanding the setting from which the law emerges. Early in the book, Driver asserts that "the public school has served as the single most significant site of constitutional interpretation" in U.S. history.[4] At first, you might be inclined to resist that claim (I was, at first). Really, the single most important site? But as the book develops, you realize how strong that claim is. Driver's book shows that so many of the important issues in constitutional law—race relations, free speech, religious freedom, law enforcement, sex discrimination, noncitizens' rights—play out in schools. Name another arena in which that is true.

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

[2] 347 U.S. 483 (1954).

[3] 319 U.S. 624 (1943).

[4] DRIVER, *supra* note 1, at 8.

Or take Driver's claim that "[i]n no other sphere of constitutional meaning do the Supreme Court's major interventions so closely reflect the nation's larger social concerns."[5] The book demonstrates that one reason for considering cases about public education systematically, instead of as instances of other constitutional issues, is that schools occupy an emotional and political place that makes them a focal point for whatever else is going on in the country. Judges, reflecting the society at large, project their anxieties and prejudices—their hopes and fears, in the clichéd but accurate formulation—on to schools and schooling. When the nation is at war with foreign enemies, we get cases like *Meyer v. Nebraska*[6] or *Tinker v. Des Moines School District*.[7] When there is an upsurge of religious bigotry, we get *Barnette*. When there is a growing recognition of religious heterogeneity, we get the school prayer cases of the early 1960s. When there is a war on drugs, we get cases about drug testing or searching schoolchildren.

And, of course, race is a constant theme. Another of the strengths of *The Schoolhouse Gate*—more on this in a second—is Driver's excavation of the facts behind cases that, as we learn them in constitutional law casebooks, stand for relatively disembodied principles. Of course, there are cases that are explicitly about race, like *Brown*. But Driver shows—and it really should not surprise us, given the centrality of race to U.S. history—that even in cases that do not seem to be about race and that make relatively minor contributions to constitutional doctrine, race was a powerful element. Probably the most dramatic examples—and again this should not surprise us—are cases dealing with school discipline.

Goss v. Lopez,[8] which required that students be given minimal procedural protections before they are suspended from school, is just another case, and not a particularly significant one, in the constitutional law canon of procedural due process. Driver convincingly argues that it was actually more significant than it appears because it reinforced a trend, developing at the state and local levels, to give students more extensive protections than the Court itself required. But maybe more importantly, Driver explains how *Goss* fits into larger and crucially important developments about race in public education—something that you do not learn at all from the Supreme Court's opinion. As it happens, the student who brought the lawsuit that became *Goss* was suspended for alleged acts that grew out of a protest about racial injustice. And amicus briefs filed in the case "highlight[ed] the disproportionately high rates at which schools suspended black students"[9] For this reason, Driver suggests, *Goss* "could be construed as an analogue to *Brown*."[10]

[5] *Id.* at 11.

[6] 262 U.S. 390 (1923).

[7] 393 U.S. 503 (1969).

[8] 419 U.S. 565 (1975).

[9] DRIVER, *supra* note 1, at 157.

[10] *Id.*

The even more important school discipline case that Driver examines in depth—*Ingraham v. Wright*[11]—rejected the argument that corporal punishment is unconstitutional and held that after-the-fact tort actions were a sufficient procedural safeguard. Driver is scathing, and persuasive, in his criticism of the decision. Again, you would not know it from the Court's opinion, but *Ingraham* involved a student at an all-black school. And Driver, in a careful discussion of the statistics, shows that "black students receive inordinate amounts of corporal punishment."[12]

Driver's discussion of these cases is typical of another impressive feature of his book. He goes beyond the reported opinions to the human realities of the litigants. For individuals who are parties to a lawsuit, litigation can take over your life for months or years; it is often traumatizing, whatever the outcome. When the litigation involves children—and when it challenges a practice at a public school, with all that means for the communities in which the students and the parents live—those effects are even greater. Driver never lets us lose sight of that. In the casebooks, these are cases that stand for principles; in his book, they are also events of enormous importance to all the people involved.

Finally, and integrally related to these other aspects of the book, *The Schoolhouse Gate* is characterized by an intense moral awareness. Driver is not afraid to make judgments; he is judicious, but he does not pull punches. There are many examples. He is, for example, appropriately critical of Justice John Marshall Harlan's dissenting opinion in *Plessy v. Ferguson*,[13] which is famous for saying "our constitution is color-blind."[14] Driver, who plausibly calls it "the single most overrated opinion ever written by a Supreme Court justice,"[15] points out that the opinion explicitly endorses white supremacy and traffics in overt anti-Asian bigotry. He identifies occasions on which progressive heroes among the Justices, like Louis Brandeis and Harlan Fiske Stone, went along, apparently comfortably, with racial segregation. Driver's careful historical discussions show how, in the first decades of the twentieth century, segregation was accepted as the norm among whites even while most African American newspapers highlighted its injustice. And, rejecting euphemisms, Driver calls the continued practice of corporal punishment "an atrocity" and an "act of barbarism": "[n]o legal issue sits higher atop the long list of needed educational reforms than eliminating corporal punishment against students—the sole remaining group that government actors are permitted to strike with impunity."[16] When you read Driver's words, you wonder how people could have embraced corporal punishment—that is to say, battering children—for so long and can continue to tolerate it today.

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[11] 430 U.S. 651 (1977).

[12] DRIVER, *supra* note 1, at 177.

[13] 163 U.S. 537 (1896).

[14] *Id.* at 559 (Harlan, J., dissenting).

[15] DRIVER, *supra* note 1, at 36.

[16] *Id.* at 184.

In the introduction to the book, Driver invites criticism, and of course in a book that addresses difficult issues and does not equivocate in taking a stand on those issues, there are things with which one might want to disagree. While Driver positions the book primarily as a contribution not just to the literature on law and education, he also has some points to make about the role of the Supreme Court. In particular, he rejects what he (correctly) describes as revisionist trends toward minimizing the importance of the Court and portraying the Court as an institution that more or less goes along with majority opinion and mostly cannot protect minorities.

Driver is right to say that matters are more complicated than that, but I do wonder whether public education is the best site in which to consider the question of how much difference Supreme Court decisions make. Figuring out the extent to which those decisions, by themselves, actually affect what goes on in schools seems like a fiendishly difficult task. There is no way systematically to monitor teachers' conduct in classrooms all across a diverse nation. Even if we could, it seems next to impossible to identify the effect of judicial decisions, because untangling the various influences—individual teachers; the social dynamics among students and among their families; the culture of the school and the local community; and the outside influence of boards of education and local, state, and even federal politicians—is so hard to do. But it is really too much to ask this terrific book to resolve a longstanding issue about the role of the Supreme Court. It does more than its share already.