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Equality of Opportunity and the Schoolhouse Gate

The Schoolhouse Gate: Public Education, the Supreme Court, and the Battle for the American Mind

BY JUSTIN DRIVER

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ABSTRACT. Public schools have generated some of the most far-reaching cases to come before the Supreme Court. They have involved nearly every major civil right and liberty found in the Bill of Rights. The cases are often reflections of larger societal ills and anxieties, from segregation and immigration to religion and civil discourse over war. In that respect, they go to the core of the nation's values. Yet constitutional law scholars have largely ignored education law as a distinct area of study and importance.

Justin Driver's book cures that shortcoming, offering a three-dimensional view of how the Court's education law jurisprudence has evolved over the past century. The Court, once loath to intervene in school affairs, increasingly recognized that students' constitutional rights do not end at the schoolhouse gate. But that extension has not been without limitations, pause, or controversy. Driver vividly narrates both the Court's internal conversations and those occurring in broader society. Most importantly, Driver helps the reader see how the Court's decisions were not preordained, could have gone a number of different ways, and heavily influenced the history that followed.

This Book Review, however, argues that no account of the Court's education precedent is complete without a detailed examination of how the Court's decisions have affected equal opportunity. The attempt to ensure equal educational opportunity is ultimately the tie that binds so much of the Court's precedent. Unfortunately, the Court's doctrine on this score has not been one of consistent expansion. In fact, too often the Court has limited students' rights and, thus, the educational opportunities they receive. This failure is clearest in two areas: those cases implicating a constitutional right to education and school desegregation.

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BOOK REVIEW CONTENTS

INTRODUCTION

Justin Driver's *The Schoolhouse Gate: Public Education, the Supreme Court, and the Battle for the American Mind* excels in two key respects. As a book about education law, it weaves together disparate doctrines and discrete issues into a cogent whole. This is no small accomplishment, given the broad spectrum of questions the Supreme Court has addressed in schools: racial segregation, funding, immigration, free speech, religion, corporal punishment, suspension, and LGBTQ rights. Reviewing over a century of cases, Driver highlights compelling themes that allow the reader to see the Court's education cases as a long, ongoing conversation about the extent to which the Court must defer to educators while also protecting students' rights and enforcing the Constitution. Given the substance of these cases and their wide-ranging impact, Driver argues the Court's education cases have been underappreciated and are, in fact, potentially the most important venue in which the Court acts.[1] *The Schoolhouse Gate* puts education law on the map.

As a book about constitutional law, Driver's work may be even more significant. Driver aims to contest the growing conventional wisdom among academics that the Supreme Court is primarily a conservative institution that merely follows public opinion and, thus, does not play a major role in shaping society.[2] He details a number of major school cases—from segregation to free speech to immigration—in which the Court's decisions were entirely at odds with public opinion at the time they were released but managed to shift public opinion over the course of time.[3] He also recasts a number of cases that others have critiqued as failures,[4] convincingly arguing that the Court threaded a needle in those cases and delivered moderate opinions so as to avoid social back-

1. JUSTIN DRIVER, THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND 9 (2018) (stating his thesis that public schools are "the single most significant site of constitutional interpretation").

2. Driver points to BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009), and MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004), as prime examples of this thinking. DRIVER, *supra* note 1, at 439 n.35.

3. *See, e.g.*, DRIVER, *supra* note 1, at 21-22 (pointing to five different countermajoritarian decisions by the Court on issues ranging from religious schools and prayer to desegregation and undocumented students, all of which he analyzes in depth later in the book).

4. *See, e.g.*, *id.* at 115-24 (emphasizing that *Morse v. Frederick*, 551 U.S. 393 (2007), could have permitted even more egregious regulations of student speech and that the limited and narrow holding in the case did relatively little to restrict student speech).

lash while still producing doctrinal victories for student rights.[5] In sum, for those not yet willing to give up on the Court, *The Schoolhouse Gate* is a breath of fresh air.

The breadth and ambition of *The Schoolhouse Gate* are its greatest strengths. But in an effort to construct a metanarrative, Driver treats all doctrines and issues as roughly equal in importance.[6] The various cases appear as data points in service of a larger story. Many scholars—including us—would argue that the Court's education cases are not equal. Some would insist free speech and religion cases have had the most significant effect on public education, while others would emphasize the influence of discipline, discrimination, and desegregation cases.[7] Rather than assign particular significance to any single area, Driver seeks to elevate the entire field of education law—an important accomplishment indeed. But one area—equality of educational opportunity—gets too little attention. Equality of educational opportunity includes the fundamental right to an education and school-segregation law. We argue these two lines of equali-

5. For instance, the Court's student free speech cases following *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), appear contradictory and regressive, but Driver argues that the Court's decision in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), permitting the school to excise certain stories from the school papers was not nearly as confused as many argue today, nor was that case at odds with *Board of Education, Island Trees Union Free School District v. Pico*, 457 U.S. 853 (1982), which placed limits on the school's ability to remove books from the library. DRIVER, *supra* note 1, at 111-15. Driver's analysis does not eliminate all of our concerns regarding those cases, but he does lessen the weight of those concerns. He fairly closes the chapter on free speech with a section demonstrating that "[w]hile *Tinker* is best construed as retaining vitality, that position should not be mistaken for complacency." *Id.* at 127. Driver similarly says that the Court's decision in *Goss v. Lopez*, 419 U.S. 565 (1975), which extended due process rights to suspended students, must be assessed against a number of background factors, not solely against observers' wishes for what the case should have said. DRIVER, *supra* note 1, at 153-58. While we would still quibble about the extent to which *Goss* achieved meaningful substantive change, Driver's point is well taken and worth making. For a discussion of those continuing concerns, see Derek W. Black, *The Constitutional Limit of Zero Tolerance in Schools*, 99 MINN. L. REV. 823, 855 (2015), which notes that "the internal flaws of *Goss* and the subsequent cabining of its doctrine have resulted in due process practices that, as a practical matter, are often reduced to a sham."

6. Freedom of expression and school desegregation, for instance, clock in at sixty-nine and seventy-three pages, respectively, while the punishment and investigation of student misbehavior clock in at forty-four and fifty-seven pages, respectively. More substantive comparisons follow below in Section I.C.

7. *See, e.g.*, Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 111 (2004) (arguing that without judicial action toward desegregation, equal education opportunity "will never exist"); John H. Garvey, *Children and the First Amendment*, 57 TEX. L. REV. 321, 338 (1979) (contending that "free speech plays an important role in the child's development").

ty doctrine tower above the rest of education law. Deeper analysis of those two lines of doctrine, moreover, would reveal that they have the potential to reshape the entire metanarrative undergirding education law if properly understood.

The Schoolhouse Gate's introduction states:

> One cannot plausibly claim to understand public education in the United States today . . . without appreciating how the Supreme Court's decisions involving students' constitutional rights shape the everyday realities of schools across the country. . . . At its core, this book argues that the public school has served as the single most significant site of constitutional interpretation within the nation's history.[8]

In exploring that thesis, the book treats the Court's school cases as a series of tussles that involve two recurring conflicts. One is the doctrinal conflict over school authority. The Court consistently struggles to balance the clear requirements of the Constitution against the harms of interfering with and undermining school administrators.[9] In other words, the scope and appropriateness of a constitutional review of school policies is the major subtext of the Court's school cases.

The second is the conflict between society and the courts, with schools stuck in the middle. Driver does not frame it exactly that way. Rather, he emphasizes that the Court has decided many of our nation's most controversial cultural issues in the school context.[10] His conclusion regarding the importance of education law follows naturally from that point. But the question remains: *why* have schools played this role? The answer lies in public schools' unique ability to capture the "nation's cultural imagination," reflect its "social concerns," and "illuminate[] both the hopes and the fears" of the people.[11] Thus, when cultural and constitutional conflicts arise, litigants naturally choose public schools as their battlefield. This phenomenon alone justifies Driver's special attention to education law as a distinct strand of the Court's jurisprudence.

Driver explores both of these themes well, but, because of the scope of his book, he does so at a level of abstraction. Respect for schools' authority is about managing institutional relationships, and problems arise any time the Court reviews another branch of government's actions. This is not unique to

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8. DRIVER, *supra* note 1, at 9.

9. *Id.* at 16-19.

10. *Id.* at 10-12.

11. *Id.* at 10-11.

education. Further, because cultural-legal wars will inevitably occur, so too will school cases. The way the Court shapes actual educational opportunities and experiences is another important part of the story. And understanding it requires a deeper examination of the theoretical and doctrinal underpinnings of the Court's cases, which we provide here.

The Schoolhouse Gate treats issues like school discipline, searches and seizures, desegregation, funding, and equal access as doctrinally and theoretically distinct—bound together by the Court's general concerns over judicial intervention and school authority. In doing so, Driver neglects the central unifying concern of the Court's most important cases: the nature and scope of the constitutional right to education.[12] In the Court's most significant cases, the tension over school authority is an outgrowth of the substantive weight and significance of the underlying right at stake—the right to education.[13] If the Court were to acknowledge such a right, it would have no choice but to intervene in various educational contexts. Without that right, the Court is free to afford considerable weight to policy implications and to tweak around the edges of educational opportunity without ever fully validating the principle that the educational opportunity should be equal.[14]

In short, while school cases consistently force the Court to make tough decisions regarding judicial intervention and school authority, the most central issue in the most important cases is whether the Constitution protects the right to education. Our nation has long been committed to such a right.[15] Various

12. *See infra* Part II.

13. That right, as later sections argue, rests at the foundation of our democratic order. *See infra* Part II.

14. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33 (1973) (expressing the Court's reluctance to recognize a right to education because of the legislative policies involved).

15. Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. 1059, 1081-85 (2019); Kara A. Millonzi, *Education as a Right of National Citizenship Under the Privileges or Immunities Clause of the Fourteenth Amendment*, 81 N.C. L. REV. 1286, 1303 (2003); George Washington, Eighth Annual Message of George Washington (Dec. 7, 1796), http://avalon.law.yale.edu/18th_century/washs08.asp [https://perma.cc/9ZQ9-2WV3] ("[A] primary object of such a [national university and a military academy] should be the education of our youth in the science of government. In a republic what species of knowledge can be equally important and what duty more pressing on its legislature than to patronize a plan for communicating it to those who are to be the future guardians of the liberties of the country?"); *cf.* Thomas Jefferson, Sixth Annual Message to Congress (Dec. 2, 1806), http://avalon.law.yale.edu/19th_century/jeffmes6.asp [https://perma.cc/WX65-38ST] (calling for public funding of education).

state constitutions have explicitly recognized it.[16] The Court routinely alludes to such a right.[17] But it has never affirmatively recognized it. As a result, the Court has condoned educational inequality as often as it has interrupted the practice. This failure is the sad lynchpin that undergirds the Court's most important cases.

This Review proceeds in three parts. Part I provides an overview of *The Schoolhouse Gate* and a critical assessment of its strengths, contributions, and limitations. Part II identifies the constitutional right to education as the most doctrinally and theoretically important issue in education law. Part II then details the right to education's implications in several of the Court's most important school cases. And finally, Part III examines the Court's school-integration jurisprudence, the area in which the right to equal education has been contested most consistently and most deeply.

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16. *See, e.g.*, ARK. CONST. art. XIV, § 1 (mandating the maintenance of a public-education system because "[i]ntelligence and virtue [are] the safeguards of liberty and the bulwark of a free and good government"); MINN. CONST. art. VIII, § 1 ("The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the Legislature to establish a general and uniform system of public schools."); N.D. CONST. art. VIII, § 1 (mandating the creation of a free public-education system because "[a] high degree of intelligence, patriotism, integrity and morality on the part of every voter in a government by the people [is] necessary in order to insure the continuance of that government"); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 205 (Ky. 1989) (noting that the constitutional convention of 1890 justified the education clause as essential to the "prosperity of a free people" and to "develop[ing] patriotism and understand[ing] our government"). John Adams authored the Massachusetts Constitution and placed an education clause in it, making it the nation's oldest clause of its kind. It provided that "diffus[ion of education] generally among the body of the people [is] necessary for the preservation of their rights and liberties." MASS CONST. pt. 2, ch. V, § II.

17. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 221 (1982) (discussing the role of education in our democratic order and quoting several other Supreme Court cases); Ambach v. Norwick, 441 U.S. 68, 76 (1979) ("Public education, like the police function, 'fulfills a most fundamental obligation of government to its constituency.'" (quoting Foley v. Connelie, 435 U.S. 291, 297 (1978))); Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) (accepting the State's proposition that "some degree of education is necessary . . . if we are to preserve freedom and independence"); Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (stating that education "is the very foundation of good citizenship"); Meyer v. Nebraska, 262 U.S. 390, 400 (1923) ("American people have always regarded education and acquisition of knowledge as matters of supreme importance . . . .").

I. BOOK OVERVIEW

A. Comprehensive Coverage and Approach

The Schoolhouse Gate's coverage is impressive. It persuasively puts to rest the notion that public education does not involve significant constitutional issues.[18] It does. Driver's thesis is that "schools should be deemed our most significant theaters of constitutional conflict."[19] His book reveals how school cases represent "the hopes and the fears that have captivated the American people during the last century."[20] Chapter One makes clear the controversial nature of school cases. The Court's very first education cases, like those of today, involved culturally divisive issues. From a doctrinal standpoint, the early cases are scattered, but they share common ground as battles over major cultural issues. Those cases waded into the racial, cultural, religious, and patriotic politics of the day.

With that groundwork laid, Driver assigns the remaining chapters to each of the Court's major constitutional subjects as played out in the school context: freedom of speech, student punishment, student searches, racial segregation, equality of opportunity beyond race, and religion. Driver's treatment of such disparate subject matter and nearly all of the Court's significant school cases is remarkable.[21] In contrast, the leading education-law casebooks tend to provide thin coverage of a large number of issues or to skew heavily toward one area of the law.[22] Michael and Sherelyn Kaufman's *Education Law, Policy, and Practice*

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18. A typical constitutional law casebook, for instance, affords little to no attention to education as a distinct topic of analysis. The typical approach is a short reprint of *San Antonio v. Rodriguez*—and maybe an even a shorter one of *Plyler v. Doe*—to establish that education is not a fundamental right. *See, e.g.*, CHARLES A. SHANOR, AMERICAN CONSTITUTIONAL LAW: STRUCTURE AND RECONSTRUCTION 745 (3d ed. 2009); KATHLEEN M. SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW 800 (18th ed. 2013). At least one case book does even less, using *Rodriguez* to make a point unrelated to education—that the Court would not accept fundamental rights grounded solely in equal protection. CALVIN MASSEY, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES 743 (3d ed. 2009).

19. DRIVER, *supra* note 1, at 9.

20. *Id.* at 10.

21. The book covers the First Amendment rights to speech and free exercise of religion, due process, cruel and unusual punishment, substantive due process, unreasonable search and seizure, privacy, equal protection based on race, equal protection based on gender, immigration status, fundamental rights, and separation of church and state.

22. *See, e.g.*, KERN ALEXANDER & M. DAVID ALEXANDER, AMERICAN PUBLIC SCHOOL LAW (7th ed. 2009); STUART BIEGEL, EDUCATION AND THE LAW (2d ed. 2009); LAWRENCE F. ROSSOW & JACQUELINE A. STEFKOVICH, EDUCATION LAW: CASES AND MATERIALS (2d ed. 2015); CHARLES J. RUSSO, REUTTER'S THE LAW OF PUBLIC EDUCATION, at v (8th ed. 2012); RICHARD S. VACCA

and Derek Black's *Education Law: Equality, Fairness, and Reform* are the only ones that come close to both depth and full coverage.[23] The Kaufmans' book, however, still focuses heavily on First Amendment issues, reducing all of equal protection to a single chapter. Black's book, while more evenly balanced, focuses on equality. Driver covers the full panoply of multiple constitutional subjects with clear competency and deep insight. The book could easily serve as the primary text for a class on education law or a perfect companion to a course using a casebook.

Driver's treatment of individual cases follows a general pattern. First, he offers the story behind each the case. His aim is to provide insight into the broader social forces that led to the case, as well as plaintiffs' individual stories and motivations. For obvious reasons, the personal stories in old cases tend to be thinner, but Driver offers details on newer cases that many readers will find novel and important.[24] Second, he efficiently explains the basic doctrine of each case and identifies the battle lines between the parties and members of the Court.[25] In many instances, Driver's explanations provide more clarity than the Court itself did.[26] Driver's lucid framing of the cases allows even the lay reader to move through multiple cases and eras without losing the narrative thread. Third, he looks outward, surveying contemporaneous media and scholarly reactions to the Court's decisions. This allows the reader to see each case in the real-time social context in which the Court made each decision, free of the bias of retrospect. Fourth, Driver regularly explores the possibility of alternate outcomes in the cases, considering the Court's options as they stood at the time and whether those options were viable.[27] Finally, he provides a cogent conclud-

& WILLIAM C. BOSHER, JR., LAW AND EDUCATION: CONTEMPORARY ISSUES AND COURT DECISIONS (6th ed. 2003); MARK G. YUDOF ET AL., EDUCATIONAL POLICY AND THE LAW (5th ed. 2012).

23. DEREK W. BLACK, EDUCATION LAW: EQUALITY, FAIRNESS, AND REFORM (2013); MICHAEL J. KAUFMAN & SHERELYN R. KAUFMAN, EDUCATION LAW, POLICY, AND PRACTICE (2005).

24. *See, e.g.*, DRIVER, *supra* note 1, at 293-94 (explaining the parent organizing that led to the legal challenge in *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701 (2007)); *id.* at 349-50 (telling how the plaintiff in *Plyler v. Doe*, 457 U.S. 202 (1982) watched his children stay home day after day because of the law that excluded them).

25. *See, e.g.*, *id.* at 75-78 (drawing the battle lines on each of the standards involved in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969)).

26. *See, e.g.*, *id.* at 94-95 (explaining clearly what the Court held in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), notwithstanding the fact that the Court had created new ambiguities).

27. *Id.* at 88-89 (considering a path not taken in *Tinker*); *id.* at 108-09 (considering an alternate approach to school-newspaper doctrine); *id.* at 201 (considering the downside of an alternate approach to student searches).

ing analysis examining whether the Court got it "right."[28] Throughout, Driver exercises a restraint that other scholars often lack. This restraint serves a larger objective: focusing the reader's attention on the drama playing out in the cases.

B. Strengths and Major Contributions

Driver's approach produces several important gems for the reader. First, Driver humanizes the cases in ways that other scholars have not. He is forthright in this effort. In the introduction, he urges the reader to appreciate the plaintiffs in these cases because the "students and their families who contest school practices must often exhibit deep reservoirs of courage when the Supreme Court addresses their disputes."[29] He observes, and demonstrates throughout his narrative, that these families "resist not only the wishes of local educators but also the norms of their surrounding communities," which can respond with "insults, hate mail, intimidating telephone calls, and even death threats."[30] In later chapters, Driver follows through with confirming details. The plaintiff group in *Engel v. Vitale*[31]—a school prayer case—started at fifty only to shrink to five by the time trial began.[32] The Weismann family, in another prayer case, received so much hate mail after filing their case that they turned it into a scrapbook.[33]

Less explicit but equally effective is Driver's humanization of the Court. The path of least resistance in a book like Driver's is to speak simply of "the Warren Court," "the Rehnquist Court," or even more broadly just "the Court." This, of course, reduces the Court to a thing rather than a group of individuals making incredibly difficult decisions. Driver does the opposite. For instance, he begins the book with a wedding story that seems to have nothing to do with litigation other than the fact that Justice Frankfurter was in attendance.[34] But during the course of the wedding, the bride, groom, and others directly excoriate Justice Frankfurter for his opinion in *Minersville School District v. Gobitis*[35]—

28. *Id.* at 120-22 (arguing that in his assessment, the Court in *Morse v. Frederick*, 551 U.S. 393 (2007), "unwisely betrayed the traditional First Amendment principle permitting restrictions on speech only if they are neutral with respect to viewpoint").

29. *Id.* at 15.

30. *Id.*

31. 370 U.S. 421 (1962).

32. DRIVER, *supra* note 1, at 365.

33. *Id.* at 383.

34. *Id.* at 3-5.

35. 310 U.S. 586 (1940).

a case upholding schools' authority to compel students to pledge allegiance to the flag.[36] Frankfurter had reasoned that it was not the role of courts to overturn or second-guess educators' decisions.[37] The wedding attendees, however, found it shocking that Frankfurter would ignore students' rights and told him so.[38] Under the weight of the combative discussion, Frankfurter eventually lost his composure and swore to never again discuss cases in social settings.[39]

Other depictions offer a fuller measure of the Justices, including those of ill repute. Driver identifies Justice McReynolds as a racist, anti-Semitic, and misogynistic man with a "nasty temperament," while at the same time acknowledging that the Justice was more complex than those labels.[40] Drawing on Justice McReynolds's declaration that "[t]he child is not the mere creature of the State,"[41] Driver notes that McReynolds was among "at least a few figures who, while generally odious, were capable of admirable utterances."[42] Driver also offers details about Justice Powell that help explain his enigmatic school decisions.[43] And one of his most extended dives reveals how Justice Ginsburg played a pivotal role on an otherwise all-male Court in a case involving the strip search of a female middle-school student.[44] In each of these cases, Driver highlights that Supreme Court cases involve people—from those bringing and deciding the cases to those watching from a distance.

By humanizing both the litigants and the Court, Driver also allows the reader to see school cases as a conversation between the Court, schools, and the families involved. This accomplishment alone will keep the book relevant well into the future. Moreover, Driver helps scholars more fully appreciate the doctrine. He does this by consistently challenging conventional wisdom. For instance, scholars regularly criticize the Court in *Brown v. Board of Education II*[45]

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36. DRIVER, *supra* note 1, at 5.

37. *Id.*

38. *Id.* at 3-4.

39. *Id.* at 4.

40. *See id.* at 60-61.

41. Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).

42. DRIVER, *supra* note 1, at 61.

43. While Powell's prior service as a school-board member is well known, Driver digs deeper, developing Powell's concerns about how busing "could devastate the sense of community engendered when youngsters living in the same neighborhood attended the same school." *Id.* at 277. One need not agree with Powell to appreciate Driver's humanizing efforts.

44. *Id.* at 226-30.

45. 349 U.S. 294 (1955).

for requiring only that desegregation proceed with "all deliberate speed."[46] Driver recognizes that this phrase eventually became the excuse for districts to delay desegregation, but he also emphasizes that the language was not immediately perceived that way.[47] *Brown II* included other strong language demanding desegregation and, on the whole, represented a balanced approach to desegregation in light of the context—too slow for some and too rapid for others.[48] Similarly, Driver rejects the notion that the Court's validation of bussing to achieve integration in *Swann v. Charlotte-Mecklenburg Board of Education*[49] provoked overwhelming outrage in white communities and was a failed policy idea. Driver highlights that eighty-seven percent of "the parents of children who were bused to promote integration" viewed it positively,[50] and he recounts how Charlotte residents perceived desegregation, not as a failure, but "as a rousing success."[51]

The most powerful challenges to conventional wisdom, however, come in Driver's exploration of alternative outcomes. His masterful hypotheticals and contrapositives demonstrate just how much the Court has achieved and how much we may now take for granted.[52] Some of the most impressive examples come from the most unexpected places.[53] Driver shows how, against those plausible possibilities, some of the Court's holdings are far more impressive, more disappointing, or less egregious than previously thought. In some of

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46. *See generally* Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 613-14 (1983) (discussing those criticisms of *Brown II*).

47. DRIVER, *supra* note 1, at 256-57.

48. *Id.* at 257 (quoting Editorial, *Prompt and Reasonable*, N.Y. TIMES, June 1, 1955, at 28, which makes this point).

49. 402 U.S. 1 (1971).

50. DRIVER, *supra* note 1, at 293.

51. *Id.* at 291.

52. Driver's free speech chapter, for instance, takes on the Court's hotly debated and most criticized student-speech cases. Driver argues that *Tinker* was more momentous than we appreciate in retrospect—"resist[ing], rather than ratif[ying], the era's prevailing attitudes on student dissent." *Id.* at 84. The Court's later cases do not curtail free speech as much as many would normally argue. *Id.* at 125.

53. For instance, the Court today is often critiqued for demanding so little due process in *Goss v. Lopez*, 419 U.S. 565 (1975), but Driver argues, based on the circumstances at the time, that the Court could have just as easily done nothing. Instead, the Court took a major step to vindicate the basic notion that the Constitution does apply in schools. DRIVER, *supra* note 1, at 155-56. While we might still contest Driver's account to some extent, he makes clear here and elsewhere that we can mistakenly examine cases from a modern perspective that does not fairly account for the conditions of the time. He similarly argues that *Morse v. Frederick*, 551 U.S. 393 (2007), "cannot be dismissed as an opinion that simply legitimated the status quo." DRIVER, *supra* note 1, at 121.

these cases, Driver posits that had the Court done what some commentators proposed, it would have triggered backlash and resentment.[54] For instance, with student-search cases, Driver argues that the Court's low threshold for justifying student searches is not such a bad thing. Had the Court barred searches or made them more onerous to justify, school administrators would have just suspended students or restricted their movements and foregone searches.[55] If forced to choose between school exclusion and a search, students may prefer the search, even if somewhat intrusive.[56] On the other hand, he reasons that the Court in *Tinker v. Des Moines* "could have quite plausibly adopted a rule that afforded greater protection to students' First Amendment rights than did the reasonable-forecast-of-substantial-disruption test."[57] Thus, while Driver defends *Tinker*,[58] he also points out that the case is not the shining "high-water mark" in student free speech that we often assume it to be.[59]

One does not have to agree with any of Driver's particular arguments or revel in any particular backstory to appreciate the overall service he does to the subject matter. By humanizing the participants, contextualizing the issues, and considering the alternatives, Driver forces the reader to measure the Court's cases not just against the reader's own perspective and bias but against reality. This makes it all but impossible to leave these cases without changing one's view a little—or at least acknowledging that the cases are too complex to have full confidence in any single perspective.

C. The Cutting-Room Floor

The doctrinal breadth and narrative depth of *The Schoolhouse Gate*, however, also come at a cost. Synthesizing the cases into a comprehensive metanarrative makes the book widely accessible but requires leaving out some analytical threads and cases that are worth exploring. Driver can only devote so much attention to any single issue or case. As a result, the cases and the legal issues get roughly equal treatment. This may make the relative treatment of a few cases jump out for some readers.

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54. DRIVER, *supra* note 1, at 81-84.

55. *Id.* at 201 (citing William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 564 (1992)).

56. *Id*.

57. *Id*. at 88-91. He backs up this conclusion with lower-court decisions that were more aggressive prior to *Tinker*.

58. *See supra* note 52.

59. DRIVER, *supra* note 1, at 91.

Take *San Antonio Independent School District v. Rodriguez*,[60] which ranks among the Supreme Court's most important education cases. *The Schoolhouse Gate* devotes thirteen pages to the case, roughly the same number of pages it devotes to *Vorchheimer v. School District of Philadelphia*,[61] a case which few—including many scholars—have heard of. While *Vorchheimer* involved the highly controversial operation of a male-only public high school, the Supreme Court failed to reach a decision in the case, evenly splitting four-to-four.[62] Driver discusses *Vorchheimer* to emphasize what can happen when the Court fails to decide an important issue,[63] a point well taken. Single-sex education persisted and has even seen periods of expansion.[64] But more important are two more recent cases, *Mississippi University for Women v. Hogan*[65] and *United States v. Virginia*,[66] that severely restricted single-sex education.[67] These cases, however, understandably do not make an appearance in the book because they arise in the context of higher education.

Driver's treatment of *Safford Unified School District No. 1 v. Redding*[68] is similarly striking.[69] The case does not add much to the canon of education doctrine. In it, the Court held that the strip search of a middle-school girl was un-

60. 411 U.S. 1 (1973).

61. 430 U.S. 703 (1977) (per curiam).

62. *Id.* at 703. The lower court had upheld the policy and the Court's failure to reach a decision acted as a practical affirmance. Vorchheimer v. Sch. Dist. of Phila., 532 F.2d 880, 881 (3d Cir. 1976), *aff'd by an equally divided court*, 430 U.S. 703 (1977).

63. DRIVER, *supra* note 1, at 333 (describing the case as an "institutional obligation [that] remains unfulfilled"); *id.* at 339-40 (discussing the continuing debate over the "legitimacy of single-sex public schools").

64. J. Shaw Vanze, *The Constitutionality of Single-Sex Public Education in Pennsylvania Elementary and Secondary Schools*, 12 U. PA. J. CONST. L. 1479, 1480 (2010) (discussing the increase in single-sex education notwithstanding the Court's holding in *United States v. Virginia*, 518 U.S. 515 (1996)).

65. 458 U.S. 718 (1982).

66. 518 U.S. 515 (1996).

67. Justice Scalia lamented in his *Virginia* dissent that "[u]nder the constitutional principles announced and applied today, single-sex public education is unconstitutional" or, at best, "functionally dead." *Id.* at 595-96 (Scalia, J. dissenting). For an analysis of whether the Court's decision did portend the end of single-sex public education, see Kimberly J. Jenkins, *Constitutional Lessons for the Next Generation of Public Single-Sex Elementary and Secondary Schools*, 47 WM. & MARY L. REV. 1953 (2006).

68. 557 U.S. 364 (2009).

69. *See* DRIVER, *supra* note 1, at 219-30.

reasonable under the Fourth Amendment.[70] From the Court's perspective, it did little more than apply a twenty-year-old basic rule to a troubling set of facts[71]—not the sort of thing the Supreme Court normally does. Driver appears to include it, not because it involves groundbreaking doctrine, but because it provides a vivid example of how far school districts have gone in their authoritarian approach to school discipline.[72]

But at the same time, *The Schoolhouse Gate* does not discuss some seminal desegregation cases like *Freeman v. Pitts*[73] and *Missouri v. Jenkins*,[74] which are worth mentioning here. *Freeman v. Pitts* effectively ended school desegregation that was otherwise occurring across the South and elsewhere. First, the Court held that schools did not have to eliminate all the vestiges of discrimination before courts could begin releasing them of supervision;[75] it was enough if schools had eliminated the vestiges in some particular aspects of their operations.[76] Second, the Court articulated what amounted to an affirmative defense to the continuing duty to desegregate. Under *Freeman*, schools need only show that demographic shifts had contributed to segregation in the district.[77] This was enough to shift the burden back onto plaintiffs[78]—plaintiffs who had in those cases already established de jure segregation. This burden-shifting was devastating for plaintiffs,[79] as the mere passage of time inevitably produces

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70. *Redding*, 557 U.S. at 379 ("The strip search of Savana Redding was unreasonable and a violation of the Fourth Amendment . . . .").

71. *Id.* at 375 ("The indignity of the search . . . implicate[s] the rule of reasonableness as stated in [*New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985),] that 'the search as actually conducted [be] reasonably related in scope to the circumstances which justified the interference in the first place.'").

72. For numerous examples of the egregious lengths to which schools have gone, the data to support it as a systematic problem, and a potential constitutional response, see DEREK W. BLACK, ENDING ZERO TOLERANCE: THE CRISIS OF ABSOLUTE SCHOOL DISCIPLINE (2016).

73. 503 U.S. 467 (1992).

74. 515 U.S. 70 (1995).

75. *Freeman*, 503 U.S. at 471 (indicating that the district court could grant partial unitary status).

76. *Id.* ("A district court need not retain active control over every aspect of school administration until a school district has demonstrated unitary status in all facets of its system.").

77. *Id.* at 494 ("[T]he school district is under no duty to remedy imbalance that is caused by demographic factors.").

78. *Id.* ("[I]n the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary." (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 32 (1971))).

79. Bradley W. Joondeph, Note, *Killing* Brown *Softly: The Subtle Undermining of Effective Desegregation in* Freeman v. Pitts, 46 STAN. L. REV. 147 (1993).

demographic changes and, thus, the basis for districts to escape their duty to desegregate.[80]

Missouri v. Jenkins[81] addressed the other part of what was left of school desegregation. In those districts in which the physical integration of schools was not possible, courts had long ordered states and districts to fund school-improvement programs.[82] In *Jenkins*, the Court required plaintiffs to justify the continuation of those programs with evidence so precise that it is practically impossible to supply. Plaintiffs would, for instance, need to demonstrate the extent to which current achievement gaps are traceable to prior de jure segregation.[83] Having announced an immediately available defense to school desegregation in *Freeman* and a huge evidentiary barrier to school improvement in *Jenkins*, courts rapidly dissolved school-desegregation cases across the country.[84] Taken together, *Jenkins* and *Freeman* were so consequential that it is hard to imagine that the Court will ever hear another mandatory school-desegregation case.

There are no perfect answers to the questions about what one includes in or excludes from a book. In most ways, *The Schoolhouse Gate* is a resounding success. Driver writes in an engaging, narrative style that covers much of the Court's education docket. He puts readers in the position to interpret and judge the Court for themselves rather than rely on others' biased points of view. He proves that the Supreme Court has made a significant difference—for good or bad—in the nation's largest governmental institution. But one significant narrative left out of the book is a sustained interrogation of the right to education, which we provide below.

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80. *Id.* at 162 ("*Freeman* significantly increases the possibility that, despite years of judicial supervision, school districts will never truly desegregate.").

81. 515 U.S. 70 (1995).

82. That authority flowed from the Court's holding in *Milliken v. Bradley*, 433 U.S. 267 (1977).

83. *Jenkins*, 515 U.S. at 102 ("Just as demographic changes independent of *de jure* segregation will affect the racial composition of student assignments, so too will numerous external factors beyond the control of the [Kansas City, Missouri School District] and the State affect minority student achievement. So long as these external factors are not the result of segregation, they do not figure in the remedial calculus." (citation omitted)).

84. *See, e.g.*, NAACP v. Duval Cty. Sch., 273 F.3d 960, 965 (11th Cir. 2001) (discussing the lower-court decision in the early 1990s finding that the district had met its constitutional obligations); Lockett v. Bd. of Educ., 111 F.3d 839, 841 (11th Cir. 1997) (same); *see also* Gary Orfield & Chungmei Lee, *Historic Reversals, Accelerating Resegregation, and the Need for New Integration Strategies*, C.R. PROJECT 5 (Aug. 2007), https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/historic-reversals-accelerating-resegregation-and-the-need-for-new-integration-strategies-1/orfield-historic-reversals-accelerating.pdf [https://perma.cc/58JT-RSXR].

II. THE RIGHT TO EDUCATION

The most basic, complex, and potentially consequential issue in education law is whether students have a right to education. In four of the Court's most important education cases—*Brown v. Board of Education*,[85] *San Antonio Independent School District v. Rodriguez*,[86] *Goss v. Lopez*,[87] and *Plyler v. Doe*[88]—the right to education is directly implicated. Driver acknowledges the importance of these cases and, interestingly, seeks to elevate *Plyler*.[89] Indeed, Driver characterizes the Court's opinion in *Plyler* as one of "the most egalitarian, momentous, and efficacious constitutional opinions that the Supreme Court has issued throughout its entire history."[90]

The scope of *The Schoolhouse Gate*, however, requires that Driver's treatment of these cases focuses on their facts and the narrow grounds upon which they were decided. His effort to construct a narrative of the Court, its members, and the evolution in the Court's thinking across time understandably precludes him from probing the larger theoretical aspects that we elicit here. Yet there remains a contradiction in the Court's own narrative. For nearly a century, the Court has consistently acknowledged the special place that education holds in our democratic structure.[91] But the Court refused to recognize the doctrinal implications of that status and the possibility that students have a right to public education.[92] A key question thus remains unanswered: why has the Court failed to ensure equal educational opportunity?

This Part explores this and related issues through the most prominent Supreme Court decisions touching on the right to education in three Sections. The first Section examines the Court's rejection of a fundamental right to education in *San Antonio v. Rodriguez*. It emphasizes that the Court's holding was inconsistent with the lofty status *Brown v. Board of Education* had afforded edu-

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85. 347 U.S. 483 (1954).

86. 411 U.S. 1 (1973).

87. 419 U.S. 565 (1975).

88. 457 U.S. 202 (1982).

89. Jill Lepore was the first to notice and emphasize the important work Driver was doing on *Plyler*. *See* Jill Lepore, *Is Education a Fundamental Right?*, NEW YORKER (Sept. 10, 2018), https://www.newyorker.com/magazine/2018/09/10/is-education-a-fundamental-right [https://perma.cc/S6KQ-6PN2].

90. DRIVER, *supra* note 1, at 316.

91. *See supra* note 17.

92. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35-37 (1973) (rejecting education as a fundamental right); *see also* Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 458 (1988) (confirming *Rodriguez* on that point).

cation and also created a number of practical and doctrinal challenges for the future. One of them was the basis upon which the Court might intervene in other egregious denials of educational opportunity. The second Section explores this intervention problem through *Goss v. Lopez*, a school suspension case. Having rejected education as a fundamental right in *Rodriguez*, the Court had to identify some statutory right to education that schools could not simply take away at their discretion. The third Section explores a similar problem in *Plyler v. Doe*. While Texas had clearly targeted undocumented students for exclusion from school, the Court's prior decision in *Rodriguez* dictated that the state need only justify educational inequality under rational basis review. Thus, the Court again struggled to articulate the logic upon which it would intervene.

A. San Antonio v. Rodriguez*: School Funding's Impact on the Right to Education*

1. Implications Well Beyond Money

In *Rodriguez*, the Court infamously announced that education is not a fundamental right[93] and that poverty is not a suspect class triggering heightened scrutiny.[94] Thus, the Court only applied rational basis review to the egregious funding disparities between school districts.[95] Driver frames his discussion of the case almost entirely around its facts. He writes that *Rodriguez* was about school-funding practices that "yielded massive disparities in per pupil expenditures between areas with high property values and areas with low property values."[96] Driver describes *Rodriguez* as a technical case about "tax dollars," the "intricacies and uncertainties of school financing,"[97] and the "desirability of school-financing reform."[98] He also attempts to put a silver lining on the case by noting that advocates can still turn to state courts and state law for remedies. He tells the reader: "[E]ven if federal courts prove initially hostile to

93. *Rodriguez*, 411 U.S. at 35 ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.").

94. *Id.* at 29 ("[T]his Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny.").

95. *Id.* at 55 ("The constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest. We hold that the Texas plan abundantly satisfies this standard." (citation omitted)).

96. DRIVER, *supra* note 1, at 315.

97. *Id.* at 319.

98. *Id.*

rights claims under the federal Constitution, reformers can attain victories at least sometimes by invoking state constitutional provisions."[99]

But it is worth noting that the contrary opinion, expressed by Justice Marshall, may be the better one—that the case was a massive blow to educational rights. Writing in dissent, Marshall framed the case as one about the "quality of education [the state] offers its children."[100] The Court's holding, he argued, was "an abrupt departure" from precedent and "a retreat from our historic commitment to equality of educational opportunity."[101] Now, the state will be free to "depriv[e] children in their earliest years of the chance to reach their full potential as citizens."[102]

In a closing paragraph, Driver optimistically notes a recent Michigan lawsuit that takes up the question left open in *Rodriguez*—whether depriving students of even a minimally basic education might violate students' constitutional right to education.[103] But as Justice Marshall's dissent reveals, the constitutional right to an education—more particularly, the equal educational opportunities it demands—has been the question since the beginning. The issue arises in Michigan because the Court skirted it in *Rodriguez*.

Driver is not the first to label *Rodriguez* and the state litigation it spawned "school-finance litigation." But money is simply a means to an end, as state courts and leading scholars have recognized.[104] The right in so-called school-finance cases is not a right to some specific level or form of school funding. It is a right to an adequate or equal education, and such a right can implicate any number of issues.[105] Money is just one.

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99. *Id.* at 316.

100. *Rodriguez*, 411 U.S. at 70 (Marshall, J., dissenting).

101. *Id.* at 70-71.

102. *Id.* at 71.

103. DRIVER, *supra* note 1, at 329-30.

104. James E. Ryan, Sheff*, Segregation, and School Finance Litigation*, 74 N.Y.U. L. REV. 529, 532 (1999); *see also* Derek W. Black, *Middle-Income Peers as Educational Resources and the Constitutional Right to Equal Access*, 53 B.C. L. REV. 373, 390 (2012) ("[A]dditional funding is not an end in and of itself. Funding is relevant only because it can purchase the critical inputs, such as teachers and curricula, which are necessary to offer students an equal educational opportunity or some qualitative level of education."); Molly S. McUsic, *The Future of* Brown v. Board of Education*: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1355-56 (2004); James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 307-10 (1999); Christopher E. Adams, Comment, *Is Economic Integration the Fourth Wave in School Finance Litigation?*, 56 EMORY L.J. 1613, 1642 (2007).

105. *See* Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 211-12 (Ky. 1989) (holding that the state constitution "requires the General Assembly to establish a system of common schools that provides an equal opportunity for children to have an adequate education," that

At its core, school-finance litigation—whether under the rubric of adequacy or equity—concerns the constitutional right to education and its qualitative scope.[106] Plaintiffs' primary substantive complaint is that shortcomings in teacher quality, class size, student learning, graduation rates, curriculum, or academic standards reveal a deprivation of educational opportunity.[107] This broad understanding of the constitutionally required educational opportunity has allowed plaintiffs to challenge almost any education policy or resource that interferes with equity, adequacy, and access.[108] *Sheff v. O'Neill*, a seminal case striking down school segregation under the Connecticut Constitution, offers a perfect example of how these rights span beyond money.[109] In *Sheff*, the court held that the state had an "affirmative constitutional obligation to provide a substantially equal educational opportunity" and "extreme racial and ethnic isolation," regardless of equalized school funding, "deprives schoolchildren" of their constitutional rights.[110]

These cases are not mere consolation prizes but rather they reveal how much was at stake—and how much was lost—in *Rodriguez*. When the Court rejected plaintiffs' challenge to school-funding inequity in Texas, the Court rejected the fundamental right to education and every aspect of learning and equity that it touches. The Court's holding appeared so momentous that the majority qualified its approach, allowing that plaintiffs' claim might have "merit . . . if a State's financing system occasioned an absolute denial of educational opportunities to any of its children" or "fail[ed] to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political pro-

the state had failed in that duty, and that the state had to "recreate" and "redesign" its entire education system).

106. *See, e.g.*, Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 666 (N.Y. 1995) ("That Article requires the State to offer all children the opportunity of a sound basic education. Such an education should consist of the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury." (citations omitted)).

107. *See, e.g.*, Abbeville Cty. Sch. Dist. v. State, 767 S.E.2d 157, 169-73 (S.C. 2014) (examining transportation, teachers, and district size); Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 333-36 (N.Y. 2003) (evaluating teachers, facilities, and the instrumentalities of learning).

108. Derek W. Black, *Reforming School Discipline*, 111 NW. U. L. REV. 1, 15-16 (2016) (explaining the basic logic and specific challenges to segregation, teacher tenure, charter-school caps, and school discipline under education clauses).

109. 678 A.2d 1267 (Conn. 1996).

110. *Id.* at 1281.

cess."[111] This type of distinction is often the work of dissenters seeking to limit a negative decision, not the pronouncement of a majority.

2. Decades of Scholarly Outrage

As discussed above, *The Schoolhouse Gate* probes contemporary and subsequent scholarship as a measure of an opinion's significance. With *Rodriguez*, Driver quotes two scholars who immediately affirmed the result and discusses Goodwin Liu's more recent argument that Congress has the authority to intervene in funding inequality even if the Court will not.[112] But the literature on the right to education is particularly voluminous and extremely critical of the Court. While it is beyond the scope of Driver's project to detail that literature, it worth more discussion for our purposes.

Mark Yudof's early autopsy of *Rodriguez* is instructive.[113] He charged the Court with casting aside doctrinal "analysis of equal educational opportunity . . . in favor of a focus on the appropriate judicial role, the limits on judicial manageability, and the dictates of public policy."[114] Yudof emphasized that the precise doctrinal question was whether to "declare[] education to be constitutionally fundamental."[115] But the Court's analysis on that question was neither full nor fair. Rather than seriously entertain the key constitutional issues, the Court rested its decision on the uncertainty regarding the impact of relative differences in per-pupil expenditures.[116] Yudof predicted that the "Court's unwillingness to treat education with . . . solicitude . . . may have grave consequences" in a variety of education cases having little if anything to do with interdistrict disparities in school funding.[117] Yudof was correct. Fifteen years later, for instance, the Court would rely on *Rodriguez* in upholding school-bus

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111. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973).

112. DRIVER, *supra* note 1, at 326-27; Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330 (2006). Driver's footnotes include some additional citations, but they are directed at the efficacy of school finance.

113. Mark G. Yudof, *Equal Educational Opportunity and the Courts*, 51 TEX. L. REV. 411 (1973).

114. *Id.* at 503.

115. *Id.*

116. The Court rejected plaintiffs' claims "because the majority—or at least Mr. Justice Powell—did not believe that the requisite degree of injury had been established where the State allegedly provided a minimum educational opportunity." *Id.* at 503-04.

117. *Id.* at 503. Yudof pointed to "intradistrict resource disparities, school exclusions, and ability grouping practices." *Id.*

fees, even for distant families with incomes "near the officially defined poverty level."[118]

The scholarly criticism of *Rodriguez* has continued ever since. For instance, a decade after Yudof's critique, Gershon Ratner argued that standards-based reform had shown that qualitative tools can be developed to evaluate and compare districts.[119] The advent of those standards, Ratner argued, imposes a constitutional duty on every urban public school to educate "the vast majority of its students, regardless of the proportions of poor and minority students," with "basic skills."[120] More recently, one of us has argued that "every predicate upon which the Court made its decision has changed," including state-court precedent, which has shown "educational rights [to be] inapposite to the Court's characterizations in *Rodriguez*."[121] As late as 2015, Charles Ogletree and Kimberly Robinson edited a volume devoted solely to critiquing *Rodriguez* and theorizing options for counteracting it.[122] Scholars have so dutifully obsessed over the case that Joshua Weishart—a full forty-five years after *Rodriguez*—aptly dubbed Derek Black's 2018 attempt to reconceptualize the constitutional foundations of the right to education as something akin to the quest for the Holy Grail—a quest that "has captured the imagination of the likes of Erwin Chemerinsky and Cass Sunstein, among scores of other scholars."[123]

3. Imagining an Alternative Outcome

Driver could not fairly be expected to exercise his skilled touch in spinning alternate scenarios and hypotheticals for every case discussed in the book. Yet it is particularly illuminating to deploy Driver's method to *Rodriguez* here. The alternative universe in which the Court would have recognized a fundamental

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118. Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 455 (1988).

119. Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 781, 800-803 (1985).

120. *Id* at 781.

121. Derek W. Black, *Unlocking the Power of State Constitutions with Equal Protection: The First Step Toward Education as a Federally Protected Right*, 51 WM. & MARY L. REV. 1343, 1395 (2010). The Court in *Rodriguez* "treated education as being equivalent to a state-sponsored bus voucher that the State might freely offer or withhold," but state courts have since held education is an absolute constitutional duty of the states. *Id.* at 1396-97.

122. THE ENDURING LEGACY OF *RODRIGUEZ*: CREATING NEW PATHWAYS TO EQUAL EDUCATIONAL OPPORTUNITY (Charles J. Ogletree, Jr. & Kimberly Jenkins Robinson eds., 2015).

123. Joshua E. Weishart, *The Compromised Right to Education?*, 71 STAN. L. REV. ONLINE 123, 123 (2018) (responding to Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735 (2018)).

right to education seemed plausible, if not likely, in 1973. Prior to the Court's decision, several signs pointed toward the Court ruling in favor of the plaintiffs. The federal district court had held that education was a fundamental right.[124] State supreme courts were also entertaining school-funding cases that implicated state and federal fundamental rights to education. Both the California and New Jersey Supreme Courts had already concluded that education was a fundamental right under the state and federal constitutions.[125]

Most importantly, the Court's school-desegregation precedent, as well as a number of other liberty cases, suggested that the recognition of a right to education was just around the corner. In *Brown v. Board of Education*,[126] for instance, the Court came close to recognizing a fundamental right. It stated that education is "perhaps the most important function of state and local governments"—an "opportunity" which "must be made available to all on equal terms."[127] *Bolling v. Sharpe*[128]—the companion case to *Brown* that dealt with segregation in Washington, D.C.— might have gone even further.[129] Chief Justice Warren's initial draft of the opinion declared education to be "a fundamental liberty" and struck down school segregation as "an arbitrary deprivation of [that] liberty."[130] The Court ultimately decided *Brown* and *Bolling* based on

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124. Rodriguez v. San Antonio Indep. Sch. Dist., 337 F. Supp. 280 (W.D. Tex. 1972), *rev'd*, 411 U.S. 1 (1973).

125. Robinson v. Cahill, 303 A.2d 273, 279 (N.J. 1973) (indicating that it had already reached its decision and written an opinion prior to *Rodriguez*, but had to revise its decision regarding federal law when *Rodriguez* was decided), *on reh'g*, 351 A.2d 713 (N.J. 1975); *see also* Serrano v. Priest, 487 P.2d 1241, 1248 (Cal. 1971) ("We are convinced that the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a 'fundamental interest.'").

126. 347 U.S. 483 (1954).

127. *Id.* at 483.

128. 347 U.S. 497 (1954).

129. *See* Hans J. Hacker & William D. Blake, *The Neutrality Principle: The Hidden yet Powerful Legal Axiom at Work in* Brown Versus Board of Education, 8 BERKELEY J. AFR.-AM. L. & POL'Y 5, 46-47 (2006) (describing Chief Justice Warren's initial draft opinion in *Bolling* and its eventual abandonment); Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1, 93-94 (1979) (reprinting a memorandum from the Chief Justice on the "*District of Columbia Case*.").

130. Hacker & Blake, *supra* note 129, at 47 (quoting Chief Justice Warren's draft opinion). Warren's draft cited *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Bartels v. Iowa*, 262 U.S. 404 (1923), *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Farrington v. Tokushige*, 273 U.S. 284 (1927), for support of the proposition of a liberty interest in education. Hacker & Blake, *supra* note 129, at 46. He later abandoned this language, presumably in the service of unanimity, but this shift created an obvious problem that remains in *Bolling* to this day. Without a fundamental right vested in liberty—a term that does appear in the Fifth Amendment—the

equal protection principles, but that rationale was primarily to ensure a unanimous opinion.[131] The cases clearly laid the ideological foundations of a right to education. Leading advocates and scholars such as the late Derrick Bell have argued that the Court simply needed the right facts to build on that foundation.[132]

An alternative universe in which *Rodriguez* recognized a right to education ultimately would have rewritten both school-finance history and the entirety of the struggle for equal educational opportunity. This is not to say federal intervention is without downsides. Federal intervention would have cut short the experimental and evolving common law development of the right to education that eventually occurred in state courts. That trial-and-error approach has certainly produced some benefits that might not have occurred otherwise.[133] But on the whole, federal intervention would have brought three positive developments.

First, a federal right to education would have secured uniform rights. State litigation thus far has produced uneven results and plaintiffs only have viable state constitutional claims in just over half of the states.[134] States like Illinois,

Court had to infer an equal protection principle into the Amendment because that principle is not found in the text of the Fifth Amendment.

131. *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 682-99 (2004) (discussing the push for a unanimous decision).

132. *See* Christopher R. Lockard, *In the Wake of* Williams v. State*: The Past, Present, and Future of Education Finance Litigation in California*, 57 HASTINGS L.J. 385, 387 (2005) (noting Bell's involvement in the litigation in *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971)).

133. *See* Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1526-38 (2007) (describing state-level educational litigation and ensuing reforms).

134. Overview of Litigation History, SCHOOLFUNDING.INFO, http://schoolfunding.info/litigation-map [https://perma.cc/X6AT-AHC7]. No obvious neutral principles of law or issues of fact fairly explain these disparate results. The Illinois Constitution, for instance, includes one of the most progressive education clauses in the nation, yet its judiciary has consistently refused to intervene in what has been one of the nation's most inequitable school-funding systems. *See* Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1193 (Ill. 1996) (dismissing the plaintiffs' claim regarding the constitutionality of the state's public-school-financing system on the basis that "whether the educational institutions . . . in Illinois are 'high quality' is outside the sphere of the judicial function"). Florida's constitution likewise declares education to be a "fundamental value of the people" and imposes a "paramount duty" on the state to provide a "high quality system of free public schools." FLA. CONST. art. IX, § 1. However, Florida's courts have also rejected constitutional education claims several times notwithstanding troubling education inequalities. *See* Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 408 (Fla. 1996) (per curiam). In contrast, South Carolina's constitution simply provides that the General Assembly "shall provide for the

Georgia, and Florida have thus far entirely precluded school-funding challenges[135] and unsurprisingly have experienced relatively high levels of funding inadequacy or inequality.[136] Courts in North Carolina and South Carolina have recognized a right to education,[137] but have struggled to force their legislatures to adopt meaningful remedies for deprivations of education.[138] Only one state has managed to both recognize education rights and consistently enforce them over an extended period of time.[139]

Second, a federal right would have improved the enforcement of education rights. Even prevailing state-court plaintiffs struggle to secure effective remedies.[140] Separation-of-powers principles, the election of state-court judges, and recalcitrant legislatures all constrain the judiciary's ability to remedy constitutional education violations.[141] Federal courts do not operate under those same

maintenance and support of a system of free public schools," S.C. CONST. art. XI, § 3, but its supreme court has twice sided with plaintiffs in challenges to the quality and funding of education in the state. Abbeville Cty. Sch. Dist. v. State, 767 S.E.2d 157 (S.C. 2014), *amended by* 777 S.E.2d 547 (S.C.), *order superseded by* 780 S.E.2d 609 (S.C. 2015); Abbeville Cty. Sch. Dist. v. State, 515 S.E.2d 535 (S.C. 1999).

135. *Coal. for Adequacy & Fairness*, 680 So. 2d at 408; McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1981); *Comm. for Educ. Rights*, 672 N.E.2d at 1193.

136. *See generally* BRUCE D. BAKER ET AL., EDUC. LAW CTR., IS SCHOOL FUNDING FAIR? A NATIONAL REPORT CARD (7th ed. 2018).

137. Leandro v. State, 488 S.E.2d 249 (N.C. 1997); *Abbeville Cty. Sch. Dist.*, 515 S.E.2d at 538-40.

138. *Abbeville Cty. Sch. Dist.*, 780 S.E.2d 609; Wendy Lecker, Leandro *Court Process Underway to Remedy North Carolina's Inadequate School Funding*, EDUC. L. CTR., (Oct. 1, 2018), http://edlawcenter.org/news/archives/other-states/leandro-court-process-underway-to-remedy-north-carolinas-inadequate-school-funding.html [https://perma.cc/NR4X-24L7] (noting the years of delay in implementing a remedy).

139. *See, e.g.*, *The History of* Abbott v. Burke, EDUC. L. CTR. http://edlawcenter.org/litigation/abbott-v-burke/abbott-history.html [https://perma.cc/NNZ9-G9BB] (discussing the history of the litigation in New Jersey).

140. *See generally* Scott R. Bauries, *Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 ALA. L. REV. 701 (2010) (reviewing the different approaches that state courts have taken to adjudicating and remediating education-adequacy cases).

141. *See, e.g.*, Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989) ("It is [the General Assembly's] decision how best to achieve efficiency."); Campaign for Fiscal Equity, Inc. v. State, 861 N.E.2d 50, 58 (N.Y. 2006) ("[I]n fashioning specific remedies for constitutional violations, we must avoid intrusion on the primary domain of another branch of government."); *Leandro*, 488 S.E.2d at 261 ("[T]he administration of the public schools of the state is best left to the legislative and executive branches of government. Therefore, the courts of the state must grant every reasonable deference to the legislative and executive branches when considering whether they have established and are administering a . . . sound basic education."); Derek W. Black, *Averting Educational Crisis: Funding Cuts,*

limitations. Federal courts are far from perfect, but school desegregation reveals that they have the capacity to take over school systems and enforce education reform.[142]

Third, had the Court recognized a federal right to education, it would have expanded congressional power to guarantee educational equity and adequacy. Currently, Congress's only power to promote general educational improvements and equity comes from the Spending Clause. It has used this power to pass and fund legislation such as the No Child Left Behind Act[143] and the Every Student Succeeds Act.[144] But statutes passed pursuant to the Spending Clause allow states to refuse to participate in federal programs.[145] This limits Congress's ability to require states to reform their education practices. On the other hand, if *Rodriguez* had recognized education as a fundamental right, it would be protected by the Fourteenth Amendment. Because Section 5 of the Fourteenth Amendment grants Congress power to enforce the Amendment's substantive provisions, Congress could have required states to remedy educational inadequacies and inequities.[146] When using its Section 5 powers, Congress need not cajole or bribe states.[147] Instead, it can demand that states come into compliance with the substantive provisions of the Amendment and allow individual plaintiffs to sue recalcitrant states in federal court to ensure compliance if they do not.

Perhaps the fear of this alternate universe was what drove the Court away from recognizing a fundamental right to education. Yet fear is insufficient as a sole explanatory factor. Responding to general critiques of judicial intervention in schools, Driver astutely recognizes that intervention concerns are often overstated.[148] The Court has intervened in many controversial education issues.

Teacher Shortages, and the Dwindling Commitment to Public Education, 94 WASH. U. L. REV. 423, 456 (2016) (discussing legislatures that had defied court orders).

142. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971) (discussing the "broad" scope of a district court's power to fix equitable remedies where school authorities have failed to eliminate segregation).

143. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002).

144. Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015).

145. *See, e.g.*, *Utah Set to Reject No Child Left Behind*, WASH. TIMES (Feb. 22, 2005), https://www.washingtontimes.com/news/2005/feb/22/20050222-111910-7518r [https://perma.cc/BR4E-UNX5]. *See generally* Michael D. Barolsky, Note, *High Schools Are Not Highways: How* Dole *Frees States from the Unconstitutional Coercion of No Child Left Behind*, 76 GEO. WASH. L. REV. 725 (2008).

146. Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735, 829-33 (2018).

147. *Id.*

148. DRIVER, *supra* note 1, at 17-25.

Thus, the better reading seems to be that the Court intervenes whenever it wants to and laments the dangers of intervention when it is disinclined to do so.[149] Regardless, the consequences of nonintervention in *Rodriguez* could not have been more significant. Those consequences shaped much of the most important state and federal education litigation that followed it.

B. Goss v. Lopez*: Suspension as a Deprivation of a Right to Education*

Goss v. Lopez[150] shows yet again how the right to education links the Court's school cases. The case involved a state statute that permitted schools to summarily suspend students without any sort of process.[151] The Court struck down the statute, holding that students are entitled to due process prior to suspension.[152] The case also, however, has two vital links to the right to education beyond due process and a school-discipline dispute. First, note how *Goss* is part of *Brown*'s progeny. As schools began to integrate, racial bias and discrimination began to manifest themselves in school discipline.[153] Driver does an excellent job teasing out this part of the story. He devotes an entire subsection to explaining why *Goss* "should not be mistaken for an insignificant opinion."[154] He argues that *Goss* was part of the "march toward racial equality" and a failure to intervene would have been a "conspicuous" "snub to the cause."[155] His telling of the story implicitly substantiates our thesis that the right to equal educational opportunity is a central aspect of the Court's education precedent.

Second, *Goss* confronted the issue that *Brown* avoided and *Rodriguez* did not fully resolve—the existence and nature of a right to education. Had the Court in either of those cases recognized a right to education, *Goss* would have been an easy case for the plaintiffs to win.[156] But that was a road not taken. Instead, it was the school district that argued that the outcome was preordained: "[B]ecause there is no constitutional right to an education at public expense, the Due Process Clause does not protect against expulsions from the public

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149. *Id.*

150. 419 U.S. 565 (1975).

151. *Id.* at 567.

152. *Id.*

153. BLACK, *supra* note 72, at 32-35.

154. DRIVER, *supra* note 1, at 157.

155. *Id.* at 157-58.

156. *Goss* may have not even made it to the Supreme Court, as due process would have clearly attached to school actions that sought to take away a student's fundamental right to education.

school system."[157] Thus, the Court in *Goss* confronted a tough choice: rule against the plaintiffs and ignore the blatant unfairness occurring in school discipline or identify some right that triggers due process but does not implicate a fundamental right to education.

Pursing the latter option, the Court characterized education as a property interest and found that property in a strange place—Ohio's compulsory-attendance law.[158] The Court reasoned that the combination of schools' statutory duty "to provide a free education" and students' statutory requirement to attend those schools created a property interest or "legitimate claims of entitlement to a public education."[159] School suspensions and expulsions amount to attempts to take that property interest away, requiring due process.[160] The dissent responded with confusion: "[T]he very legislation [that the majority relies on to] 'defin[e]' the 'dimension' of the student's entitlement . . . does not establish this right free of discipline imposed."[161] To the contrary, "the right is encompassed in the entire package of statutory provisions governing education in Ohio—of which the power to suspend is one."[162] In other words, an education statute that gives schools the authority to suspend students without any due process is a strange place to locate a property right.

Goss shows how the right to education is inescapable in education cases. First, in attempting to skirt the constitutional issue of a right to education, the Court simply triggered statutory-interpretation squabbles on the same general subject. This game is not worth the candle because statutory rights in education do not operate independently of constitutional rights to education. The Court simplistically and incorrectly ignored this connection when it wrote that "[a]lthough Ohio may not be constitutionally obligated to establish and maintain a public school system, it has [by statute] nevertheless done so and has required its children to attend."[163] A simple reading of Ohio's constitution reveals the flaw. The Ohio Constitution provides that "the general assembly shall make such provisions . . . as . . . will secure a thorough and efficient system of com-

157. *Goss*, 419 U.S. at 572.

158. The Court also indicated that students have a liberty interest in their reputation that suspensions tarnish, *id.* at 575-76, but later cases reject the notion that this type of reputational interest standing alone without some other tangible property interest would trigger due process concerns, *see, e.g.*, Paul v. Davis, 424 U.S. 693, 701 (1976).

159. *Goss*, 419 U.S. at 573-74.

160. *Id.*

161. *Id.* at 586 (Powell, J., dissenting).

162. *Id.* at 586-87.

163. *Id.* at 574 (majority opinion).

mon schools throughout the State."[164] Thus, the provision of public education is no mere voluntary legislative act. It is a constitutional duty. This constitutional duty, not simply the attendance laws enacted pursuant to that duty, implies an individual right to education.

Second, Ohio's constitution is not unique. All fifty state constitutions require their governments to provide for public education.[165] This makes the Court's obfuscation all the more glaring and raises a crucial question: why are education clauses uniformly present in state constitutions? The answer, one of us has argued, is that these clauses exist and coalesce around common concepts because they are an effectuation of the U.S. Constitution itself.[166] The end of the Civil War raised two constitutional issues—the meaning of a republican form of government and the rights of citizens in such a government. The ratification of the Fourteenth Amendment and the readmission of southern states to the Union resolved these issues. Ratification and readmission established education both as a right of citizenship protected by the Fourteenth Amendment and as a central pillar, alongside the right to vote, of a republican form of government.[167] The most persuasive evidence for this conclusion is that Congress by statute explicitly conditioned the readmission of the final three confederate states on their education clauses: "[T]he constitution of [the state] shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the constitution of said State."[168] Moreover, after 1870, no state would ever again enter into the Union without an education clause in its state constitution.[169]

This deeper analysis, which eluded the Court, is directly relevant to a host of additional issues—issues that cannot be fairly resolved without a full appreciation of the right to education. Most notably, a constitutional right to education triggers a different due process response than a statutory property right.[170]

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164. OHIO CONST. art. VI, § 2.

165. Black, *supra* note 108, at 10.

166. Black, *supra* note 146, at 792-93.

167. *Id.* at 781-83.

168. Act of Mar. 30, 1870, ch. 39, 16 Stat. 80, 81 (readmitting Texas to the Union); Act of Feb. 23, 1870, ch. 19, 16 Stat. 67, 68 (readmitting Mississippi to the Union); Act of Jan. 26, 1870, ch. 10, 16 Stat. 62, 63 (readmitting Virginia to the Union).

169. Black, *supra* note 146, at 743.

170. *See, e.g.*, King v. Beaufort Cty. Bd. of Educ., 704 S.E.2d 259, 262 (N.C. 2010) (applying a stricter standard of review where a state constitutional right to equal educational access is concerned); Phillip Leon M. *ex rel.* J.P.M. v. Greenbrier Cty. Bd. of Educ., 484 S.E.2d 909, 913 (W. Va. 1996) (applying strict scrutiny to review a state's interference with a right to education guaranteed in its constitution); *In re* RM, 102 P.3d 868, 873 (Wyo. 2004) (same).

The deprivation of a constitutional right requires more than just minimal due process.[171] Errors that might be acceptable in the context of a property right are likely intolerable in the context of a sacrosanct constitutional right.[172] Second, as some state-court decisions have indicated, a constitutional right requires a school to justify suspensions and expulsions with important or compelling interests.[173] In other words, expelling a student for relatively minor misbehavior is unjustifiable when access to education is recognized as a constitutional right. Likewise, even when the school has an important or compelling reason for excluding a student, the existence of a constitutional right would require the school to first explore less restrictive alternatives.[174]

Finally, by reducing the case to an issue of statutory property rights, the Court in *Goss* may not have actually provided any meaningful protection to students subject to suspension and expulsion. Over time, basic due process has evolved into little more than perfunctory box-checking as schools execute their preordained decision to exclude a student.[175] Rather than requiring schools to justify exclusion as serving a state interest proportionate to or more important than the harm imposed on the student, exclusions are viewed as justified so long as a student has been put on notice of their misbehavior.[176] This questionable standard made the movement toward zero tolerance possible.[177] Additionally, *Goss*'s problematic framing continues to influence the way that state courts approach school discipline.[178] In sum, the aftermath of *Goss* offers just one

171. *See generally* Mathews v. Eldridge, 424 U.S. 319 (1976) (articulating a balancing test under which the weight of the private interest affects the level of process required).

172. *Id.*

173. *See supra* note 170.

174. *See, e.g.*, *Phillip Leon M.*, 484 S.E.2d at 914 (requiring the creation of an alternative program for suspended or expelled students).

175. *See* Black, *supra* note 5, at 902.

176. *See id.* at 847.

177. *See, e.g.*, Ratner v. Loudoun Cty. Pub. Sch., 16 F. App'x 140, 141 (4th Cir. 2001) (upholding the expulsion of a student who technically violated a zero-tolerance policy on weapons when he took a weapon from his suicidal friend because the district had afforded the student all the process that *Goss* required). Driver also laments zero-tolerance policies but does not focus on how the Court's doctrinal and theoretical flaws create the problem. DRIVER, *supra* note 1, at 158-65.

178. Students' chances of succeeding in challenging suspension and expulsion are low and have fallen further over time, although students' chances are ironically better in state court than in federal court due to additional statutory protections that states sometimes provide. Youssef Chouhoud & Perry A. Zirkel, *The* Goss *Progeny: An Empirical Analysis*, 45 SAN DIEGO L. REV. 353, 381 (2008).

more example of how the Court's failure to take the right to education seriously has far-reaching and negative consequences.

C. Plyler v. Doe*: The Unavoidable Tension Between Access and the Right to Education*

Two years after the Court's decision in *Rodriguez*, Texas passed legislation barring undocumented children from enrolling in and attending public school.[179] In *Plyler v. Doe*,[180] the Court struck down that legislation. *Plyler* has been the subject of many competing scholarly theories and narratives.[181] *The Schoolhouse Gate* is extremely impressive here. Almost four decades after the fact, Driver offers a new interpretation of the case and its context. Driver demonstrates that *Plyler* was forward-thinking, not an idiosyncratic one-off. Framed this way, he forcefully argues that the Court's opinion in *Plyler* is one of its most influential.

Driver's rationale is compelling. He explains how the Court resolved a new problem quickly before it could spread.[182] For Driver, the proper measure of a case's impact is not just what it overturns or rebukes but also what it prevents from ever happening. Had the Court permitted Texas's exclusion of undocumented students, history strongly suggests that other states would have replicated the policy.[183] But because the Court took bold early action, it shaped the

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179. Plyler v. Doe, 457 U.S. 202, 205 (1982).

180. *Id.*

181. *See, e.g.*, Stuart Biegel, *The Wisdom of* Plyler v. Doe, 17 CHICANO-LATINO L. REV. 46, 55 (1995) (reasoning that *Plyler* establishes a two-step analysis for educational inequality); Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 568-69 (1992) (reasoning that *Plyler* straddled the line between recognizing and not recognizing a right to education); Steven G. Calabresi & Lena M. Barsky, *An Originalist Defense of* Plyler v. Doe, 2017 B.Y.U. L. REV. 225, 230 (arguing that the plain meaning of the Fourteenth Amendment, when enacted, would have protected access to education for both citizens and noncitizens); Michael J. Perry, *Equal Protection, Judicial Activism, and the Intellectual Agenda of Constitutional Theory: Reflections on, and Beyond,* Plyler v. Doe, 44 U. PITT. L. REV. 329, 330-31 (1983) (emphasizing the doctrinal confusion that the case created); Ratner, *supra* note 119, at 834-45 (comparing the plight of undocumented students to that of poor urban students and reasoning that *Plyler* applied intermediate scrutiny).

182. DRIVER, *supra* note 1, at 353.

183. In fact, some jurisdictions have since considered bills or carried out policies knowing that they contradict or challenge *Plyler*. *See, e.g.*, *Lawmakers to Debate Education for Illegals*, AUGUSTA CHRON. (Ga.), Dec. 29, 2005, at B5; Benjamin Mueller, *New York Compels 20 School Districts to Lower Barriers to Immigrants*, N.Y. TIMES (Feb. 18, 2015), https://www.nytimes

course of history. Outside of "prominent right-leaning commentators [who] assail the opinion as a lawless aggrandizement of judicial authority,"[184] *Plyler* has remained well-settled law for over three decades. Even as anti-immigrant sentiments have recently grown, *Plyler* has operated as a clear and relatively uncontroversial bulwark against efforts to indirectly exclude undocumented students.[185] From this perspective, the incredible influence of the Court's decision renders its success invisible.

At the same time, *Plyler* highlights the Court's uneasiness with its prior rejection and obfuscation of the right to education—a point that Driver does not take up. Based on existing precedent establishing rational basis review,[186] the plaintiffs' chance of success in *Plyler* was, at best, extremely low. Under rational basis review, the state could certainly articulate a legitimate government purpose, such as saving costs and improving other students' education.[187] Excluding undocumented students would marginally further those goals.[188] The perniciousness of the legislation, however, laid bare that the Court's prior decisions had trapped it in an understanding of public education with troubling implications. As the Court itself wrote in *Plyler*, education is not a constitutional right, but "neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation."[189] Yet no majority existed to overturn *Rodriguez* or announce a new doctrine that would limit the case's impact. This tension helps explain the curious reasoning in *Plyler*.

First, the Court recounted laudatory characterizations of education from several other cases. The language it selected is the type normally reserved for fundamental rights: education is of "supreme importance" to the nation, "most vital [in] . . . the preservation of a democratic system of government," and necessary for individuals to "participate effectively and intelligently in our open

.com/2015/02/19/nyregion/new-york-compels-20-school-districts-to-lower-barriers-to-immigrants.html [https://perma.cc/73XX-JSWD].

184. DRIVER, *supra* note 1, at 358.

185. *See, e.g.*, Mueller, *supra* note 183.

186. Per *Rodriguez*, education is not a fundamental right; thus, the law would only trigger rational basis review. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973). Similarly, immigration status is not a suspect classification; thus, rational basis review still applies. *See* Plyler v. Doe, 457 U.S. 202, 223 (1982).

187. *Plyler*, 457 U.S. at 209.

188. *Id.* at 248-51 (Burger, C.J., dissenting); Perry, *supra* note 181, at 338.

189. *Plyler*, 457 U.S. at 221.

political system" and lead "economically productive lives."[190] The Court's point, it seemed, was to isolate *Rodriguez* as aberrational without actually overturning or challenging its doctrine. Second, it created wiggle room within existing doctrine. The Court acknowledged that rational basis review applied, but emphasized that "we would not be faithful to our obligations under the Fourteenth Amendment if we applied so deferential a standard to every classification."[191] The facts in *Plyler*, it reasoned, justified less deference because the state had taken action "inconsistent with elemental constitutional principles."[192] The Court neither explained these elemental principles nor the meaning of its reduced deference, but the Court in mercurial fashion indicated that it would seek "assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the State."[193]

These two steps, the Court reasoned, justified striking down the legislation, but they also produced an opinion lacking any clear neutral and replicable principle of law—a principle that has long eluded scholars and courts.[194] The most aggressive explanation for the outcome in *Plyler* is that it rests on a right to some minimally adequate educational opportunity. This, of course, is the issue that *Rodriguez* had left open. Thus far, however, *Plyler* remains entirely limited to its facts. Lower courts have refused to apply *Plyler*'s closer-look review to other inequalities and deprivations.[195] The point here is not to mediate these approaches but to emphasize that once again the right to education lies at the core of the Court's most significant cases. *Plyler*, like the cases that preceded it, cannot be fully understood or justified without a theory of the right to education. The Court's convoluted opinion is a direct result of its previous failure to

190. *Id.* (first quoting Meyer v. Nebraska, 262 U.S. 390, 400 (1923); then quoting Abington Sch. Dist. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring); and then quoting Wisconsin v. Yoder, 406 U.S. 205, 221 (1972)).

191. *Id.* at 216.

192. *Id.*

193. *Id.* at 217-18.

194. The case could be read as a hybrid, meaning that when two factors intersect—important rights and class-based disadvantage—heavier constitutional scrutiny is appropriate, but the Court never specifically articulates that. Or the case could be read as being about one of those two factors, but the case does not fully stand on that either. Or, perhaps, it stands on a final ground: that the Constitution does guarantee access to a minimally adequate education and, because these students had been denied education all together, that right had been breached.

195. *See, e.g.*, Martinez v. Malloy, 350 F. Supp. 3d 74 (D. Conn. 2018); Gary B. v. Snyder, 329 F. Supp. 3d 344 (E.D. Mich. 2018).

substantiate a right to education and its current refusal to either revise its doctrine or tolerate its logical results.

III. THE RIGHT TO EQUAL AND INTEGRATED EDUCATION

In the absence of a general constitutional right to education, equal educational opportunity for minorities has almost exclusively been litigated through the Court's school-desegregation doctrines. In fact, school-desegregation cases have consumed far more of the Court's docket than any other education equity issue.[196] During the late 1960s and for much of the 1970s, the Court issued a desegregation opinion almost every year—sometimes more than one.[197] Those cases involved innumerable factual details and generated several nuanced doctrines regarding when courts could intervene in school districts and what particular remedies they could and could not demand. With all that nuance, it is tempting to get caught up in the details and lose sight of the forest for the trees. But for those seeking to vindicate the rights of African American students, these cases were never just about the narrow issue of busing, intentional versus de facto segregation, desegregation across school-district lines, resetting attendance zones for a particular school, or money; these cases were all about securing equal educational opportunity for African Americans—something far too long denied.[198]

Covering this enormous body of law in a single chapter is a herculean task. It might even be impossible if one is committed to the three-dimensional storytelling that Driver so excellently pursues. Richard Kluger, for instance, devoted an entire book to the story of *Brown*.[199] With far less space, Driver has to make tough choices. One is to focus on *Swann* and *Milliken v. Bradley* and wrap them in the narrative of "busing cases." But as the following sections will show, these cases defy narrow categorization.

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196. James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1370, 1363, 1392 (2000) (examining four decades of educational equity cases and finding desegregation cases "are legion" compared to only one due process expulsion case, *Goss v. Lopez*, and a few funding-equity cases).

197. DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 157 (4th ed. 2000) ("[In the] 1976 term, the Supreme Court had either vacated or remanded orders for system-wide school desegregation plans in four cases.").

198. *See, e.g.*, Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

199. *See* KLUGER, *supra* note 131.

A. Parents Involved *and the Spirit of* Brown

The core of Driver's chapter on the Court's equal protection doctrine as it relates to racial segregation in schools is an examination of *Brown v. Board of Education*[200] and its progeny. Driver observes, correctly, that *Brown* is open to competing interpretations because Chief Justice Warren's desire for unanimity led to an abstractly written opinion.[201] This explains why Driver bookends the chapter with a discussion of *Parents Involved in Community Schools v. Seattle School District No. 1*.[202] Driver's observation that *Parents Involved* represented "the successful culmination of a conservative legal effort, extending back several decades, to mold and constrain *Brown*'s meaning" is spot on.[203] The case featured one of the greatest battles over constitutional meaning in recent history. Squaring off in one corner was Chief Justice Roberts and, in the other, Justice Breyer. As Driver reminds the reader, the Chief Justice was relatively new to the Court at the time of the decision, and there was some question—given that he had disassociated himself from the Federalist Society—as to how he might view race-conscious desegregation remedies.[204] But in *Parents Involved*, Chief Justice Roberts put those questions to rest.

At issue in *Parents Involved* were two school districts' race-based student-assignment plans. The two school districts recognized that rigidly assigning students to schools in their neighborhoods would predictably lead to racially segregated schools when the neighborhoods themselves were segregated.[205] Seeking to circumvent this, the districts voluntarily decided to use race in their student-assignment plans to achieve more racial diversity in their schools. They believed their plans paid fealty to *Brown*.[206] The argument was sincere. *Brown*, with its emphasis on the importance of equal educational opportunity and its admonition that "separate educational facilities are inherently unequal,"[207] at a minimum suggested that school districts had some latitude to use race to achieve integration—and arguably *required* that they do so. But by the time of *Parents Involved*, the question had been transformed into whether exercising such discretion violated the Equal Protection Clause.

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200. 347 U.S. 483 (1954).

201. DRIVER, *supra* note 1, at 250–53.

202. 551 U.S. 701 (2007).

203. DRIVER, *supra* note 1, at 242.

204. *Id.* at 296.

205. *See Parents Involved*, 551 U.S. at 711–13.

206. *Id.* at 747 (noting that both parties believed that their position was faithful to *Brown*).

207. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

Writing for a plurality of the Court, the Chief Justice adopted the narrowest possible view of *Brown*'s meaning. As Driver correctly observes, Chief Justice Roberts adopted a "colorblindness" reading of *Brown*. For Chief Justice Roberts, the student-assignment plans violated both the letter and the spirit of *Brown*. The Chief Justice asked incredulously, "What d[id] the racial classifications do in [*Brown*], if not determine admission to a public school on a racial basis?"[208] He opined, "Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin."[209] Chief Justice Roberts thought that the problem the Court was trying to solve in *Brown* was the general problem of race-based state statutes (rather than the specific race-based segregation of African American students). Such statutes violated the Constitution because the Constitution must be "colorblind" (not because they disadvantaged African Americans).[210] From this perspective, the invalidity of the student-assignment plans in *Parents Involved* was an open-and-shut case.

Driver correctly characterizes Justice Breyer's dissenting opinion as embodying the competing vision of *Brown*, one that emphasized the importance of racial integration over segregation, togetherness and belonging over separateness and segregation.[211] Clocking in at over sixty-six pages and extensively reviewing Supreme Court doctrine, Justice Breyer emphatically rejected the colorblindness interpretation of *Brown*.[212] Justice Breyer focused on the idea of "*Brown*'s promise of integrated primary and secondary education that local communities have sought to make a reality."[213] Seeking to distinguish the instant case from the Court's affirmative-action doctrine, Justice Breyer emphasized the unique context in which the case arose. Surely local public school districts were in the best position to make good on *Brown*'s promise of

208. *Parents Involved*, 551 U.S. at 747.

209. *Id.* Note Justice Stevens's terse reply: "There is a cruel irony in The Chief Justice's reliance on our decision in *Brown v. Board of Education*." *Id.* at 798 (Stevens, J., dissenting). Justice Stevens continued, "[the Chief Justice's opinion] states: 'Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin.' This sentence reminds me of Anatole France's observation: '[T]he majestic equality of the la[w], . . . forbid[s] rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread.' The Chief Justice fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools." *Id.* at 799 (citations omitted) (first quoting *id.* at 747 (majority opinion); and then quoting ANATOLE FRANCE, THE RED LILY 95 (Winifred Stephens trans., 6th ed. 1922)).

210. DRIVER, *supra* note 1, at 297.

211. *Id.* at 298-99.

212. *Parents Involved*, 551 U.S. at 803 (Breyer, J., dissenting).

213. *Id.* at 803-04.

remediating past discrimination and creating a more pluralistic society that had tragically gone unfulfilled.[214]

Driver is at his most effective in explaining how it was that the Chief Justice erred. Pushing aside the standard claim that the Roberts's opinion was "ahistorical," Driver unearths the Chief Justice's real muse. Roberts's plaintive cry that "history will be heard" did not pay fealty to *Brown*, Driver argues. Instead, Roberts was referencing another, less savory history. He was reasserting views held by *Brown*'s conservative southern opponents. As Driver puts it, "The most ringing portions of Roberts's opinion sound as though they could have been ghostwritten by Senator Sam Ervin."[215] He puts a finer point on it just a few sentences later: "While Roberts's opinion in *Parents Involved* identified different villains than Ervin did in 1984, the colorblind rhetoric remained exactly the same."[216] Thus, *The Schoolhouse Gate* is particularly useful because it demonstrates that *Parents Involved* represented the culmination of a decades-long conservative legal effort to mold and domesticate *Brown*'s meaning.

With the Chief Justice's approach effectively disqualified, the reader is left to ponder whether Justice Breyer or Justice Kennedy had the better of the argument. Justice Kennedy's concurring opinion emphasized that racial diversity in K-12 public schools is a constitutionally appropriate goal but one that school districts must pursue via (mostly) facially race-neutral means.[217] It is not clear where Driver falls on this, although it does appear that he is somewhat partial to Justice Kennedy's approach as it relies, perhaps inadvertently, on Justice Powell's opinion in *Keyes v. School District No. 1*.[218]

Because of the framework of his book, Driver spends more time on the differences between the majority and dissent of *Parents Involved* than on its political impact. He does note that "[t]he primary obstacle to realizing meaningfully integrated schools nowadays comes in the form of not an unbending judiciary but an inert body politic."[219] But it is also worth noting here that progressive school districts *were* doing important work to integrate their schools before the devastating effects of *Parents Involved*. While it is true that

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214. *Id.* at 867-68.

215. DRIVER, *supra* note 1, at 304. Senator Ervin represented North Carolina and drafted the Southern Manifesto, a tract signed by southern legislators condemning *Brown*. *See* 102 CONG. REC. 4459-60 (1956).

216. DRIVER, *supra* note 1, at 304.

217. *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring in part and concurring in the judgment).

218. 413 U.S. 189, 217-53 (1973) (Powell, J., concurring in part and dissenting in part); DRIVER, *supra* note 1, at 301; *see also infra* notes 260-266 (discussing *Keyes*).

219. DRIVER, *supra* note 1, at 305.

relatively few school districts were pursuing voluntary integration at the time the case was decided,[220] the Supreme Court's decision cut those few districts off at the knees. What is more, the federal courts played a substantial role in shutting down race-conscious remedies well before the Court decided *Parents Involved*.[221] Any movement to integrate schools comes against the background of those court decisions. Those decisions have made voluntary desegregation extraordinarily difficult. Had the Court in *Parents Involved* validated the student-assignment plans at issue, it would have created a clear exception to that background doctrine and removed litigation fears. This could have freed, if not incentivized, school districts and other state, local, and federal officials to do the hard work of integration. Instead, the Court reinforced a strong disincentive for other districts to voluntarily integrate.

Finally, striking down community-integration plans is both malignly symbolic and normalizing. From beginning to end, the Court's school-desegregation precedent has played a central normalizing function. Its earliest cases denormalized segregation and made progress possible. Later cases normalized school-district boundaries and demographic shifts, making resegregation all but inevitable. In *Parents Involved*, Roberts's decision seeks to denormalize race consciousness, even for integrative purposes. In doing so, he not only makes voluntary integration more difficult as a practical matter, he makes it less desirable as an end itself.

Driver's discussion of the importance of *Brown v. Board of Education* spends a good deal of time arguing that too much weight is placed on *Brown*'s unanimity.[222] He argues that the opinion left too many important questions (such as whether other types of segregation were prohibited) undecided[223] and critiques the view associated with scholars such as Jack Balkin that *Brown* actually represented "an emerging national consensus on racial equality that only the South rejected."[224] Driver also argues that *Brown* was more important than

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220. James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 132-33 (2007).

221. *See, e.g.*, Tuttle v. Arlington Cty. Sch. Bd., 195 F.3d 698 (4th Cir. 1999); Wessmann v. Gittens, 160 F.3d 790, 791 (1st Cir. 1998); *see also* Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) (striking down the University of Texas School of Law's tiered race-conscious admissions plan using lower presumptive-admit ranges for black and Mexican American applicants).

222. DRIVER, *supra* note 1, at 251-53.

223. *Id.* at 250.

224. *Id.* at 253; *see also* Jack M. Balkin, *What* Brown *Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537, 1538-39 (2004) (observing that when *Brown* was decided, a minority of states,

many critics have allowed. In assessing *Brown*'s legacy, Driver emphasizes the symbolic value of the opinion. He states, "*Brown*, properly understood, provided supporters of racial equality with a powerful rhetorical and moral weapon that helped to catalyze the nation toward the goal of racial equality."[225] This, undoubtedly, is true. After *Brown*, it was the white segregationists, not black activists, not black parents, not black children, who were the constitutional outliers.[226] *Brown* shifted the defaults and put the U.S. Supreme Court, for a time at least, on the right side of history. While Driver emphasizes *Brown*'s symbolic importance, he also reaffirms its substantive significance. An assessment of the *Brown* implementation cases shows why.

B. Implementing Brown*: "It's Not the Bus. It's Us."*

Driver argues that the familiar critique of *Brown v. Board of Education II*[227]—that "all deliberate speed" is oxymoronic—developed long after the decision, rather than contemporaneously.[228] The timing is important because it suggests that *Brown II* (and *Brown I* before it) might have been more "muscular" than they appear to us today. Driver explains that in *Brown II*, the Court was simply recognizing its own limitations. It needed the executive branch to enforce any constitutional mandate it might recognize. Thus, it could only go so far in its holding. In this way, Driver speaks of *Brown II* in many of the same ways we think of *Marbury v. Madison*[229] as a decision that achieved about as much as was possible given the political realities on the ground at the time. In this regard as in others, *The Schoolhouse Gate* seeks to make a crucial point that goes well beyond education law: looking only at the doctrine gives an incomplete understanding of constitutional law. Driver implicitly embeds this point in the very structure of the book. He dutifully focuses on the plaintiffs in each case as real people and consistently surveys contemporary newspaper accounts and the legal academy's reaction to the Court's doctrine. He also grounds each case within a particular political milieu. In all of these ways, Driver attempts to present a three-dimensional account of the Supreme Court's key education cases.

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primarily in the South, retained "some version of 'separate but equal,'" while in "the rest of the country . . . de jure segregation had effectively been abolished").

225. DRIVER, *supra* note 1, at 312.

226. Balkin, *supra* note 224, at 1541.

227. Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955).

228. DRIVER, *supra* note 1, at 256.

229. 5 U.S. (1 Cranch) 137 (1803).

Of course, Driver cannot explore all of the dynamics of every case he discusses. He correctly points out that, after *Brown*, the Court "abandoned any effort to develop a meaningful desegregation jurisprudence for well over a decade."[230] This had a hugely dilatory effect on the path of school desegregation.[231] The Court belatedly got back on the field in *Green v. County School Board* in 1968.[232] Driver rightly praises *Green* for introducing the "affirmative duty doctrine" to the school-desegregation pantheon.[233] But then the Court moved sideways and ultimately reversed course. Driver analogizes the trio of decisions following *Green*—*Swann v. Charlotte-Mecklenburg Board of Education*,[234] *Keyes v. School District No. 1*,[235] and *Milliken v. Bradley*[236]—to a traffic light that first "flashed a cautionary yellow before turning solidly red."[237] Driver also notes that all three cases implicate "the use of busing for desegregation"[238] and a distinction between de jure and de facto segregation, but there was much more underlying these cases that is worth exploring here.

In *Swann*, the Court ruled—for the first time—that federal district courts had broad authority to order specific remedies for school segregation. The most important and controversial of these remedies was busing. There is much that Driver gets right about *Swann*. He notes how the case provided federal district courts with broad authority to combat de jure segregation, including the power to gerrymander school attendance zones and order race-based student assignments.[239] And he unearths a key point that many forget—that the Court in *Swann* explicitly recognized that school districts "retained discretion to consider the race of students to promote integration,"[240] even if district courts lacked the power to order it. This point is important because it undermines the Court's dubious determination in *Parents Involved* that the school

230. DRIVER, *supra* note 1, at 243.

231. *Id.* at 262-63 ("[A]fter issuing *Brown II*, the Court—incomprehensibly—disengaged from the field for the next thirteen years.").

232. 391 U.S. 430 (1968).

233. DRIVER, *supra* note 1, at 263 (discussing *Green*, which imposed an affirmative duty on school officials to "take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch").

234. 402 U.S. 1 (1971).

235. 413 U.S. 189 (1973).

236. 418 U.S. 717 (1974).

237. DRIVER, *supra* note 1, at 264.

238. *Id.*

239. *Id.* at 268.

240. *Id.* at 268-69.

districts had gone too far in their attempts to maintain racially integrated schools. In *Swann*, the Court didn't just give federal district court judges broad discretion to chop away at educational Jim Crow; it recognized that local educators had that authority, too. The Court held that

> school authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. *To do this as an educational policy is within the broad discretionary powers of school authorities*.[241]

Take that, Chief Justice Roberts.

The Schoolhouse Gate provides a textured narrative about the battle over busing in *Brown*'s progeny. In his discussion of *Swann*, Driver canvasses contemporaneous newspaper articles that emphasized busing,[242] zooms in on a suburban Charlotte homeowner who began a parental regional organization to oppose busing,[243] and analyzes contemporaneous polling of Americans' attitudes toward busing.[244] He also discusses President Nixon's March 1970 magnum opus—his 8,191-word policy statement on school desegregation that signaled his opposition to busing.[245]

There is no question that busing was an enormous topic of discussion and tension in the early 1970s.[246] But also important is *why* busing was such a significant domestic policy issue. *Swann* (and *Keyes* and *Milliken*) are about much more than just busing.

Busing is not an inherently controversial subject. Busing is simply a mode of transportation—a way for students to get to and from school—with a long

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241. *Id.* at 269 (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971) (emphasis added)).

242. *Id.* at 256-66.

243. *Id.* at 266.

244. *Id.* at 271-72.

245. *Id.* at 267; *see also* Richard Nixon, *Statement About Desegregation of Elementary and Secondary Schools*, AM. PRESIDENCY PROJECT (Mar. 24, 1970), https://www.presidency.ucsb.edu/documents/statement-about-desegregation-elementary-and-secondary-schools [https://perma.cc/JT3X-X9J6] ("I have consistently expressed my opposition to any compulsory busing of pupils beyond normal geographic school zones for the purpose of achieving racial balance.").

246. MATTHEW F. DELMONT, WHY BUSING FAILED: RACE, MEDIA, AND THE NATIONAL RESISTANCE TO SCHOOL DESEGREGATION 5 (2016).

history in American public schools.[247] And that history was largely uncontroversial when busing served the interests of white students. For a time, the luxury of taking a bus to school was one largely reserved for white students.[248] Moreover, white students were often bused to avoid integration.[249]

Busing only became an issue when the race of the students taking the bus changed.[250] When busing became a means to integrate schools in the early 1970s, it took on a charged social meaning. White parents and their allies were spectacularly successful in recharacterizing the school-desegregation issue, reframing the question in ways that had enormous constitutional, political, and moral ramifications. They turned the question of whether black Americans would finally achieve equal educational opportunity into an instrumental question concerning point-to-point transportation and the inviolability of neighborhood schools. As a leading scholar of the era put it, "White parents and politicians framed their resistance to school desegregation in terms of 'busing' and 'neighborhood schools.' This rhetorical shift allowed them to support white schools and neighborhoods without using explicitly racist language."[251] School desegregation and the drive to eliminate Jim Crow—i.e., "forced integration"—became something that the federal government was doing *to* white parents rather than *for* black students.

In *Swann*, the Court approved busing as one of several means of achieving desegregation. Driver notes that Chief Justice Burger thought that the case limited rather than expanded court authority to order busing and, thus, believed that *Swann* had been misrepresented.[252] Driver appears to agree with Burger's analysis, writing that "*Swann* might more accurately be understood not by the constraints it placed on segregating school districts but instead by the constraints it placed on the federal judiciary."[253] To be sure, *Swann* came with more qualifications than many civil rights advocates might have desired.[254] But it is

247. *Id.* at 2 ("Students in the United States had long ridden buses to school, and the number of students transported to school at public expense in the United States expanded from 600,000 in 1920 to 20,000,000 in 1970.").

248. *Id.*

249. *Id.* ("In other parts of the South, as well as New York, Boston, and other northern cities, students rode buses past closer neighborhood schools to more distant schools to maintain segregation.").

250. *Id.*; *see also id.* at 172-73.

251. *Id.* at 3.

252. DRIVER, *supra* note 1, at 272.

253. *Id.* at 273.

254. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 24, 30, 32 (1971) (finding that students' travel time may be too long in some cases and imposing neither a requirement of

also worth noting that *Swann* invested district courts with significant remedial authority. Chief Justice Burger wrote that "[o]nce a right and a violation have been shown, the scope of the district court's equitable powers to remedy past wrongs is broad."[255] This concept of judicial power allowed federal district courts to desegregate large metropolitan areas. Of course, Chief Justice Burger sidestepped an opportunity to issue an unambiguous nationwide desegregation rule, one that would have applied in the North as well as the South.[256] Many southerners pointed to ubiquitous racial segregation in the North and cried foul.[257]

There is also a key passage in *Swann* that can be read to bridge the so-called de jure and de facto regimes that would later come to define the limits of desegregation. In a particularly trenchant passage, the Court recognized the complex interrelationship between school and housing segregation:

> In addition to the classic pattern of building schools specifically intended for Negro or white students, school authorities have sometimes, since *Brown*, closed schools which appeared likely to become racially mixed through changes in neighborhood residential patterns. This was sometimes accompanied by building new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principles of "neighborhood zoning." Such a policy does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns which, when combined with "neighborhood zoning," further lock the school system into the mold of separation of the races. *Upon a proper showing a district court may consider this in fashioning a remedy*.[258]

Perhaps *Swann* can be read, as Chief Justice Burger would have preferred, as a limited authorization of desegregation measures.[259] But *Swann*'s limitations coexisted alongside equally tantalizing possibilities. *Swann* did not reach out to

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any particular degree of race mixing nor a requirement to make year-by-year adjustments of the racial composition of the student body).

255. *Id*. at 15.

256. DRIVER, *supra* note 1, at 270.

257. *Id*.

258. *Swann*, 402 U.S. at 21 (emphasis added).

259. Fred P. Graham, *Burger Cautions Lower Tribunals on Busing Orders*, N.Y. TIMES (Sept. 1, 1971), https://www.nytimes.com/1971/09/01/archives/burger-cautions-lower-tribunals-on-busing-orders-says-rulings-by.html [https://perma.cc/FT4L-8U82].

establish nationwide desegregation guidelines. But it did lay the foundation for a case that might. Most importantly, both what was at stake and what could conceivably have been achieved went far beyond mere busing.

C. The De Jure/De Facto Illusion

Analyzing *Keyes v. School District No. 1* offers another opportunity to interrogate the de jure/de facto distinction.[260] In an opinion authored by Justice Brennan, the Court effectively embraced the idea that segregation's causes varied by region. *Keyes* established that there were two different liability rules for establishing a *Brown* violation. In the South, where there was a clear history of state-imposed school segregation mandated by positive law, the Court essentially presumed liability. That was the essence of *Green*'s "affirmative duty" mandate.[261] After *Green*, the burden was on southern school authorities to "come forward with a [desegregation] plan that promises realistically to work, and promises realistically to work *now*."[262] But in the North and the West, the presumption cut the other way. In the absence of positive law either requiring or permitting school segregation, plaintiffs needed to "prove that the school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities within the school system."[263] This meant that plaintiffs had to show that school authorities intentionally segregated at least a "meaningful portion of the school system."[264] This distinction, in effect, created a firewall against "all out" desegregation in the North.

In order for the de jure/de facto distinction to make sense, however, there has to be some meaningful difference between the two types of segregation. Otherwise, the distinction loses explanatory force. Racial segregation in northern schools was and is typically labeled "de facto," meaning adventitious, accidental, customary, or otherwise the result of private choices. Driver's analysis assumes that de facto segregation has some independent, explanatory force.[265]

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260. 413 U.S. 189 (1973).

261. Green v. Cty. Sch. Bd., 391 U.S. 430 (1968).

262. *Id.* at 439.

263. *Keyes*, 413 U.S. at 201.

264. *Id.* at 208.

265. Driver comes closest to acknowledging that "de facto" is a misnomer on page 280 where he states: "[T]he Court wrongly perpetuated the fiction that many communities existed throughout the nation where racial minorities simply happened to cluster due to their own preferences, rather than being forced into racialized ghettos through a complex web of mutually reinforcing public and private exclusions." DRIVER, *supra* note 1, at 280. He continues:

But, as Richard Rothstein has recently explained in the context of residential segregation (which dependably delivers school segregation), there really is no such thing as de facto segregation; instead, it is all de jure.[266]

The validity of the de jure/de facto distinction lies at the core of the Court's limiting of desegregation and is a concept that decades after *Keyes*, the Court was still struggling to reconcile. In *Freeman v. Pitts* in 1992, for instance, three Republican appointees questioned whether demographic shifts and private choice could fairly explain school segregation. They wrote:

> [The district] claims that it need not remedy the segregation in DeKalb County schools because it was caused by demographic changes for which [it] has no responsibility. It is not enough, however, for [the district] to establish that demographics exacerbated the problem . . . . [Much closer] examination is necessary because what might seem to be purely private preferences in housing may in fact have been created, in part, by actions of the school district. . . . [S]chools that are demonstrably black or white provide a signal to these families, perpetuating and intensifying the residential movement.[267]

Moreover, the duty to desegregate schools does not go away simply because demographic shifts occur. "[A] school district is not responsible for all of society's ills, but it bears full responsibility for schools that have never been desegregated."[268]

While it is beyond the scope of *The Schoolhouse Gate* to substantively interrogate the distinction between de jure and de facto itself, Driver does criticize *Keyes* for requiring school-segregation plaintiffs in the North and West to "hunt for bad actors" and for clinging to "the de jure/de facto distinction."[269]

"The Court's emphasis on discriminatory intent seems particularly misguided in the educational sphere, moreover, because it obfuscates how segregated schools are invariably the product of some official government action, namely the assignment of students to attend designated schools." *Id.* But then in the very next sentence, Driver uses the term "de facto segregation" in a manner that unnecessarily confuses the point. He writes: "Perpetuating de facto segregation in schools by retaining pupil assignment plans should not, however, be understood as tantamount to making a decision at all." *Id.* at 280-81. Were school officials "perpetuating *de facto* segregation"? Or were the school officials' actions—as state actors—directly attributable to the government and consequently de jure?

266. RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017).

267. 503 U.S. 467, 512-13 (1992).

268. *Id.* at 514.

269. DRIVER, *supra* note 1, at 280.

He argues that the Court should have adopted the approach advanced by Justice Powell in a separate opinion in the case. Justice Powell famously had been chairman of the segregationist Richmond, Virginia, school board when *Brown* was decided,[270] and he had submitted an antibusing amicus brief in the *Swann* case.[271] Given his background, Justice Powell surprised many by suggesting that the Court abandon regional distinctions and effectively adopt a strict-liability rule in all school-desegregation cases.[272] Justice Powell would have required local school boards across the country to "operate *integrated school systems* within their respective districts."[273] Moreover, he recognized that the de jure/de facto distinction was chimerical. In *Keyes*, Powell wrote that "there is also not a school district in the United States, with any significant minority school population, in which the school authorities—in one way or the other—have not contributed in some measure to the degree of segregation which still prevails."[274] Driver also points to the "knock on" effect that the earlier adoption of Powell's standard in the school-desegregation context might have had in other areas of equal protection law. He argues that had the Court accepted Powell's standard in *Keyes*, then perhaps *Washington v. Davis*[275] might have come out differently.[276]

One would have thought that Justice Brennan would be the very first to sign on to such an approach. But he declined to do so. Driver suggests that Justice Powell failed to attract Justice Brennan's support because there were strings attached. Justice Powell would vote to jettison the de jure/de facto distinction but only if the liberals jettisoned their attachment to busing. As Driver puts it, "Cutting against this sweeping remedy, however, Powell did aim in *Keyes* to dial back the status quo in one major respect: he would not have obligated schools to bus students with the purpose of maximizing integration, even in areas of de jure segregation."[277] Driver wishes that a deal could have been

270. *Id.* at 276.

271. Brief for the Commonwealth of Virginia as Amicus Curie at 27, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (No. 281), 1970 WL 122664 (arguing against the "disruption" of busing and seeking racial balance "as an end in itself" while arguing for giving school administrators "reasonable discretion . . . in assigning pupils").

272. DRIVER, *supra* note 1, at 276-77.

273. Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 226 (1973) (Powell, J., concurring in part and dissenting in part).

274. *Id.* at 252-53.

275. 426 U.S. 229 (1976).

276. DRIVER, *supra* note 1, at 281.

277. *Id.* at 277; *see also* PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 1121 (6th ed. 2014) ("Brennan's decision to reject Powell's approach had

cut. Throughout *The Schoolhouse Gate*, he repeatedly expresses his admiration for Justice Powell's elegant, nationwide approach to establishing liability for school segregation. And Driver argues that Justice Powell's well-known attachment to the neighborhood school might have been more flexible than it first appeared.[278] Thus, Driver's position is that "the Supreme Court should have interpreted the Constitution to require school districts to pursue racial integration throughout the nation regardless of their recent history—taking a cue from Justice Powell's opinion in *Keyes*, even if it declined to adopt his aversion to busing."[279]

The first question is whether there were ever five votes for this proposition. John Jeffries, Lewis Powell's biographer, suggested that the answer to this question was no.[280] But given how things turned out, perhaps Justice Brennan miscalculated and should have accepted Justice Powell's condition. There are at least two responses to this view. First, perhaps Justice Brennan resisted Justice Powell because busing was the only feasible way to obtain *cross-district* integration. Again, busing is instrumental, not an end in and of itself. Justice Powell's approach would have required local school boards to "operate *integrated school system*s within their respective districts."[281] Justice Powell placed emphasis on the phrase "integrated school systems," but the phrase "within their respective districts" is equally if not more important.[282] He favored a nationwide rule

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fateful consequences, not only for the school cases, but for equal protection doctrine generally."). John Jeffries tells the story a bit differently. On his telling, it was Justice Brennan who offered a deal to Justice Powell: "Brennan had offered to take Powell's views on the de facto-de jure distinction but not on busing. The offer, however, was contingent. Brennan would change his opinion *if* he could get majority support—that is, if Powell tendered his vote." JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 303 (1994). But Jeffries confirms the gravamen of the deal; in order to get a uniform national rule, Powell would have to give up his opposition to busing. *Id.*

278. DRIVER, *supra* note 1, at 278 ("Powell made clear that he used the term 'neighborhood school' in an elastic sense—meaning not necessarily the absolute closest school to one's residence but instead indicating a preference for assigning students to schools closer, rather than further, from their homes.").

279. *Id.* at 281.

280. Brennan praised Powell's approach, saying it "has the virtue of discarding an illogical and unworkable distinction." JEFFRIES, *supra* note 277, at 303. Justice Brennan believed that if he could "eliminate the distinction without cutting back on our commitment [to eliminate all vestiges of state-imposed segregation], . . . [he] would gladly do so." *Id.* The problem was that, according to Jeffries at least, Justice Brennan could not obtain majority support for this view without Justice Powell's vote. And that vote came with a heavy price. *Id.*

281. Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 226 (1973) (Powell, J., concurring in part and dissenting in part).

282. *Id.*

mandating integration but that rule only operated within and not between districts.[283] By the early 1970s, it was becoming increasingly clear that a great deal of segregation was operating at the school-district rather than the individual-school level, as had been the case in *Brown*.[284] "Within their respective districts" ties the *Brown* integration mandate to a specific and often residentially segregated place. From this perspective, one could easily imagine that "within their respective districts" meant "within their separate districts." Given suburbanization and the sheer size of many metropolitan areas, it is difficult to imagine how children from different school districts would be educated together absent busing. Second, as Myron Orfield has helpfully explained, the *Keyes* liability rule led to overwhelming success for plaintiffs.[285] Perhaps Justice Brennan was right to stick to his guns.

Milliken v. Bradley[286] is by far the most problematic of the trilogy of the early 1970s "busing" cases that Driver highlights. In *Milliken*, the Supreme Court overturned a city-suburban desegregation plan.[287] The Court rationalized its rejection of the multidistrict plan by closely linking the constitutional violation to the remedy sought.[288] The constitutional violation was de jure segregation *within* the city of Detroit.[289] The remedy could not exceed the scope of the violation. Consequently, the Court ruled that suburban school districts that had not formally engaged in racial discrimination in Detroit could not be included in a larger integration plan.[290]

Driver opens his discussion of this case by stating that "[t]he litigation decision to target the state was driven by the metropolitan area's racial demographics, which featured a heavily black city (served by the Detroit Public Schools) surrounded by a ring of overwhelmingly white suburbs (each of which operated its own school system)."[291] While that description of the demographic breakdown is true, technically speaking, the reason why the plain-

283. *Id.*

284. *See* Erika K. Wilson, *The New School Segregation*, 102 CORNELL L. REV. 139, 148-50 (2016) (describing how many of the tools used to resist desegregation operated at the school-district level).

285. *See* Myron Orfield, Milliken*,* Meredith*, and Metropolitan Segregation*, 62 UCLA L. REV. 364, 390 (2015).

286. 418 U.S. 717 (1974).

287. *Id.*

288. *Id.* at 744.

289. *Id.* at 745.

290. *Id.*

291. DRIVER, *supra* note 1, at 284.

tiffs sued the State of Michigan was because the state legislature had passed a statute expressly nullifying a high-school integration plan that had been adopted by the liberal-leaning Detroit Board of Education.[292] The State was a defendant because it engaged in classic de jure segregation in the city of Detroit.[293] When the lawsuit was filed, the plaintiffs' attorneys were not certain what kind of relief they wanted.[294] But there was a finding of liability against the State (which was never disturbed on appeal), and under Michigan law, education is very much a state function.[295] It was against this background that federal district court Judge Roth required the suburban school districts to participate in the desegregation remedy.

Milliken is perhaps the most important school-desegregation case after *Brown* for at least three reasons. First, *Milliken* rewrote history. In its opinion, the Supreme Court ruled that Roth's remedy was not supported by the evidence because the suburban school districts did not cause Detroit's schools to be segregated. According to the Court, how Detroit and its suburbs came to look as they did was anyone's guess, as the "predominantly Negro school population in Detroit [was] caused by unknown and perhaps unknowable factors."[296] But the record amply demonstrated the relationship between school and housing segregation and the state's (and the federal government's) culpability in creating the stark racial divisions between city and suburb.

Second, *Milliken* fortified and strengthened school-district lines, the geographical fences that separate our children based on race and class. During the Jim Crow era, black children were confined to all-black schools. *Brown* later held that kind of overt discrimination unconstitutional. The lesson of *Milliken* is that, absent extraordinary circumstances, children should attend school

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292. Michelle Adams, Soul Force: Detroit, the Supreme Court and the Epic Battle for Racial Justice in America 95-105 (Mar. 18, 2019) (unpublished manuscript) (on file with author).

293. *Milliken*, 418 U.S. 717. Ironically, a recent federal district court once again recognized Michigan as a proper defendant in Detroit's ongoing educational inadequacies. *See* Gary B. v. Snyder, 313 F. Supp. 3d 852, 857-62 (E.D. Mich. 2018) (analyzing traceability and the state's role).

294. Adams, *supra* note 292, at 133; *see also* PAUL R. DIMOND, BEYOND BUSING: REFLECTIONS ON URBAN SEGREGATION, THE COURTS, & EQUAL OPPORTUNITY 30 (2005) ("As to appropriate remedies, neither Jones nor the NAACP had a clear idea at the outset. They both hoped that some form of actual desegregation that would break the back of segregated community life in urban areas might finally be ordered, but they were more concerned about finding the ways to prove to the court and to the country that a color line, every bit as wrong as Jim Crow, still divided America on a racial basis.").

295. *See generally* MICH. COMP. LAWS §§ 380.1-.1853 (2005) (providing for Michigan's public primary and secondary schools).

296. *Milliken*, 418 U.S. at 756 n.2 (Stewart, J., concurring).

where they live. But because of residential segregation, black and other minority students are largely concentrated in the urban core or in separate suburban neighborhoods and, within those areas, to separate school districts. These areas are not just racially segregated. Then as now, black children are far more likely than white children to live in high-poverty neighborhoods. So when it comes to neighborhood-level segregation (which, in turn, produces school segregation), black children are segregated by race *and* class. Third, *Milliken* provided whites who wanted to avoid desegregation with a clear-cut exit strategy. The suburbs held out the promise of an exclusive "whites-only" existence. *Milliken* did not create white flight, but it certainly encouraged it.

Consistent with the framework through which Driver analyzes the *Brown* progeny, he writes about *Milliken* as a busing case. He notes that there was a "bitter chasm" within the black community on its views on busing.[297] There were definitely differences of opinion on busing in the black community during that time.[298] But it is helpful to dig deeper on this point.

Driver argues that "traditional civil rights organizations" and "many black citizens" disagreed on the issues of busing, pointing to the NAACP's public positions for support.[299] While the NAACP was the largest black membership organization in the country at the time,[300] its views were not just those of the organization's board of directors. It is also important to note that *Milliken* was the culmination of a larger black-activist-led movement to desegregate the public schools in the North that dated back to the late 1950s.[301] The leaders and participants in that movement were certainly "black citizens."[302] Additionally, as Driver notes, black newspapers "almost without exception also reviled [these cases],"[303] and black newspapers tended to reflect the views of the mass of the black citizenry. Finally, the true goal of integration was not to get white kids into black schools so that blacks could "teach or learn effectively."[304] Rather, in-

297. DRIVER, *supra* note 1, at 287.

298. Adams, *supra* note 292.

299. DRIVER, *supra* note 1, at 287-88.

300. GILBERT JONAS, FREEDOM'S SWORD: THE NAACP AND THE STRUGGLE AGAINST RACISM IN AMERICA, 1909-1969, at 307 (2005) (stating that the NAACP had a membership of 500,000 in 1968).

301. Adams, *supra* note 292.

302. *Id*.

303. DRIVER, *supra* note 1, at 288.

304. *Id.* at 289 (quoting Robert Reinhold, *Impact of the Ruling*, N.Y. TIMES, July 26, 1974, at 16 (quoting Derrick Bell)).

tegration was a "tying strategy."[305] The integration approach was driven by an understanding that

> [a]s long as blacks were in separate schools, many believed, they would always be shortchanged. Separate was never going to be equal, and the equalization suits tended to confirm this impression. The best and perhaps only way for blacks to receive an education equal to whites was to attend the same schools. That way, white dominated legislatures and school officials could not benefit white students without also benefiting black ones, or harm black students without also harming whites. Desegregation, from this perspective, was not so much an end in itself as a means to an end. It was a tying strategy, essentially, where black students would tie their fates to white students because, as the saying went, green follows white.[306]

Recent work by labor economists supports this conclusion, demonstrating the extraordinarily positive impact of court-ordered desegregation on black students across a variety of indicia including higher educational and occupational attainment, improved health, and reduced rates of incarceration.[307] For all these reasons, the "busing cases" were about much more than a means of transportation—they were about achieving the ends of equal access to education.

CONCLUSION

The Schoolhouse Gate demonstrates that education law is among the most significant areas in constitutional law, worthy of its own independent treatment and capable of teaching broader lessons about judicial authority and capacity. More specifically, the book shows just how much the Court can achieve when it chooses to intervene, even in the face of enormous cultural controversy. In this Review, we have attempted to show that the Court's reluctance to recognize the full extent of the Constitution's demands in public education leaves essential obligations unfulfilled, trapping millions of children in conditions that deny them education adequacy and racial equity.

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305. JAMES E. RYAN, FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA 27-29 (2010).

306. *Id.* at 28.

307. Rucker C. Johnson, *Long-Run Impacts of School Desegregation & School Quality on Adult Attainments* (Nat'l Bureau of Econ. Research, Working Paper No. 16664, 2015), https://www.nber.org/papers/w16664 [https://perma.cc/NM5W-5H58].

When the Court validates constitutional rights and norms in schools, it extends the horizon of opportunity for millions of students. Sometimes that means students can learn to engage in political debate without fearing a repressive disciplinary response. Other times that means students will be free from government coercion—explicit or implicit—to participate in religious activities as they strive to define their own spiritual imperatives. The Court's intervention can even result in the transformation of the entire structure of schooling, prompting the transformation of broader society. School systems, for instance, have gone from places designed primarily to serve students of one race, gender, and ethnicity to engines of opportunity for all students. With this change, the operative norms that purported to justify the former regime of repression, exclusion, and discrimination are repudiated.

The work of achieving equal educational opportunity is undoubtedly difficult and likely to be prolonged. Entrenched cultural forces often militate against it, and this enterprise requires examining the nuances of educational policy and practice, a field replete with new and sometimes competing social-science claims, making it uncomfortable terrain for judges. The Court, to its credit, has not run from all of these issues. *The Schoolhouse Gate* cogently identifies the Court's most consequential interventions to enforce constitutional promises of equality and freedom of conscience.

The full measure of the Court's impact, however, requires acknowledging both what the Court has given and what it has taken away. Driver tracks how the Court has vacillated in its enforcement of certain rights but stops short of what could have been a much more critical account.[308] A holistic normative assessment of the Court's interventions, noninterventions, and retractions is not flattering. The Court has said "no" to students on matters of enormous significance quite often. The Court has also said "yes" in important cases only to later retract or nullify the original mandate in later controversies. The net result of the Court's noninterventions and retractions is the perpetuation of a tremendous amount of behavior that either used to be, or should have been, prohibited. That behavior—funding inequality, resource inadequacy, segregation, and zero tolerance—then becomes constitutionally normalized, a result that deforms constitutional expectations far beyond the public schools.

The treatment of the right to education and desegregation provides two of the most troubling illustrations of how the Court's education jurisprudence disappoints. For more than half a century, the Court issued decisions that sug-

308. This is not to suggest, however, that Driver excuses the Court. He clearly writes in the introduction that "[i]n recent decades, the Court has often foundered badly in its commitment to vindicating constitutional rights in schools." DRIVER, *supra* note 1, at 22.

gested that education would receive special protection under the U.S. Constitution and that, in the right case, it would recognize education as a fundamental right. But when the moment of decisive action came, the Court demurred, announcing a doctrine that would have extensive ramifications for students' hopes of enjoying the full measure of political and economic citizenship. Nearly half a century later, the Court's decision in *Rodriguez* continues to shape the structure of educational opportunity and governmental duty in problematic ways.

Although distinct from the campaign to secure a federal right to education, the effort to preserve *Brown v. Board*'s legacy has faced increasing opposition from the Court. Litigants spent decades paving the way for the Court to strike down segregation. When *Brown* finally reached the Court, its basic holding confirmed the value of that struggle. The Court began to build on *Brown*'s foundation, issuing decisions in the late 1960s and early 1970s that vastly expanded the scope of the desegregation imperative. Regrettably, the Court then spent four decades thwarting desegregation at every turn. By some accounts, those decisions erased nearly all of integration's gains, leaving our schools as segregated today as they were in the early 1970s.[309]

Cases like *Rodriguez*, *Brown*, and their progeny represent opportunities for the Court's work to matter tremendously. While the Court has been true to the Constitution's commands and brave enough to follow them on important occasions, it has refused to do so in equally vital moments. Such refusals inflict deep wounds. The Court may be the last resort for many young people seeking to realize their hopes for equal access to what the Court itself describes as a "fundamental obligation of government to its constituency."[310] A Court that turns its back on those claims weakens the Constitution it is charged with enforcing.

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309. Orfield & Lee, *supra* note 84, at 4.

310. Ambach v. Norwick, 441 U.S. 68, 76 (1979) (quoting Foley v. Connelie, 435 U.S. 291, 297 (1978)).