

# Michigan Law Review

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Volume 117 | Issue 6

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2019

## The Supreme Court and Public Schools

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### Recommended Citation

Erwin Chemerinsky, *The Supreme Court and Public Schools*, 117 MICH. L. REV. 1107 (2019).

Available at: <https://repository.law.umich.edu/mlr/vol117/iss6/9>

<https://doi.org/10.36644/mlr.117.6.supreme>

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# THE SUPREME COURT AND PUBLIC SCHOOLS

*Erwin Chemerinsky\**

THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND. By *Justin Driver*. New York: Pantheon Books. 2018. P. 429. \$35.

## INTRODUCTION

Professor Justin Driver<sup>1</sup> has written a brilliant book. *The Schoolhouse Gate: Public Education, the Supreme Court, and the Battle for the American Mind* focuses on the Supreme Court and public elementary and secondary schools. He looks at all the major areas where the Court has considered constitutional issues arising in the public school context: free speech, school discipline, investigations of students, inequalities based on race and sex and income, and religion.

In each area, Professor Driver presents the major Supreme Court decisions and often tells the underlying story of the litigation. He relates the Court's rulings to the social issues of the time, and he describes the public reaction to the major decisions. I found this aspect of the book fascinating and original, as Professor Driver looks to what followed the decisions and describes the reactions in newspapers and by politicians. The book is comprehensive, covering almost all the Supreme Court's decisions concerning public elementary and secondary education, but at the same time it is very accessible to a wide audience. The book is beautifully written. Professor Driver is a great storyteller, and throughout the book he is telling the reader about the people involved in the litigation and what it meant to them.

The book thus will be an invaluable resource for those looking at issues concerning the Constitution in public schools. In teaching Criminal Procedure this semester, I used the material in the book on police searches in schools and found things in the book that I have not seen elsewhere. At the same time, those with no prior knowledge of constitutional law can enjoy and be informed by this magnificent book. Professor Driver has managed to write a book that will be invaluable for scholars and constitutional litigators, while at the same time it is accessible and informative for a general audience.

At the risk of criticizing Professor Driver for the book he didn't write, in reading the book, I kept wondering: why? Why has the Court treated public schools in this way? What, if anything, provides an overall explanation for

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the Court's decisions concerning public schools? What does this tell us for the future?

I wanted a unifying thesis to explain the Court's actions across doctrinal areas. Professor Driver's thesis is a modest one. In both his Introduction and Conclusion, he emphasizes how many constitutional issues have been litigated in the public education context. In the Introduction he writes: "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."<sup>2</sup> In the Conclusion, Professor Driver says: "Surveying the legal landscape of the United States since the late nineteenth century, it is breathtaking to step back and observe how many of the Supreme Court's decisions that meaningfully advance the causes of constitutional liberty and constitutional equality have arisen from clashes in public schools" (p. 423).

I wish, though, that this outstanding book had a more ambitious thesis. The book is far more descriptive than normative, though in the concluding chapter Professor Driver offers a few areas where he would like to see changes: more protection for free speech for students, limits on corporal punishment in schools, and greater application of Fourth Amendment rights in schools (pp. 426–27). Yet he presents these proposals only briefly. Again, it may be unfair, but I wanted to see more about how to solve the problems Professor Driver identifies—such as the failure to desegregate schools or to correct the tremendous wealth inequalities in public education.

In this Review, I want to focus on these two points. First, what explains the Supreme Court's decisions as to public schools? Second, are there solutions and are they likely to occur in the future? My answer to these questions is one of pessimism: the Supreme Court's decisions, as much or more than in any area of constitutional law (and as Professor Driver rightly points out, schools involve almost all areas of constitutional law), are entirely the product of the justices' ideologies. Professor Driver—and I—want to see more protection of free speech, greater safeguards when students are disciplined, stronger protection of Fourth Amendment rights in schools, and far more equality in public education. With a very conservative Court likely for many years to come, the law in these areas is going to become much worse.

## I. WHY?

Across the many areas of constitutional law that Professor Driver considers, there are often two competing visions of the role of the Constitution in public schools. One view stresses the importance of applying the Constitution in elementary and secondary schools. This approach says that if we

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2. P. 9. I am not sure this is true, and Professor Driver provides no support for the conclusion. A case could be made that the Court's federalism decisions through history have been more important as sites for constitutional interpretation. Or perhaps one could argue that the Court's decisions about individual rights have served this function. I don't think it matters what has been "the single most significant site of constitutional interpretation." The key point is that many important constitutional cases have arisen in the context of public education.

want to teach our children that the Constitution matters, they must see it applied in their schools. The other approach sees public schools as authoritarian institutions and emphasizes the need to give deference to school officials; that is, enforcing rights in schools is incompatible with the need to defer to school authorities.

Each vision is expressed in many of the cases and often is central to the differences between the majority and the dissent. For example, in *Tinker v. Des Moines Independent Community School District*, the majority eloquently spoke of the importance of protecting free speech in schools and declared: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>3</sup>

Justice Hugo Black's dissent could not have been more different. He said that "[t]he Court's holding in this case ushers in what I deem to be an entirely new era in which the power to control pupils by the elected 'officials of state supported public schools . . .' in the United States is in ultimate effect transferred to the Supreme Court."<sup>4</sup> He wrote: "I deny, therefore, that it has been the 'unmistakable holding of this Court for almost 50 years' that 'students' and 'teachers' take with them into the 'schoolhouse gate' constitutional rights to 'freedom of speech or expression.'"<sup>5</sup>

Likewise, six years later in *Goss v. Lopez*, the Court held that students must be accorded due process before a suspension.<sup>6</sup> But the dissent sounded remarkably like that in *Tinker*:

The Court holds for the first time that the federal courts, rather than educational officials and state legislatures, have the authority to determine the rules applicable to routine classroom discipline of children and teenagers in the public schools. It justifies this unprecedented intrusion into the process of elementary and secondary education by identifying a new constitutional right: the right of a student not to be suspended for as much as a single day without notice and a due process hearing either before or promptly following the suspension.<sup>7</sup>

This same tension was evident in *New Jersey v. T.L.O.*, where the Court held that students and their possessions may be searched if there is reasonable suspicion.<sup>8</sup> The majority emphasized the need for deference to school officials:

Against the child's interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds. Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly

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3. 393 U.S. 503, 506 (1969).

4. *Tinker*, 393 U.S. at 515 (Black, J., dissenting) (quoting petition for certiorari).

5. *Id.* at 521 (Black, J., dissenting) (quoting *id.* at 506 (majority opinion)).

6. 419 U.S. 565 (1975).

7. *Goss*, 419 U.S. at 585 (Powell, J., dissenting).

8. 469 U.S. 325 (1985).

forms: drug use and violent crime in the schools have become major social problems.<sup>9</sup>

But Justice Brennan, dissenting in part, strongly disagreed:

Teachers, like all other government officials, must conform their conduct to the Fourth Amendment's protections of personal privacy and personal security. . . . [T]his principle is of particular importance when applied to schoolteachers, for children learn as much by example as by exposition. It would be incongruous and futile to charge teachers with the task of embuing their students with an understanding of our system of constitutional democracy, while at the same time immunizing those same teachers from the need to respect constitutional protections.<sup>10</sup>

Across the range of issues discussed in Professor Driver's book, it is striking how much these two views correlate with the ideology of the justices. As much as in any area of law, it is the liberal justices who favor protecting the rights of students, while it is the conservatives who want to defer to the authority of school officials. Consider examples from Professor Driver's chapters concerning the rights of students.

For instance, as to the First Amendment, in *Morse v. Frederick*, it was a 5–4 decision that the principal could confiscate a banner that said, “BONG HiTS 4 JESUS,” and suspend the student who displayed it.<sup>11</sup> Chief Justice Roberts wrote for the majority, joined by the most conservative justices (Scalia, Kennedy, Thomas, and Alito), while Justice Stevens wrote a dissent joined by Justices Souter and Ginsburg.<sup>12</sup> The conservative justices, who are seen as pro-free speech in other contexts—such as in striking down campaign finance laws<sup>13</sup>—were not protective of speech when it involved expression in the context of schools.

In Professor Driver's chapter on school discipline (Chapter Three), he discusses *Ingraham v. Wright*,<sup>14</sup> where the Court held that corporal punishment in schools does not require any due process. In his Conclusion, Professor Driver points to *Ingraham* as one of the cases that most should be overruled (p. 426). It was a 5–4 decision split along ideological lines. Justice Powell wrote the majority opinion, joined by Chief Justice Burger and Justices Stewart, Blackmun, and Rehnquist. Justice White wrote the principal dissent, joined by Justices Brennan, Marshall, and Stevens.

In discussing “policing student investigation” (Chapter Four), again the ideology of the justices very much explains the decisions. *New Jersey v. T.L.O.*, which held that searches in schools require only reasonable suspi-

9. *T.L.O.*, 469 U.S. at 339.

10. *Id.* at 353–54 (Brennan, J., concurring in part and dissenting in part).

11. 551 U.S. 393 (2007).

12. Justice Breyer wrote a separate opinion concurring in part and dissenting in part.

13. See, e.g., *Citizens United v. FEC*, 558 U.S. 310 (2010) (plurality opinion in part) (same five justices in the majority).

14. 430 U.S. 651 (1977).

cion, was 6–3, with the three most liberal justices in dissent.<sup>15</sup> *Board of Education v. Earls*, which upheld random drug testing for students participating in extracurricular activities, was 5–4, albeit with Justice Breyer joining the majority and Justice O’Connor joining the dissenting liberal justices.<sup>16</sup> But this should not be surprising because Justice Breyer often has been with the conservative justices in Fourth Amendment cases.<sup>17</sup>

The ideology of the justices also entirely explains decisions concerning religion in schools. Professor Driver discusses *Zelman v. Simmons-Harris* (pp. 410–20), which rejected a First Amendment challenge to a voucher system for students in the Cleveland area even though 96 percent of the vouchers were used in parochial schools.<sup>18</sup> The Court divided exactly along ideological lines, with the five most conservative justices (Rehnquist, O’Connor, Scalia, Kennedy, and Thomas) voting to uphold the voucher system and the four most liberal justices (Stevens, Souter, Ginsburg, and Breyer) voting to strike it down. In a different context of religion and schools, a decade earlier the Court found prayers at public school graduations to be unconstitutional in *Lee v. Weisman*.<sup>19</sup> The Court was ideologically divided, but Justice Kennedy joined with the liberal justices to create the majority.

Perhaps the most important examples of ideology have been in the area of school finance (Chapter Six) and school desegregation (Chapter Five). In two cases in the early 1970s, *San Antonio Independent School District v. Rodriguez*<sup>20</sup> and *Milliken v. Bradley*,<sup>21</sup> the Court hugely contributed to separate and unequal schools in the United States. *Rodriguez* concerned disparities in school funding.<sup>22</sup> In 1972, education expert Christopher Jencks estimated that, on average, 15 percent to 20 percent more was being spent on each white student’s education than on each black child’s schooling.<sup>23</sup> This was true throughout the country.<sup>24</sup> For example, in the late 1980s, the Chicago public schools spent \$5,265 for each student’s education, but in the Niles school system, just north of the city, \$9,371 was spent on each student’s

15. 469 U.S. 325.

16. 536 U.S. 822 (2002).

17. See, e.g., *Utah v. Strieff*, 136 S. Ct. 2056 (2016) (holding that evidence gained from an illegal stop does not need to be excluded if police discover an outstanding arrest warrant); *Navarette v. California*, 572 U.S. 393 (2014) (holding that police can stop a car based on an anonymous tip); *Maryland v. King*, 569 U.S. 435 (2013) (holding that police may take DNA from a person arrested for a serious crime to see if it matches an unsolved crime in the police database).

18. 536 U.S. 639 (2002).

19. 505 U.S. 577 (1992).

20. 411 U.S. 1 (1973).

21. 418 U.S. 717 (1974).

22. Professor Driver discusses *Rodriguez* at pages 315–30.

23. CHRISTOPHER JENCKS ET AL., *INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA* 28 (1972).

24. See JONATHAN KOZOL, *THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA* 321–24 (2005).

schooling.<sup>25</sup> In Camden, New Jersey, \$3,538 was spent on each pupil, but in Princeton, New Jersey, \$7,725 was spent.<sup>26</sup> These disparities also corresponded to race: in Chicago, the majority of the students were African American; in Niles Township, the schools were 91.6 percent white and 0.4 percent black.<sup>27</sup>

There is an easy explanation for the disparities in school funding. In most states, education is substantially funded by local property taxes. Wealthier suburbs have significantly larger tax bases than poor inner cities. The result is that suburbs can tax at low rates and still have a great deal to spend on education. Cities must tax at higher rates and, nonetheless, often have much less to spend.

The Court had the opportunity to remedy this inequality in *Rodriguez*. But the Court profoundly failed and expressly concluded that inequalities in funding did not deny equal protection.<sup>28</sup>

The plaintiffs challenged this system on two grounds: it violated equal protection as impermissible wealth discrimination, and it denied the fundamental right to education.<sup>29</sup> The Court rejected the former argument by holding that discrimination based on wealth does not violate the Constitution. Unlike discrimination based on race or gender, which are subjected to careful judicial scrutiny, the Court said that courts should defer to legislative judgments when it comes to matters of wealth discrimination.<sup>30</sup> In fact, there is no Supreme Court decision since *Rodriguez* that has found any discrimination based on wealth to be unconstitutional.

Moreover, the Court rejected the claim that education is a fundamental right. The Court said: "It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws."<sup>31</sup> Nixon appointee Justice Lewis Powell, writing for the majority, then concluded: "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."<sup>32</sup> Although education obviously is inextricably linked to the exercise of constitutional rights such as freedom of speech and voting, the Court nonetheless decided that education, itself, is not a fundamental right. Thus, the Court concluded that significant disparities in school funding did not offend the United States Constitution.

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25. JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS* 285 (Broadway Books 2012) (1991).

26. *Id.* at 286.

27. Roberta L. Steele, Note, *All Things Not Being Equal: The Case for Race Separate Schools*, 43 CASE W. RES. L. REV. 591, 620 n.173 (1993).

28. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 23–24 (1973).

29. *See id.* at 17–18.

30. *Id.* at 40–41.

31. *Id.* at 33.

32. *Id.* at 35.

*Rodriguez* was a 5–4 decision split along ideological lines. The four Nixon appointees—Burger, Blackmun, Powell, and Rehnquist—joined with Justice Potter Stewart to create the majority (p. 320 & n.\*). It is easy to imagine that this case would have been decided differently if it had come to the Supreme Court a few years earlier during the Warren era or if Hubert Humphrey had defeated Richard Nixon and had made those four appointments to the high court.

A year later, in *Milliken v. Bradley*, the Court made desegregating schools far more difficult.<sup>33</sup> By the 1970s it was clear that effective school desegregation required interdistrict remedies. There were simply not enough white students in many major cities to achieve desegregation. Likewise, suburban school districts could not be desegregated without interdistrict remedies because of the scarcity of minority students in the suburbs.

In *Milliken*, the Court imposed a substantial limit on the judiciary's remedial powers in desegregation cases. The case involved the segregation of the Detroit public schools. Following the pattern that is common throughout the United States, Detroit had a student population that was almost entirely minority but that was surrounded by suburbs that were almost entirely white. For example, of the fourteen schools that opened in Detroit in 1970–1971, eleven opened with over 90 percent of their students being African American and one opened with less than 10 percent African American students.<sup>34</sup> Many of the surrounding suburbs had school systems that were comprised almost entirely of white students.<sup>35</sup> The federal district court found that without including the suburbs in the desegregation plan, many schools in Detroit would inevitably remain between 75 percent and 100 percent black.<sup>36</sup>

A federal district court devised a remedy for the racial separation in the city and suburban schools.<sup>37</sup> The plan included Detroit and fifty-three of eighty-five suburbs in that metropolitan area.<sup>38</sup> No one in the litigation disputed that the area-wide remedy would have been very successful in achieving desegregation.

Nonetheless, the Supreme Court ruled this impermissible and held that:

Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been

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33. 418 U.S. 717 (1974). Professor Driver devotes little attention to this case, mentioning it in a few endnotes. See pp. 438 n.31, 503 n.122, 504 nn.123–26. This is one of the few instances in which I would disagree with his choices in terms of coverage of the Supreme Court's decisions.

34. *Milliken*, 418 U.S. at 726.

35. *Id.* at 727.

36. *Id.* at 738–39 (presenting these statistics).

37. See *id.* at 739.

38. *Id.* at 733.



a constitutional violation within one district that produces a significant segregative effect in another district.<sup>39</sup>

In other words, courts can include suburbs in desegregation efforts only if it can be shown that they had violated the United States Constitution. This is usually an insurmountable burden. So many factors contribute to the pattern of predominately minority city schools surrounded by a ring of white suburban schools that it is difficult to prove that this resulted from identifiable constitutional violations. Since *Milliken*, there have been only a few successful efforts at having courts impose interdistrict remedies for school segregation.

*Milliken* has had a devastating effect on the ability to achieve desegregation in many areas. Duke Professor Charles Clotfelter, in a careful study of American schools, concluded that “the bulk of segregation in” the nation’s most segregated metropolitan areas “could be attributed to racial disparities between school districts,” ranging from 33 percent in Charlotte, North Carolina, to 88 percent in Detroit.<sup>40</sup> But after *Milliken*, this component of segregation cannot be reduced by judicial interdistrict remedies.<sup>41</sup>

Common sense and experience explain why this is so. Cities comprised almost entirely of minority students are surrounded by predominantly white suburbs. The segregated pattern in major metropolitan areas—blacks in the city and whites in the suburbs—did not occur by accident but rather was the product of myriad government policies. Moreover, *Milliken* has the effect of encouraging white flight. Whites who wish to avoid desegregation can do so by moving to the suburbs. If *Milliken* had been decided differently, one of the incentives for such moves would be eliminated.

Like *Rodriguez*, *Milliken* was a 5–4 decision, with the four recent Nixon appointees—Warren Burger, Harry Blackmun, Lewis Powell, and William Rehnquist—joining with Potter Stewart, an Eisenhower appointee, to create the majority.<sup>42</sup> Nixon’s pick for chief justice, Warren Burger, wrote the opinion for the Court. *Milliken* remains the law to this day and continues to prevent courts from devising desegregation remedies that include both cities and suburbs.

Maybe all of this can be explained by conservative justices wanting to defer to the government in these areas of education, while liberal justices reject such deference. This certainly explains the many examples described above. But *Parents Involved in Community Schools v. Seattle School District No. 1*, discussed in detail by Professor Driver (pp. 293–308), belies this ex-

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39. *Id.* at 744–45.

40. CHARLES T. CLOTFELTER, AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION 118, 119 tbl.4.3 (2004).

41. *Id.*

42. 418 U.S. 717; *Supreme Court Nominations: Present-1789*, U.S. SENATE, <https://www.senate.gov/pagelayout/reference/nominations/Nominations.htm> [https://perma.cc/6G7U-SHK4].

planation.<sup>43</sup> The case involved public school systems in Louisville, Kentucky and Seattle, Washington that had adopted plans to achieve greater racial diversity that used race as one factor in assigning students to schools.<sup>44</sup> Louisville, which had a program that included all students from kindergarten through twelfth grade, had previously been a system segregated by law and had been subject to a judicial desegregation order, which had been lifted not long before the school system adopted its own desegregation plan.<sup>45</sup> Seattle never had been segregated by law and had a plan to achieve greater racial diversity that used race as a factor in assigning students to high schools.<sup>46</sup>

The Court, in a 5–4 decision, found both plans to be unconstitutional. Chief Justice Roberts’s opinion was joined in its entirety only by Justices Scalia, Thomas, and Alito. Justice Kennedy concurred in part but also concurred only in the judgment in part. All five justices in the majority agreed that the government must meet strict scrutiny—its actions must be necessary to achieve a compelling purpose—even if it is using race to achieve school desegregation. Chief Justice Roberts, writing for the majority, declared: “It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny.”<sup>47</sup>

The Chief Justice, writing for a plurality of four, found that Seattle and Louisville lacked a compelling interest for their desegregation efforts.<sup>48</sup> But all five justices in the majority agreed that the school districts failed to show that race-neutral means could not achieve desegregation.<sup>49</sup> Justice Kennedy, like the four justices in the plurality, said that race could be used in assigning students only if there was no other way of achieving desegregation.<sup>50</sup>

Justice Breyer wrote a lengthy dissent, joined by Justices Stevens, Souter, and Ginsburg.<sup>51</sup> He described how American public schools are increasingly racially segregated and lamented that the Court’s decision will have the effect of placing many effective desegregation plans in jeopardy.<sup>52</sup> Justice Breyer attached an appendix to his dissent that listed the many voluntary desegregation plans that would be in jeopardy in light of the invalidation of the Louis-

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43. 551 U.S. 701 (2007) (plurality opinion in part). For an excellent analysis of this issue, see Neil S. Siegel, *Race-Conscious Student Assignment Plans: Balkanization, Integration, and Individualized Consideration*, 56 DUKE L.J. 781, 835–38 (2006).

44. *Parents Involved in Cmty. Sch.*, 551 U.S. at 709–10 (plurality opinion).

45. *Id.* at 715–16 (majority opinion).

46. *Id.* at 711–12.

47. *Id.* at 720.

48. *Id.* at 725–26 (plurality opinion).

49. *Id.* at 735 (majority opinion).

50. *Id.* at 790 (Kennedy, J., concurring in part and concurring in the judgment).

51. *Id.* at 803 (Breyer, J., dissenting).

52. *Id.* at 858–63.

ville and Seattle programs.<sup>53</sup> The dissent questioned whether meaningful desegregation could be achieved without such efforts.<sup>54</sup>

This case is important because here the conservative justices did not defer to the choices of the government and popularly elected officials. It powerfully illustrates that what explains the Court's decisions is the ideology of the justices, pure and simple.

## II. THE FUTURE

Professor Driver does not expressly put the cases in this ideological framework, as I have done. Perhaps it seemed too obvious to warrant doing this. Maybe it seems too reductionist and simplistic. Perhaps it reflects the facts that his book is structured around the particular areas of constitutional law involving the schools and there is relatively little—apart from some discussion in the Introduction and Conclusion—about common themes connecting the decisions concerning these different constitutional doctrines.

Yet, as I look across the areas the book surveys, as I did in the prior Part, ideology powerfully explains the cases. I cannot think of closely divided cases discussed in Professor Driver's book that were not split along ideological lines.

This raises the interesting question of why ideology so correlates to voting in the area of the Constitution and public education. But even more important, it raises the question of what is likely in the future. Professor Driver's book is descriptive of what the Court has done. It is not prescriptive except for a short discussion in the Conclusion.<sup>55</sup> As a reader, I would have liked to see him address the future, what should be done, and what can be done. In fairness, though, that would have been a somewhat different book than the one Professor Driver set out to write.

But anyone who reads the book must face that question. What will it mean that there will be five very conservative justices likely for many years to come? As of this writing in late 2018, Clarence Thomas is 70 years old, Samuel Alito is 68, John Roberts is 63, Brett Kavanaugh is 53, and Neil Gorsuch is 51.

Based on the discussion in Professor Driver's book and the cases discussed above, it is easy to forecast what we will see in the years ahead. Although it is a Court that is often protective of free speech,<sup>56</sup> there is no reason

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53. *Id.* at 873–76.

54. *Id.* at 861–62.

55. *See* pp. 426–27.

56. *See, e.g.*, *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018) (holding that nonunion members cannot be forced to pay the share of the union dues that support the collective bargaining activities of the union); *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (holding that the disclosures required by the California Reproductive FACT Act violate the protections set forth in the Free Speech Clause of the First Amendment); *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876 (2018) (holding that a

to believe that this will cause the justices to side with students and rule against schools in First Amendment cases. No student has won a free speech case in the Supreme Court since *Tinker* in 1969. Nor is there any reason to imagine the conservative justices on the Court will be more willing to protect students' Fourth and Fifth Amendment rights in schools. The last Supreme Court decision concerning criminal procedure rights in schools—*J.D.B. v. North Carolina*—held that the determination of whether a child is in custody needs to account for the age of the child.<sup>57</sup> The Court was ideologically divided, but with Justice Kennedy joining the liberal justices to create the majority. Without Justice Kennedy's presence, it is hard to see who would be the fifth vote for protecting students' rights in this context.

The two areas where I foresee the greatest changes are religion and affirmative action. As to the former, I believe that there are now five justices on the Court who will allow much more of a religious presence in public schools and more government support for religion. In fact, the Supreme Court's last decision about religion in education, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, held that the government was constitutionally required to give parochial schools the same aid—in this case, grants to help in the purchase of rubber playground surfaces made from recycled tires—that it provided secular private schools.<sup>58</sup> Although the Court dealt only with aid for playground surfaces, it is hard to see how the case can or will be so limited. I expect that this will lead to decisions holding that the government generally must provide parochial schools with the same aid it provides secular private schools.

As for affirmative action, I think that there are now five votes to hold that the government cannot use race as a factor in admissions decisions to achieve diversity. In 2016, in *Fisher v. University of Texas at Austin*, Justice Kennedy wrote for the Court in a 4–3 decision upholding the University of Texas affirmative action program.<sup>59</sup> But with Justice Kennedy replaced by Justice Kavanaugh, I expect that there are now five justices to strike down all affirmative action programs. This will have less effect for public elementary and secondary schools because *Parents Involved in Community Schools* already has greatly limited race-conscious programs to achieve desegregation. Eliminating affirmative action will have an enormous effect at the college and university level, though.

I see no indication that there is a majority on the Court that is troubled by public schools that are separate and unequal. It certainly is not a Court that will be using the Constitution to solve inequities in school funding or to remedy the ever-increasing racial separation in American public education.

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Minnesota law that broadly bans all political apparel at the polling place is facially overbroad under the First Amendment).

57. 564 U.S. 261 (2011). Professor Driver discusses *J.D.B.* at pages 230–39.

58. 137 S. Ct. 2012 (2017) (plurality opinion in part).

59. 136 S. Ct. 2198 (2016).

I thus see little likelihood that the recommendations in Professor Driver's Conclusion—more protection of student speech, greater limits on school discipline, and the Court "revisit[ing] its severely deformed public school jurisprudence involving the Fourth Amendment's prohibition on unreasonable searches"—will occur (p. 426). But then what? Professor Driver raises the possibility of the use of state law, including state constitutions and state statutes, to provide more protection of these rights (p. 427). I wish he would have done more to analyze whether and when this is a realistic alternative to federal constitutional decisions. Is it realistic to expect popularly elected school boards to do better in these areas? Is it realistic to expect legislatures to adopt laws to solve these problems? After all, when was the last time that a legislature acted to deal with the problem of segregation in schools or to equalize funding in education when it was not required to do so by a court?

Professor Driver considers the areas where the Supreme Court has looked at constitutional issues in public schools. But left unexamined is the question of why it is so important that the Court do so. I think it is because the elected branches of government—whether school boards or city councils or state legislatures or Congress—are unlikely to see political gain in providing more free speech rights to students or limiting punishments in schools or expanding the rights against searches or lessening the presence of religion in schools or taking action to equalize funding or decreasing racial separation. Professor Driver is right that so many constitutional issues have come to the Supreme Court involving schools. This is because these are areas where the political process won't succeed. It is therefore the courts or nothing to enforce the Constitution.

This, then, leaves the reader of Professor Driver's book worrying: If the Supreme Court isn't there to do these things, is there any hope? If, as I suggested, it all comes down to the ideology of the justices, what will it mean to have the most conservative Supreme Court since the mid-1930s? That, of course, is now the central question in all areas of constitutional law.

If Professor Driver writes a second edition of this book in ten years, will there be progress in any of the areas he discusses? At this moment, I am pessimistic, but I so hope that I am wrong.