

BOOK REVIEW

The New Legal Liberalism

Emma Kaufman[†]

*The Schoolhouse Gate: Public Education, the Supreme Court,
and the Battle for the American Mind*
Justin Driver. Pantheon, 2018. 576 pages.

INTRODUCTION

Over the past three decades, legal academics have mounted a sustained attack on the traditional liberal idea that judges protect minority rights against majority will. Historians have challenged the notion that courts are countermajoritarian heroes.¹ Political scientists have argued that court rulings reflect popular sentiment, following rather than leading social change.² Constitutional theorists have criticized judicial supremacy³ and fretted about backlash against unpopular decisions.⁴ Philosophers have

[†] Bigelow Fellow and Lecturer in Law, The University of Chicago Law School. For helpful conversations and feedback, I am grateful to Will Baude, Emily Buss, Travis Crum, Justin Driver, William Hubbard, Lucy Kaufman, Brian Leiter, Jonathan Masur, Wendy Moffat, John Rappaport, David Strauss, Laura Weinrib, and the editors of *The University of Chicago Law Review*.

¹ Michael J. Klarman, *What's So Great about Constitutionalism?*, 93 Nw U L Rev 145, 192 (1998). See also Risa Goluboff, *Lawyers, Law, and the New Civil Rights History*, 126 Harv L Rev 2312, 2320 (2013) (describing a “new civil rights history” that deemphasizes courts); Lucas A. Powe Jr., *The Warren Court and American Politics* 490 (Belknap 2000) (challenging the countermajoritarian account of the Warren Court). See also generally Corinna B. Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U Pa L Rev 1361 (2004).

² See, for example, Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 40 (Chicago 2d ed 2008). Constitutional theorists have made similar arguments. See, for example, Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* 303 (Farrar, Straus, and Giroux 2009).

³ See generally, for example, Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford 2004).

⁴ For a summary of backlash scholarship, see generally Robert C. Post and Reva B. Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 Harv CR–CL L Rev 373 (2007). See also note 80.

advanced a strong case against judicial review.⁵ Feminists and critical race theorists have exposed courts' role in reproducing inequality.⁶ The cumulative result of this scholarship is a legal academy that is deeply skeptical about the judiciary's capacity and willingness to protect disfavored groups.⁷

Against this backdrop, Professor Justin Driver has written a book to give us hope. Technically, *The Schoolhouse Gate* is an account of constitutional rights in American public schools. But this Review argues that the book has a bigger ambition: to restore faith in federal courts. Every generation of legal scholars writes in response to its forebears. Critics of the judiciary reacted to a mode of scholarship they found too court-focused, too doctrinal, and insufficiently attuned to social movements.⁸ Driver, in turn, challenges the turn away from courts, arguing that scholars have dramatically underestimated the judiciary's countermajoritarian capacities. This is a refreshing, inspiring, and—given the state of the legal academy—downright audacious idea.

This Review examines the significance of Driver's argument and urges constitutional scholars to grapple with its implications. Part I recounts the book's central claims and seeks to reconcile *The Schoolhouse Gate* with Driver's earlier work critiquing the Warren Court.

Part II argues that the book represents the resurgence of legal liberalism, a form of scholarship that has gone missing from the legal academy. This Part takes on the task of defining liberalism, a notoriously fluid concept, and explores why liberal theories of the judiciary went out of fashion in the late 1980s. In reconstructing this history, Part II aims to contribute to the small but essential body of writing on movements in legal thought.⁹ In 1981, Professor

⁵ See Jeremy Waldron, *The Core of the Case against Judicial Review*, 115 Yale L J 1346, 1369–76 (2006). But see Richard H. Fallon Jr., *The Core of an Uneasy Case for Judicial Review*, 121 Harv L Rev 1693, 1694–1701 (2008).

⁶ See, for example, Derrick Bell, *Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform* 130 (Oxford 2004); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv CR–CL L Rev 323, 341 (1987). Part II provides a fuller account of each of these movements.

⁷ Professor Justin Driver calls this “the Age of Judicial Skepticism,” while Professor Frank Michelman refers to it as the emergence of a “counterconstitutional mainstream.” Justin Driver, *Reactionary Rhetoric and Liberal Legal Academia*, 123 Yale L J 2616, 2621 (2014); Frank I. Michelman, *Why Not Just Say No? An Essay on the Obduracy of Constitution Fixation*, 94 BU L Rev 1141, 1148 (2014).

⁸ See Part II.

⁹ For a few examples, see Goluboff, 126 Harv L Rev at 2318–27 (cited in note 1) (discussing “the new civil rights history”); Lani Guinier and Gerald Torres, *Changing the Wind: Notes toward a Demosprudence of Law and Social Movements*, 123 Yale L J 2740,

Owen Fiss observed that “law, as opposed to history, is lacking a literature on its scholarship.”¹⁰ Although this is less true today, writing and thinking about how we write—a practice one might call “lexiography”—remains less common in law than in other academic fields. Part II examines why legal scholars lost confidence in federal courts and how their scholarship changed as a result.

Part III considers whether Driver’s theory of the judiciary, which I describe as the *new legal liberalism*,¹¹ would be possible in a book about a different domain of constitutional law. Drawing on examples from prison and immigration law, this Part argues that the schoolhouse is an unusually hopeful—and in that sense exceptional—venue for a study of federal courts. This does not mean that Driver’s optimism is misplaced. But it does mean that, to fully realize his vision, courts will have to make less hospitable corners of constitutional doctrine look more like the law that emerges when “the Constitution goes to school.”¹²

I. FAITH IN FEDERAL COURTS

The Schoolhouse Gate is a sweeping examination of schoolchildren’s constitutional rights. Professor Driver begins his story at the turn of the twentieth century, when a unanimous Supreme Court upheld a southern school board’s decision to eliminate the only public high school for black students.¹³ That decision left black children in Augusta, Georgia without a four-year public high school for another half century and inaugurated an era in which courts declined to regulate even “blatant racial inequality” in public schools (p 33).

Driver takes his readers from that era, through the Warren Court, to the present. This quick summary does injustice to the care and breadth of his account, which covers everything from

2746–49 (2014) (describing trends in legal scholarship in the second half of the twentieth century). See also generally David Kennedy and William W. Fisher III, eds, *The Canon of American Legal Thought* (Princeton 2006); Robin West, *Normative Jurisprudence: An Introduction* (Cambridge 2011). Historians including Professor Laura Kalman have also contributed to the construction of a legal historiography. See generally Laura Kalman, *The Strange Career of Legal Liberalism* (Yale 1996); Laura Kalman, *Legal Realism at Yale 1927–1960* (North Carolina 1986).

¹⁰ Owen M. Fiss, *The Varieties of Positivism*, 90 Yale L J 1007, 1016 (1981).

¹¹ See generally Kalman, *Legal Realism at Yale* (cited in note 9). Thanks to Driver for suggesting Kalman’s work and, by extension, the title of this piece.

¹² Driver teaches a course with this title at the University of Chicago (p 432).

¹³ See *Cumming v County Board of Education of Richmond County*, 175 US 528, 545 (1899).

early efforts to restrict private education¹⁴ to midcentury debates about the pledge of allegiance¹⁵ and current controversies over cyberbullying,¹⁶ school prayer,¹⁷ and transgender students' access to bathrooms.¹⁸ But this sketch of *The Schoolhouse Gate* does capture the book's arc, which will be familiar to civil rights scholars: a long period of hands-off jurisprudence, followed by the halcyon days of the 1960s, and then the slow ebb of civil rights as courts cabined the major achievements of the Warren Court.

Driver's book is not, however, a chronology, nor is it the traditional story of civil rights in retreat.¹⁹ *The Schoolhouse Gate* is organized thematically around speech, religion, discipline, policing, racial segregation, and inequality "beyond the racial context"—a category that includes cases on funding disparities, sex segregation, and unauthorized immigrants' access to schools (p 315). In each chapter, Driver recounts the Supreme Court cases that shaped the meaning of students' constitutional rights.

Sometimes this means revisiting landmark precedents like *Pierce v Society of Sisters*²⁰ and *Tinker v Des Moines Independent Community School District*.²¹ Other times, it means introducing readers to cases that are less famous, at least to those outside education law. *Lum v Rice*,²² which upheld a Mississippi school board's decision to assign Chinese-American students to black rather than white segregated schools,²³ and *Ingraham v Wright*,²⁴ which rejected a due process challenge to corporal punishment,²⁵

¹⁴ See *Pierce v Society of Sisters*, 268 US 510, 534–35 (1925) (invalidating an Oregon statute that prohibited private and home schooling).

¹⁵ See *West Virginia State Board of Education v Barnette*, 319 US 624, 642 (1943) (holding that compelling public schoolchildren to salute the flag violated the First Amendment).

¹⁶ See p 138 (discussing whether students' online activity, including cyberbullying, falls "within the purview of school disciplinarians").

¹⁷ See p 393 (exploring the persistence of school prayer).

¹⁸ For one prominent example in this ongoing debate, see *G.G. v Gloucester County School Board*, 822 F3d 709, 715 (4th Cir 2016), vacd and remd, *Gloucester County School Board v G.G.*, 137 S Ct 1239 (2017) (reversing the dismissal of a Title IX challenge to a local school board policy that prevented transgender students from using "restrooms congruent with their gender identity").

¹⁹ See, for example, Malcolm M. Feeley and Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* 46 (Cambridge 1998) (describing the period since 1986 as "the reform movement in retreat").

²⁰ 268 US 510 (1925).

²¹ 393 US 503 (1969) (articulating the governing standard for students' free speech claims).

²² 275 US 78 (1927).

²³ *Id.* at 87.

²⁴ 430 US 651 (1977).

²⁵ *Id.* at 683.

fall into the latter category. *The Schoolhouse Gate* is at its best when analyzing these unfamiliar cases, for they reveal Driver's true aim. This book is an act of canon creation—less a comprehensive history than a concerted effort to define and valorize the field of constitutional education law. Driver is not shy about this goal: he calls the public school “the single most significant site of constitutional interpretation within the nation's history” and makes a powerful case for that claim (p 9).

Nor is Driver timid about race, a topic that gets airtime in every chapter. As it must, *The Schoolhouse Gate* includes an extended discussion of *Brown v Board of Education of Topeka*,²⁶ a case whose “mythic status” is at once deserved and lamented by scholars who seek a more nuanced history of civil rights²⁷ (p 251). But *Brown* is not the only race case in this canon. For Driver, *Goss v Lopez*,²⁸ which afforded students limited procedural protections before a suspension,²⁹ is a case about race notwithstanding the dissenters' efforts to “sanitize [it] of its racial dimensions” (p 157). So too are cases on school searches,³⁰ vouchers,³¹ single-sex schools,³² uniforms,³³ and dress codes.³⁴ This book's subtle but significant achievement is to foreground the role that race plays in nearly every decision about how to constitute and regulate American public schools.

²⁶ 347 US 483 (1954).

²⁷ See, for example, Goluboff, 126 Harv L Rev at 2320 (cited in note 1) (describing historians' efforts to decenter *Brown*); Randall L. Kennedy, *Ackerman's Brown*, 123 Yale L J 3064, 3069–71 (2014) (critiquing the lionization of *Brown*).

²⁸ 419 US 565 (1975).

²⁹ *Id.* at 579.

³⁰ See, for example, *New Jersey v T.L.O.*, 469 US 325, 341–42 (1985) (adopting a reasonable suspicion standard for school searches).

³¹ See, for example, *Zelman v Simmons-Harris*, 536 US 639, 662–63 (2002) (rejecting an Establishment Clause challenge to Cleveland, Ohio's school voucher program).

³² See, for example, *A.N.A. v Breckinridge County Board of Education*, 833 F Supp 2d 673, 678 (WD Ky 2011) (“The Supreme Court has never held that separating students by sex in a public school—unlike separating students by race . . . is *per se* unconstitutional.”). See also *Vorchheimer v School District of Philadelphia*, 532 F2d 880, 888 (3d Cir 1976), *aff'd* by an equally divided Court, 430 US 703 (1977) (rejecting an Equal Protection challenge to Philadelphia's system of optional, sex-segregated public high schools).

³³ See, for example, *Littlefield v Forney Independent School District*, 268 F3d 275, 291 (5th Cir 2001) (rejecting First and Fourteenth Amendment challenges to a Texas school district's mandatory uniform policy).

³⁴ See, for example, *Defoe v Spiva*, 625 F3d 324, 329, 338 (6th Cir 2010) (upholding a dress code in Anderson County, Tennessee that prohibited a student from wearing a t-shirt “bearing an image of the Confederate flag”).

In this respect, although it contains a full chapter on racial segregation, *The Schoolhouse Gate* dislodges *Brown* from the center of debates over race and education. Those debates tend to start with segregation and end with affirmative action—that is, to focus on who goes to which school. *The Schoolhouse Gate* examines the contested politics of school assignment but suggests that achieving racial equality will mean something more than getting the numbers right. As Driver sees it, the “march toward racial equality” (p 157) also requires conversations about drug testing, strip searching, vouchers, paddling, and prayer, to name just a few of the charged issues that surface in classrooms across the country. Driver’s views on these topics are diverse and sometimes unexpected; one never gets the sense that he hews to the party line. Driver does not, for instance, endorse Establishment Clause challenges to voucher programs,³⁵ and he believes that in some cases the First Amendment protects students’ choice to wear Confederate flags.³⁶ This variation is precisely his point: if we paid more attention to race in education cases, and thereby expanded the canon of “race cases” beyond *Brown* and its progeny, we would have richer debates about both race and education.

This claim will not surprise anyone who has read Driver’s previous writing on race. *The Schoolhouse Gate* continues the line of work Driver began in *Recognizing Race*,³⁷ in which he argued that courts engage in “asymmetrical racial recognition,” overemphasizing racial stereotypes in some cases and ignoring racial realities in others.³⁸ What may surprise readers, though, is Driver’s optimism about federal courts. In his other writing, Driver has been a trenchant critic of the Warren Court, an institution he believes was more conservative than scholars typically realize.³⁹ “Far from storming the barricades,” Driver has argued, the Warren Court was often a “defender of the status quo”⁴⁰ and an exemplar

³⁵ See p 413 (expressing skepticism about the Establishment Clause arguments mobilized against Cleveland, Ohio’s voucher program in *Zelman*).

³⁶ Driver notes that Confederate flag bans present “the most vexing case of all” but ultimately concludes that in certain circumstances such bans violate the First Amendment (p 129).

³⁷ 112 Colum L Rev 404 (2012).

³⁸ Id at 426–32.

³⁹ Justin Driver, *The Constitutional Conservatism of the Warren Court*, 100 Cal L Rev 1101, 1106 (2012) (“[T]he Warren Court frequently issued decisions that collided not just with today’s liberal sensibilities, but also with the liberal sensibilities of that time.”).

⁴⁰ Id at 1162.

of “constitutional conservatism.”⁴¹ This is not a tale of the judiciary as a site of progressive reform.

And yet, federal courts are not just the protagonists but the heroes of *The Schoolhouse Gate*. Chapter after chapter, Driver insists that the Supreme Court has led the way in recognizing students’ constitutional rights, often in the face of fierce popular resistance. Thus Driver presents *Tinker*, which upheld students’ First Amendment right to wear armbands protesting the Vietnam War, as a “momentous innovation” in constitutional law at a time when most Americans opposed rights for student protestors (p 84). He argues that *Plyler v Doe*,⁴² which rejected Texas’ effort to exclude undocumented immigrants from public schools,⁴³ provided access to education for “one of modern society’s most marginalized, most vilified groups” (p 354). And he describes *Engel v Vitale*,⁴⁴ which invalidated teacher-led prayer,⁴⁵ as a “quintessential example of the Supreme Court’s penchant for protecting constitutional rights even when doing so requires it to swim against the tide of popular opinion” (p 374).

Even *Brown* becomes a story of court-led reform. No case has inspired more pessimism about federal courts’ capacity to redress racial inequality.⁴⁶ Driver acknowledges *Brown*’s failings but urges “a sober evaluation of what the opinion actually achieved,” including “surprisingly brisk” school integration in the border states, lower levels of racial isolation in southern schools than in other parts of the country, and a powerful rhetorical shift in the moral tone of segregation debates (pp 309–10). This is a measured but sanguine approach to *Brown*’s legacy, and it exemplifies the chord of optimism that runs throughout this book.

Driver’s hopefulness arises from two distinct but related claims about federal courts. First, Driver believes that courts are significantly less constrained by public opinion than many legal scholars think. Over the last twenty years, a number of constitutional scholars have argued that court rulings tend to mirror majority sentiment, invalidating outliers but never getting too far

⁴¹ Id at 1105.

⁴² 457 US 202 (1982).

⁴³ Id at 230.

⁴⁴ 370 US 421 (1962).

⁴⁵ Id at 424.

⁴⁶ See, for example, Bell, *Silent Covenants* at 130 (cited in note 6); Rosenberg, *The Hollow Hope* at 52 (cited in note 2) (arguing that *Brown* had little effect on desegregation). Part II considers these and other critiques of *Brown*.

ahead of the American public.⁴⁷ Driver rebuts this theory, drawing on polling data to emphasize how out of step with national norms the Supreme Court's most important education cases have been. This is not just an argument about judicial activism in the 1960s: Driver sees both *Tinker*, in which the Warren Court vindicated students' free speech rights, and *Morse v Frederick*,⁴⁸ in which the Roberts Court upheld school administrators' power to suppress student speech,⁴⁹ as evidence of the courts' countermajoritarian capacities. Instead, his point is that federal courts do more than ratify social movements that are already underway.⁵⁰

Driver's second claim is that federal courts properly exercise their countermajoritarian power to protect minorities—and here he means not just black children⁵¹ but also non-Christians,⁵² noncitizens,⁵³ war protesters,⁵⁴ and gender nonconforming students.⁵⁵ *The Schoolhouse Gate* does not flinch when criticizing the Supreme Court, and the chapters on school searches, suspensions, and corporal punishment contain stinging indictments of governing law. But the clear message of this monograph is that, more often than we give them credit for, federal courts advance equality by protecting minority rights.

Distilling these two claims helps to square *The Schoolhouse Gate* with Driver's earlier work and to distinguish him from those who see the last thirty years as a period of civil rights retrenchment. Driver's critique of the Warren Court was that it forwent "liberal victories [that] were attainable."⁵⁶ In his view, venerating

⁴⁷ Driver describes this view as "consensus constitutionalism." See Justin Driver, *The Consensus Constitution*, 89 *Tex L Rev* 755, 756–57 (2011). See also Justin Driver, *Constitutional Outliers*, 81 *U Chi L Rev* 929, 934–35 (2014) (rejecting the claim that the Court invalidates laws only after popular consensus against them has developed). Part II explores the origins and core claims of such "consensus" scholarship in more detail.

⁴⁸ 551 US 393 (2007) (rejecting a First Amendment challenge to an Alaska principal's decision to suspend a student who displayed a banner reading "BONG HiTS 4 JESUS" at a parade across from his school).

⁴⁹ *Id.* at 397.

⁵⁰ See Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* 344 (Oxford 2006).

⁵¹ See *Brown*, 347 US at 495.

⁵² See *Engel*, 370 US at 424.

⁵³ See *Plyler*, 457 US at 230.

⁵⁴ See *Tinker*, 393 US at 511.

⁵⁵ See *G.G.*, 822 F3d at 715.

⁵⁶ Driver, 100 *Cal L Rev* at 1105 (cited in note 39). Specifically, Driver argues that the Warren Court could have done more to advance gender equality, protect religious minorities, regulate the use of peremptory strikes in jury selection, develop Eighth Amendment jurisprudence, and prevent disenfranchisement of jail inmates.

the Warren Court obscures these missed opportunities and produces a cribbed vision of “liberal constitutional possibilities.”⁵⁷ This thesis—essentially, that the Warren Court could have done more—is consistent with a book that seeks to give the Court its due as an agent of social change. Driver’s early writing encouraged left-leaning scholars not to settle for the liberalism of the 1960s. *The Schoolhouse Gate* seeks to convince readers that courts are capable of the change he imagines.

II. LIBERALISM AND ITS CRITICS

At first pass, Professor Driver’s approach to federal courts seems almost old-fashioned. Driver’s theory has much in common with Professor Fiss’s famous argument that judges seek “what is true, right, or just” and give meaning to “public values.”⁵⁸ Like Fiss, Driver thinks that the Constitution contains a “distinctive public morality” that federal courts articulate and protect.⁵⁹ He also shares Fiss’s skepticism about textualism—a mode of analysis Driver, with characteristic wit, calls the “Control+F” theory of constitutional interpretation—and his comfort with judicial review⁶⁰ (p 17). Driver, in other words, appears to be a good old legal liberal.

Liberalism, of course, is a term that can be so broad as to be meaningless. Following Professor Laura Kalman, I use the phrase “legal liberalism” to refer to faith “in the potential of courts, particularly the Supreme Court, to bring about [minority-protective] . . . social reforms.”⁶¹ I also mean the word “liberal” to capture a set of jurisprudential beliefs about courts’ role in mediating the relationship between the individual and the state.

This kind of liberalism has three basic tenets. First, and perhaps most important, legal liberals believe that rights protect the individual *against the state*. The claim here is both that state

⁵⁷ Id at 1106.

⁵⁸ Owen M. Fiss, *Foreword: The Forms of Justice*, 93 Harv L Rev 1, 9, 11 (1979).

⁵⁹ See id at 11.

⁶⁰ For Fiss, both textualism and anxiety about the countermajoritarian difficulty stem from a category mistake: courts exist not to interpret or represent the preferences of a particular group but to “give concrete meaning and application to our constitutional values.” Id at 9. Compare id at 11 (“[C]ourts are not default institutions, [and] their rightful place does not turn on the failure of another institution, whether it be the legislature or the executive.”), with Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16 (Yale 1962) (coining the term “counter-majoritarian difficulty”).

⁶¹ Kalman, *The Strange Career of Legal Liberalism* at 2 (quotation marks omitted) (cited in note 9).

power is the key danger in society and that law—specifically rights—can counteract that danger. This view distinguishes liberals from a group of scholars, often called left critics or progressives, who see the uneven distribution of private rather than public power as the central oppressive force in American society.⁶² This particular aspect of legal liberalism, moreover, has no political bent: both left-leaning scholars like Driver and libertarians like Professor Richard Epstein⁶³ think abusive state power is the threat against which law protects. The point is simply that individuals need rights to curb the state.

The second tenet of legal liberalism is that *courts* are the proper institutions to safeguard constitutional rights. Again, there are really two ideas here: legal liberals believe both that courts are the correct entities to police the relationship between the individual and the state and that courts should protect individuals (who bear constitutional rights) from majority will (which, when realized in law or policy, can threaten those rights). This conception of courts as defenders against the unruly majority assumes that courts can act apart from political interests—that is, that one can distinguish law from politics—and that individual rights “trump’ or delimit the power of majorities.”⁶⁴ This view of courts has a more explicit political valence than the first tenet of legal liberalism insofar as it has been associated with Supreme Court rulings in favor of nonwhite people, noncitizens, and women—and thus with “political liberalism”—since the middle of the twentieth century.⁶⁵

⁶² See Robin L. West, *Constitutional Scepticism*, 72 BU L Rev 765, 774 (1992) (distinguishing liberals from progressives). As Professor Robin West explains, progressives do not dispute that state power prevents realization of the ideal “form of social life.” *Id.* They do, however, depart from liberals in thinking that “the most serious impediments [to that ideal] emanate from unjust concentrations of *private* [rather than state] power.” *Id.* See also Wendy Brown and Janet Halley, eds, *Left Legalism/Left Critique* 5–7 (Duke 2002) (distinguishing “left legalism [from] liberal legalism”).

⁶³ See generally Richard A. Epstein, *The Classical Liberal Constitution: The Uncertain Quest for Limited Government* (Harvard 2014). Of course, there is a yawning divide between liberals who seek small government in every domain and those who invoke rights to protect the interests of historically subordinated or marginalized groups. The goal is not to conflate these very different camps, nor to put Epstein in the school of legal liberalism I am describing, but rather to highlight the shared concern about state power among libertarians and political liberals.

⁶⁴ Robin West, *Law, Rights, and Other Totemic Illusions: Legal Liberalism and Freud’s Theory of the Rule of Law*, 134 U Pa L Rev 817, 840 (1986).

⁶⁵ Kalman, *The Strange Career of Legal Liberalism* at 2 (cited in note 9) (“Because of the nation’s experience with the Warren Court, legal liberalism has been linked to political liberalism since midcentury.”). Professor Laura Weinrib argues that the minority rights—

The third tenet of legal liberalism is that the Constitution represents a *collective morality*. Professor Robin West has written a lucid analysis of the moral claims implicit in legal liberals' understanding of the Constitution.⁶⁶ As she explains, traditional legal liberals are "the constitutionally faithful": they see the Constitution "as rooted in a higher, deeper, more 'constitutive,' or simply 'prior' *morality*, and not simply a more coercive legal command."⁶⁷ This is why Fiss describes constitutional adjudication as the process of discerning a "public morality" rather than just the superior legal rule.⁶⁸ It is also why, for legal liberals, something like wearing the Confederate flag can be politically noxious and even immoral but constitutionally permitted and in that sense reflective of a desirable society. Because the Constitution "provides a higher norm"—a sort of "super-moral[ity]"—it prevails when conflicts between constitutional and other moral commitments arise.⁶⁹ This framework makes it incredibly important to get constitutional interpretation right. As a result, legal liberal scholarship tends to focus on doctrine, and particularly the binding constitutional doctrine generated by the Supreme Court.

These three views—rights restrain state power, courts protect minority rights, and constitutional rights impose moral obligations on the state—constitute the core of legal liberalism as I employ the term. Scholars one might describe as legal liberals⁷⁰ subscribe to these views with greater and less fealty. The moral claim, in particular, is not shared by every legal liberal. I suspect

focused conception of legal liberalism, which "blossomed in the late New Deal and prevailed in the postwar period," was preceded by a period in which the meaning of liberalism was less tied to protection of minorities and much more up for grabs. Laura Weinrib, *Against Intolerance: The Red Scare Roots of Legal Liberalism*, J Gilded Age & Progressive Era *1 (forthcoming 2019) (on file with author).

⁶⁶ West, 72 BU L Rev at 782–83 (cited in note 62). See also West, *Normative Jurisprudence* at 47 (cited in note 9) (describing liberalism's normative commitments).

⁶⁷ West, 72 BU L Rev at 783 (cited in note 62).

⁶⁸ Fiss, 93 Harv L Rev at 11 (cited in note 58).

⁶⁹ West, 72 BU L Rev at 783 (cited in note 62).

⁷⁰ Here I would include Fiss, Professor Laurence Tribe, and many left-leaning jurists since the Warren Court. See, for example, Fiss, 93 Harv L Rev at 9 (cited in note 58); Laurence H. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 Harv L Rev 592, 595–614 (1985) (arguing that the Supreme Court's approach to legal problems is insufficiently attentive to the distribution of wealth and social inequality); Laurence H. Tribe, Jeremy Waldron, and Mark Tushnet, *On Judicial Review: Laurence H. Tribe, Jeremy Waldron, and Mark Tushnet Debate*, 52 Dissent 81, 81–83 (2005) (debating an "End Judicial Review Amendment" to the US Constitution). See also the Honorable William Wayne Justice, *The New Awakening: Judicial Activism in a Conservative Age*, 43 Sw L J 657, 664 (1989) ("As Judge [J. Skelly] Wright has characterized it, the Warren Court activism was 'judging in the service of conscience.'" (citations omitted)).

there are many academics and judges who would distinguish law from morals and nonetheless endorse a vision of courts as counter-majoritarian rights-protectors.⁷¹ But the idea that constitutional rights trump other rights, and do so because they reflect the most valuable public values, is at the heart of legal liberalism—and this, as West points out, is a kind of constitutional morality.⁷²

This theory of constitutional law is exemplified by Fiss's writing on the Warren Court. In the early 1990s, Fiss cast that Court not only as a revolutionary "program of constitutional reform" but also as an institution that *led* the revolution.⁷³ As he put it: "[T]he Court did not act in a political or social vacuum. . . . Yet the truth of the matter is that it was the Warren Court that spurred the great changes to follow, and inspired and protected those who sought to implement them."⁷⁴ More recently, Fiss has doubled down on his claim that judges ought to seek justice, rather than just rationality or transparency, and has insisted that achieving equality is "fully within the competence of the judiciary."⁷⁵ Here we have the hallmarks of legal liberalism: a morality-inflected understanding of constitutional rights, a juriscentric conception of social change, and a muscular vision of courts' ability to produce that change.

This way of thinking about courts has been subject to ongoing critique within the legal academy over the last three decades. Although legal liberalism has many detractors,⁷⁶ two challenges are especially relevant to situating *The Schoolhouse Gate*.

⁷¹ See Fiss, 90 Yale L J at 1007–08 (cited in note 10) (distinguishing between different strains of positivism in legal scholarship). As Fiss notes, at least one form of positivism, which he calls "ethical positivism," distinguishes law from morals in order to bring existing law in line with a moral framework. Thus, ethical positivism "could be the creed of the reformist" who seeks to make law "more just." *Id.* at 1007. See also West, *Normative Jurisprudence* at 67–71 (cited in note 9) (arguing that early positivists sought to render law more moral).

⁷² West, 72 BU L Rev at 781 (cited in note 62).

⁷³ Owen M. Fiss, *A Life Lived Twice*, 100 Yale L J 1117, 1118 (1991).

⁷⁴ *Id.*

⁷⁵ Owen Fiss, *Another Equality*, 20 *Issues in Legal Scholarship* 1, 17 (2004). Fiss is talking here about a substantive conception of equality in which

certain social practices, including but not limited to discrimination, should be condemned not because of any unfairness in the transaction attributable to the poor fit between means and ends, but rather because such practices create or perpetuate the subordination of the group of which the individual excluded or rejected is a member.

Id. at 3–4.

⁷⁶ Influential critiques that fall outside the scope of this Review include those advanced by law and economics scholars who reject legal liberals' focus on doctrine and those

The first came from constitutional theorists and political scientists who objected to the idea that courts are pioneers of social progress. This critique often centered on the origins and legacy of *Brown*. Citing grassroots advocacy that preceded that opinion and its slow, uneven implementation across the South, scholars argued that the Supreme Court tends to follow social movements, not drive them.⁷⁷ For some this was a descriptive claim: the Supreme Court is “unlikely to interpret the Constitution in ways that radically depart from contemporary popular opinion” and should thus be understood as a body that affirms consensus or at best breaks ties when the nation is deeply divided.⁷⁸ For others, the claim was more normative: in a democratic society riddled with inequality, federal courts cannot⁷⁹ and therefore should not⁸⁰ lead social reform. To do so is dangerous because bad and unpredictable things happen when unelected judges outpace majority preferences.

articulated by originalists (and others) concerned with an expansive vision of the federal judiciary’s role in a system of separated powers.

⁷⁷ For the classic version of this claim, see Rosenberg, *The Hollow Hope* at 40 (cited in note 2) (“Although the conventional wisdom . . . is that federal courts, through *Brown* and its progeny, played a crucial role in producing both changes in civil rights and an active civil rights movement, truth is not thereby assured.”).

⁷⁸ Klarman, 93 Nw U L Rev at 192 (cited in note 1). Klarman continues:

Most of the Court’s famous individual rights decisions of the past half century involve either the Justices seizing upon a dominant national consensus and imposing it on resisting outliers or intervening on an issue where the nation is narrowly divided and awarding victory to one side or seeking to split the difference.

See also Powe, *The Warren Court and American Politics* at 490 (cited in note 1) (arguing that the project of the Warren Court, beginning with *Brown*, was to “force the South to conform to northern—that is, national—norms”). But see Driver, 89 Tex L Rev at 756–58 (cited in note 47) (describing this scholarship as “consensus constitutionalism” and critiquing both its premises and its implications).

⁷⁹ Rosenberg, *The Hollow Hope* at 70–71 (cited in note 2) (“[C]ourts had virtually *no direct effect* on ending discrimination in the key fields of education, voting, transportation, accommodations and public places, and housing. . . . *Brown* and its progeny stand for the proposition that courts are impotent to produce significant social reform.”). See also Friedman, *The Will of the People* at 303 (cited in note 2) (challenging “the image of the Supreme Court as an institution that runs contrary to popular will”).

⁸⁰ Most scholars in the “should not” camp worry that the Supreme Court provokes backlash or triggers other perverse consequences when it gets too far in front of majority preferences. See Post and Siegel, 42 Harv CR–CL L Rev at 376 (cited in note 4) (identifying Professors Michael Klarman, William Eskridge, and Cass Sunstein as “three eminent theorists of backlash” and arguing that each “overestimate[s] the costs of backlash and [] underestimate[s] its benefits”). But see Driver, 123 Yale L J at 2632 n 76 (cited in note 7) (arguing that Klarman’s argument “is an imperfect fit for the standard perversity narrative” because Klarman believes post-*Brown* backlash indirectly hastened egalitarian social reforms).

In a related line of scholarship, which Dean Risa Goluboff calls “the new civil rights history,” historians have called for a less “court-centered [and] major-case-centered” conception of legal development.⁸¹ This historical work is not identical to the critique of legal liberalism that emerged from debates over *Brown*—that scholarship is very much focused on major Supreme Court opinions, while the new civil rights historians aim to decenter courts.⁸² But both bodies of writing seek to debunk the “romantic vision of the [Supreme] Court as countermajoritarian hero.”⁸³ In this respect, they are part of a single, powerful objection to legal liberalism.⁸⁴

The second critique of legal liberalism came from critical theorists who aimed to expose courts’ part in perpetuating inequality. This too is a big tent. It includes, of course, the critical legal studies (CLS) movement, which rejected the distinction between law and politics and advanced a wide-ranging critique of rights.⁸⁵ As CLS scholars noted, throughout American history, rights have more often been mobilized to “solidify the holdings” of the powerful than to protect the marginalized.⁸⁶ Rights are also predicated on an individualistic, “alienat[ing]” vision of society.⁸⁷ And while constitutional rights protect citizens against the state, they offer no affirmative entitlement “to state action that might counter” the most insidious sources of oppression, including private racism and private wealth.⁸⁸ Rights, in sum, are not all they’re cracked up to be: they belong to individuals, hermetically sealed off from

⁸¹ Goluboff, 126 Harv L Rev at 2312, 2319 (cited in note 1).

⁸² Id at 2321 (“The law does not change because courts make decisions.”). See also Guinier and Torres, 123 Yale L J at 2748 (cited in note 9) (noting that a “growing chorus of scholars [] argue that change neither begins nor ends with the courts”).

⁸³ Klarman, 93 Nw U L Rev at 192 (cited in note 1).

⁸⁴ There is also the related, deeper critique of judicial review voiced by Professor Waldron, among others. See Waldron, 115 Yale L J at 1369 (cited in note 5) (critiquing judicial review as a democratically illegitimate practice that protects rights no better than legislatures). See also Kramer, *The People Themselves* at 8 (cited in note 3) (describing the relationship between judicial review and “popular constitutionalism”). Although objections to judicial review and judicial supremacy are critiques of legal liberalism, my focus here is on the narrower claim that courts cannot in fact drive social progress even if we want them to.

⁸⁵ See, for example, Mark Kelman, *A Guide to Critical Legal Studies* 243 (Harvard 1987) (“[L]egal change simply reflects the dominance of whichever pernicious elite has grabbed a greater degree of control.”); Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in Brown and Halley, *Left Legalism/Left Critique* at 183–88 (cited in note 62) (summarizing the rights critique).

⁸⁶ West, *Normative Jurisprudence* at 122 (cited in note 9).

⁸⁷ Id at 126.

⁸⁸ Id at 123.

one another, and they provide much less protection than we actually need. Rights, moreover, “legitimate privilege” by perpetuating the fallacy that all is well so long as the state stays in its lane.⁸⁹

This CLS critique dovetailed with feminist and critical race theorists’ concerns about legal liberalism. Scholars in those traditions had a much more ambivalent relationship to rights, which, as Professor Patricia Williams put it, “feel[] so new in the mouths of most black people.”⁹⁰ Many feminists and critical race theorists rejected the antinormativity of CLS scholarship, emphasizing the empowering aspect of rights discourse and urging fellow progressives “to read the Constitution as a text of liberation.”⁹¹ But they shared the view that constitutional law ignored and therefore supported private discrimination—in particular, patriarchy and racism—and the sense that legal liberals exacerbate this problem by deifying courts.⁹² This analysis led feminists and critical race theorists to develop less doctrinal forms of scholarship focused on the ways that race and gender affect experiences of state power. As a methodological matter, this meant prioritizing personal narratives and the untold stories “of those who have seen and felt the falsity of the liberal promise.”⁹³

There are many points of convergence between these critiques of legal liberalism. These schools share members: Professor Mark Tushnet, for instance, is both a leading CLS scholar and an interlocutor in debates over *Brown*,⁹⁴ and Professor Michael Klarman has challenged both court-centric histories of civil rights and legal

⁸⁹ Id. See also generally Louis Michael Seidman, *Brown and Miranda*, 80 Cal L Rev 673 (1992); Mark Tushnet, *An Essay on Rights*, 62 Tex L Rev 1363 (1984); Peter Gabel, Book Review, *Taking Rights Seriously*, 91 Harv L Rev 302 (1977).

⁹⁰ Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 Harv CR–CL L Rev 401, 431 (1987).

⁹¹ Matsuda, 22 Harv CR–CL L Rev at 341 (cited in note 6). See also Joan C. Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 NYU L Rev 429, 481 (1987) (“[M]any progressive lawyers believe that the idea of rights has great liberating potential.”).

⁹² See, for example, West, 72 BU L Rev at 776 (cited in note 62) (“The Constitution apparently leaves untouched the very conditions of subordination, oppression, and coercion that relegate some to ‘lesser lives’ of drudgery, fear, and stultifying self-hatred.”).

⁹³ Matsuda, 22 Harv CR–CL L Rev at 324 (cited in note 6).

⁹⁴ See Tushnet, 62 Tex L Rev at 1363 (cited in note 89) (developing the critique of rights); Mark Tushnet, *Some Legacies of Brown v. Board of Education*, 90 Va L Rev 1693, 1694 (2004) (“*Brown* did not transform education in the segregated South, much less American race relations.”). See also Mark Tushnet, *Taking the Constitution Away from the Courts* 194 (Princeton 2000) (advocating “populist” constitutional law).

liberals' fetishistic relationship to the Constitution.⁹⁵ These critiques also share origins in legal realism and, specifically, in the realists' exhortation to "abandon the[] traditional focus on doctrinal logic" in favor of more functional accounts of law.⁹⁶ It would be a mistake to tell this intellectual history as if it has discrete camps or a definite start date.

The purpose of distinguishing these critiques, though, is to isolate two separate points: one about courts' relationship to popular opinion and one about courts' role in an unequal society. The historical claim is that legal liberals overestimate courts' contribution to the advancement of minority rights. The critical claim is that courts are implicated in an oppressive social order in which rights, at least as jurists have traditionally understood them, are part of the problem. In other words, the historical critique takes issue with the "legal" part of legal liberalism, while critical theorists take issue with liberalism itself.

Together, these two critiques have had a lasting effect on the way scholars think and write about federal courts. Although it is now rare for law review articles to begin with poems or Angela Davis quotations,⁹⁷ the impact of the critical turn in legal scholarship can be seen in a discipline that is increasingly interdisciplinary and decreasingly focused on courts. Since roughly 1990, pushback against legal liberalism by historians and critical theorists has driven constitutional scholarship downward and outward, toward law made by lower courts and interpretation of the Constitution by actors other than judges, including legislators, bureaucrats, and laypeople. The response—dare I say backlash—to legal liberalism has also produced a much more cynical academy in which it is decidedly unhip to think that the judiciary can

⁹⁵ For Klarman's classic account of *Brown*, see Klarman, *From Jim Crow to Civil Rights* at 344 (cited in note 50). For his critique of constitutionalism, see Klarman, 93 *Nw U L Rev* at 145 (cited in note 1) (arguing that the "proffered justifications for constitutionalism" are neither "unambiguously attractive," nor do they describe particularly well our constitutional system). See also Michael J. Klarman, *Constitutional Fetishism and the Clinton Impeachment Debate*, 85 *Va L Rev* 631, 631 (1999) (exploring the tendency to "conduct[] [] transparently political debate[s]"—in that case, the debate over Bill Clinton's impeachment—"in constitutional terms").

⁹⁶ Williams, 62 *NYU L Rev* at 433 (cited in note 91) (situating CLS and feminist scholarship as an outgrowth of legal realism). See also Laura Kalman, Book Review, *Brief Lives*, 127 *Yale L J* 1638, 1672 (2018) (exploring the legacy of legal realism); Brian Leiter, *Is There an 'American' Jurisprudence?*, 17 *Oxford J Legal Stud* 367, 382–85 (1997) (connecting CLS to legal realism but identifying key distinctions between the movements).

⁹⁷ See, for example, Matsuda, 22 *Harv CR–CL L Rev* at 333 (cited in note 6); Williams, 22 *Harv CR–CL L Rev* at 401 (cited in note 90).

or will save the day. Thus it is now common for legal scholars to study “the Constitution outside the courts”⁹⁸ and to ask whether it is wise to “constitutionalize” issues that could be conceived another way.⁹⁹

This is in some respects a story about left-leaning academics’ reactions to an increasingly conservative judiciary.¹⁰⁰ But it is also (and I think more fundamentally) a story about the professionalization of the legal academy, which brought with it methodological diversity,¹⁰¹ and about legal scholars’ persistent anxiety about the judiciary’s role in a democracy.¹⁰² The last three decades have witnessed the rise of “constitutional skepticism,”¹⁰³ which is to say, real doubt about the Constitution’s normative value, and for those who still embrace the federal Constitution, deep concern about the judiciary’s ability to safeguard minority rights.¹⁰⁴

⁹⁸ John Rappaport, *How Private Insurers Regulate Public Police*, 130 Harv L Rev 1539, 1546 (2017) (quotation marks and citations omitted) (discussing the literature on legislative, administrative, and popular constitutionalism). See also, for example, Bruce Ackerman, *We the People, Volume 3: The Civil Rights Revolution* 12 (Belknap 2014) (arguing that landmark statutes ought to be part of the constitutional canon); Gillian E. Metzger, *Administrative Constitutionalism*, 91 Tex L Rev 1897, 1901 (2013) (exploring how administrative actors develop constitutional meaning).

⁹⁹ See, for example, Klarman, 85 Va L Rev at 652 (cited in note 95) (identifying the “insidious consequence[s] of the pervasive constitutionalization of the impeachment debate”); Adam B. Cox and Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 Yale L J 104, 196–214 (2015) (cautioning against “constitutionaliz[ing] the internal structures of the Executive Branch” in a manner that would limit Executive discretion over immigration enforcement). The point here is not that Professors Klarman, Adam Cox, and Cristina Rodriguez are wrong about the perils of constitutionalizing debates over impeachment and immigration but rather that their writing reflects a moment in the intellectual history of legal scholarship in which academics are highly sensitive to the consequences of inserting the judiciary into political debates.

¹⁰⁰ See, for example, Kalman, *The Strange Career of Legal Liberalism* at 132–39 (cited in note 9) (describing how the Reagan Administration “transform[ed] the judiciary through the appointment of conservative judges”). See generally, for example, Nancy Scherer and Banks Miller, *The Federalist Society’s Influence on the Federal Judiciary*, 62 Political Rsrch Q 366 (2009).

¹⁰¹ See Kennedy and Fisher, *The Canon of American Legal Thought* at 7–8 (cited in note 9) (discussing the “fall of methodological consensus” and the emergence of “eclecticism” in legal scholarship).

¹⁰² See David A. Strauss, *The Neo-Hamiltonian Temptation*, 123 Yale L J 2676, 2680 (2014) (arguing that popular constitutionalism and other “neo-Hamiltonian” efforts to defend judicial review against democratic objections arise from discomfort about “the ways in which our system is not democratic”).

¹⁰³ West, 72 BU L Rev at 774 (cited in note 62). See also Driver, 123 Yale L J at 2621 (cited in note 7).

¹⁰⁴ See Michelman, 94 BU L Rev at 1148 (cited in note 7). As Michelman notes, there are still many more scholars who embrace the Constitution but object to excessive constitutionalism than those, like West and Professor Louis Michael Seidman, who “express[] [] doubt about the value of the constitutional project *tout court*.” Id at 1142. See also Louis Michael

Driver rejects both kinds of skepticism. *The Schoolhouse Gate* advances a full-throated account of the federal judiciary's promise and a morally rich vision of constitutional law. In discussing the scope of the Eighth Amendment, for example, Driver calls corporal punishment "an atrocity" and an "act of barbarism" that future generations will regard "as a source of shame and embarrassment" (p 184). This is moral language about how to interpret the Constitution—language Driver uses with full knowledge of the historical and critical movements in constitutional law. Driver, moreover, trains his critique on the state. To return to the corporal punishment example, he clearly thinks it more objectionable for a public school principal than a private school principal or a parent to hit a child. That is not to say that Driver condones the private activity but rather that it is state action that triggers his conviction that law must step in.¹⁰⁵

Driver is not, however, an entirely old-school legal liberal. Though it is court-focused, *The Schoolhouse Gate* relies on sources unseen in early legal liberal scholarship, including Gallup polls and newspaper archives. Driver is keen not just to postulate but to *prove* that federal courts have had an appreciable impact on public schools. His book is also built, from its very first lines, around personal narratives. *The Schoolhouse Gate* teaches readers that Robert Meyer was a father of six who refused offers to help pay the fine he incurred for instructing students in German just after World War I;¹⁰⁶ that Savannah Redding left her middle school and developed ulcers after being strip searched for allegedly distributing prescription-strength ibuprofen;¹⁰⁷ and that James Ingraham's eighth grade classmates called him "Rain Bummy" after he was paddled so intensely by his principal that,

Seidman, *On Constitutional Disobedience* 5 (Oxford 2012); West, 72 BU L Rev at 770 (cited in note 62); Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)* 167 (Oxford 2006) ("[O]ur Constitution is sufficiently defective to warrant significant revision and repair.").

¹⁰⁵ To be clear, Driver's emphasis on the state is not merely a choice to work within the confines of current state action doctrine. As I read *The Schoolhouse Gate*, Driver appears to think that, when it comes to the conduct constitutional law ought to target, there is something *worse* about abuses of state power than private violence. I take the implicit belief here to be that the Constitution is a social contract whose legitimacy and validity depends on the state following the rules.

¹⁰⁶ See *Meyer v Nebraska*, 262 US 390, 396–97 (1923) (holding that Nebraska's restrictions on foreign-language education violated the Due Process Clause).

¹⁰⁷ See *Safford Unified School District No 1 v Redding*, 557 US 364, 368–69 (2009) (holding that the strip search violated the Fourth Amendment but that school officials were entitled to qualified immunity).

three days later, he had “fluid oozing” from a swollen six-inch bruise¹⁰⁸ (p 165–66). We also learn that, every day beginning in fifth grade, Driver took a city bus and two subway lines before walking nearly a mile to reach the public school he attended in Northwest Washington, DC, “where educational outcomes were much brighter and the students bodies, not incidentally, were much whiter” than his own (p 26).

This personal approach to a book about constitutional law would not make sense without the critique of legal liberalism. Driver’s mixed methods, quest for proof, and emphasis on lived experiences of the law are an implicit endorsement of interdisciplinary legal scholarship and critical legal methods, if not the critical turn away from constitutionalism. His entire project, moreover, is an explicit reaction to the historical critique of legal liberalism, which he thinks is largely wrong. Driver writes in response to the wave of legal scholars that came before him, informed but not convinced by their claims. This is not quite traditional legal liberalism, though it does seek to revive moral debates about the right way to read and enforce the Constitution.¹⁰⁹ This is the new legal liberalism, a mode of constitutional scholarship that uses fresh methods to argue that we should still extol, study, and storm the federal courts.

III. THE CONTEXTUAL CONSTITUTION

The question is whether Professor Driver is right to be so optimistic. Driver’s view of the federal judiciary develops from his focus on one very particular institution: the public school. Although *The Schoolhouse Gate* discusses the First, Fourth, Eighth, and Fourteenth Amendments, it is not really a study of individual rights. At its core this is a book about the law of public schools, no matter which constitutional provision applies.

The Schoolhouse Gate is, in other words, an example of what Dean Heather Gerken calls “domain-centered” constitutional law.¹¹⁰

¹⁰⁸ See *Ingraham v Wright*, 430 US 651, 653–57 (1977) (holding that the Due Process Clause does not require a hearing prior to corporal punishment in public schools and that the Cruel and Unusual Punishments Clause does not apply to such a hearing).

¹⁰⁹ Of course, those debates never stopped in the pages of law reviews, which still publish (and perhaps prioritize) normative scholarship about constitutional law. But normative doctrinal scholarship has receded and diminished in stature as the legal academy has grown more interdisciplinary.

¹¹⁰ Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 Harv L Rev 104, 122 (2007). In using this term, Gerken follows Professors Robert Post and Michael Walzer. See generally Robert C. Post, *Constitutional Domains: Democracy, Community,*

Gerken uses this phrase to describe Justice Anthony Kennedy's approach to race in *Parents Involved in Community Schools v Seattle School District No 1*,¹¹¹ the 2007 case that invalidated a Seattle school district's desegregation plan.¹¹² As she notes, Justice Kennedy defected from "the colorblindness camp" in *Parents Involved* and, much to Court watchers' surprise, began "to brainstorm[] about the most useful race-conscious strategies the state can use to construct the educational space."¹¹³ Gerken attributes this about-face to Justice Kennedy's long-standing belief that public schools are special sites for "inculcating civic morality."¹¹⁴ She argues that Justice Kennedy was able to depart from his traditional approach to race because he saw *Parents Involved* as a case that was foremost about schools, and only incidentally about race.¹¹⁵ This kind of "displacement," as she puts it, can be a powerful way to rethink racial inequality.¹¹⁶

Gerken's point is that a "radically contextualized" approach to constitutional analysis may lead to more nuanced constitutional jurisprudence.¹¹⁷ Although her essay is about equal protection, and specifically Justice Kennedy's views on race, it raises the broader question: Should we be thinking about more—or even all—of constitutional law in domain-centered terms?

There is no question that the Constitution operates differently in different contexts. Free speech looks different in a school than it does on a street corner. Due process is a different idea at the nation's border than it is in a coffee shop. This is a descriptive claim about how constitutional cases tend to come down in certain settings. It can also be understood as a normative claim about

Management (Harvard 1995); Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books 1983). As she explains, her use of Post's term is somewhat closer to Walzer's phrase "spheres of justice," which describes a notion of justice tied to institutional context, than to Post's conception of the three "domains" of First Amendment law (community, management, and democracy). Gerken, 121 Harv L Rev at 106 n 12. See also Michael Walzer and Ronald Dworkin, "Spheres of Justice": An Exchange (NY Review of Books, July 21, 1983), archived at <http://perma.cc/4YKU-9JPD> (describing Walzer's view); Lawrence Lessig, *Post Constitutionalism*, 94 Mich L Rev 1422, 1425 (1996) (describing Post's).

¹¹¹ 551 US 701 (2007).

¹¹² *Id.* at 745–48.

¹¹³ Gerken, 121 Harv L Rev at 104, 106 (cited in note 110).

¹¹⁴ *Id.* at 106.

¹¹⁵ See *id.*

¹¹⁶ *Id.* at 122.

¹¹⁷ Gerken, 121 Harv L Rev at 122 (cited in note 110).

how the Constitution ought to work.¹¹⁸ For those who endorse the normative view, constitutional rights actually *mean* something different depending on where they are invoked; equality, for example, means something different in a prison than in a school. If this is right, we cannot interpret the Constitution until we have a theory of the spheres it governs—a theory about the purpose of public schools, or prisons, or national borders, or voting booths. And if either the descriptive or the normative claim about constitutional domains is correct, we will understand the Constitution much better if we focus on places or plaintiffs rather than specific clauses.

From this perspective, it makes perfect sense to talk about “the constitutional law of schools” instead of, say, First or Fourth Amendment law. This is simply how constitutional law works: an eighth-grade student asserting her right to be free from unreasonable searches has more in common with an eighth grader seeking protection of her right to protest than an adult pressing a Fourth Amendment claim outside school. The Constitution is contextual, and we should study it as such. I take this to be the animating theory of Driver’s book, and I find it compelling. *The Schoolhouse Gate* presents a powerful argument not just for students’ rights but for a theory of constitutional rights that is attuned to the particular values and histories of American social institutions.

The problem, though, is that the public school is an exceptional institution. Schoolchildren are perhaps the most sympathetic plaintiffs in all of constitutional law. They are less culpable than adults, or at least courts tend to treat them as such;¹¹⁹ they are young enough for judicially imposed institutional reforms like racial or gender integration to have a real effect on their perceptions of the world; and they are acutely subject to state power—after all, they cannot leave the building until the school bell rings.

¹¹⁸ Gerken does not endorse a wholly domain-centered approach to constitutional law. In fact, she expresses concern that too much domain specificity can obscure connections between bodies of constitutional law, such as education and election law. See *id.* at 128 (“Sometimes a domain-centered narrative can be too tidy.”). As she notes, this skepticism distinguishes her from Post, who resists “efforts to develop a unified theory of the First Amendment across domains,” and from Justice Kennedy, who seems to believe that the Constitution should be analyzed differently in schools. *Id.* at 126 n 78, citing Post, *Constitutional Domains* at 16 (cited in note 110).

¹¹⁹ See, for example, *Miller v Alabama*, 567 US 460, 471–72 (2012) (discussing children’s “diminished culpability” in the course of holding that mandatory sentences of life without parole for juveniles violate the Eighth Amendment).

Schoolchildren are, in short, very easy to want to protect, which is why courts have so often protected them.¹²⁰

The question that follows is whether the public school is an uncommonly hopeful site for an assessment of the judiciary. Take the case *Plyler v Doe*. As Part I mentions, *Plyler* concerned undocumented immigrant children's access to public schools—specifically, a Texas law that permitted the state to withhold funds for educating unauthorized immigrant children from local school districts and a district that responded by charging those children tuition to attend public school. The Supreme Court held that Texas's law violated the Equal Protection Clause.¹²¹ For Driver, this holding is an example of the Supreme Court's ability and willingness to protect “vilified groups” in the face of virulent public opinion (p 354). As he explains, *Plyler* “prevent[ed] the Texas measure from spreading to other states” and “single-handedly enabled innumerable children to use education to expand both their minds and their horizons” (p 353–54).

This is right and important, but for immigration scholars, *Plyler* is an example of the path more often avoided than taken. Notwithstanding its soaring language about the rights of all noncitizens, including those “whose presence in this country is unlawful,”¹²² *Plyler* is generally understood as a case about schoolchildren rather than a reflection of the Supreme Court's constitutional immigration jurisprudence.¹²³ This is in part because the *Plyler* majority stressed that schools are special¹²⁴ and that children lack culpability for illegal entry¹²⁵ and in part because the Court has opted not to extend *Plyler*'s reasoning in other immigration

¹²⁰ See Kennedy, 123 Yale L J at 3071 (cited in note 27) (noting that *Brown* “invalidated narrowly de jure segregation in public primary and secondary schooling” rather than “gestur[ing] broadly toward the proscription of segregation in other spheres of social life”).

¹²¹ *Plyler*, 457 US at 230.

¹²² *Id* at 210.

¹²³ See, for example, Elizabeth Hull, *Undocumented Alien Children and Free Public Education: An Analysis of Plyler v. Doe*, 44 U Pitt L Rev 409, 429 (1983) (“Despite the controversy it engendered, *Plyler* after all affects only undocumented alien children, only in the area of public education, and then only when state action is not sanctioned by Congress.”).

¹²⁴ *Plyler* 457 US at 221 (“We have recognized the public schools as a most vital civil institution for the preservation of a democratic system of government, and as the primary vehicle for transmitting the values on which our society rests.”) (quotation marks and citations omitted).

¹²⁵ *Id* at 220 (“But [the statute] is directed against children, and imposes its discriminatory burden on the basis of a legal characteristic over which children can have little control.”).

cases.¹²⁶ More than thirty years after *Plyler*, immigrants' constitutional rights remain underdeveloped—it is still unclear when noncitizens bear Second, Fifth, Eighth, and Fourteenth Amendment rights¹²⁷—and undocumented noncitizens have particularly shaky claims to constitutional protection.¹²⁸ Courts have long wavered between a territorial theory of the Constitution, in which rights hinge on physical presence, and a status-based theory, in which rights extend only or more fully to those whose presence is legal.¹²⁹ The tension between these theories persists and results in unnerving debates about how poorly unauthorized immigrants can be treated before the Constitution kicks in.

Consider, for instance, the due process concerns raised by the Trump Administration's family separation and detention policies¹³⁰ or *Garza v Hargan*,¹³¹ a 2017 case in which an en banc DC Circuit debated (without resolving) whether a seventeen-year-old undocumented immigrant had the right to an abortion.¹³² Both cases illustrate how immigration status can alter settled constitutional law. Or consider *Trump v Hawaii*,¹³³ the recent decision on the Trump Administration's travel ban. The majority decision in that case—which reasoned that courts ought not peer beyond

¹²⁶ Linda E. Carter, *Intermediate Scrutiny under Fire: Will Plyler Survive State Legislation to Exclude Undocumented Children from School?*, 31 USF L Rev 345, 392 (1997) (“[T]he Court has chosen not to expand the *Plyler* case.”).

¹²⁷ See *United States v Meza-Rodriguez*, 798 F3d 664, 672 n 1 (7th Cir 2015), cert denied, 136 S Ct 1655 (2016) (departing from the Fourth, Fifth, and Eighth Circuits and relying on *Plyler* to hold that undocumented noncitizens may invoke the Second Amendment right to bear arms). See also Emma Kaufman, *Segregation by Citizenship*, 132 Harv L Rev *40–57 (forthcoming 2019) (on file with author) (discussing the scope of noncitizens' Fifth, Eighth, and Fourteenth Amendment rights).

¹²⁸ See Linda Bosniak, *A Basic Territorial Distinction*, 16 Georgetown Immig L J 407, 408–10 (2002) (tracing the history of constitutional doctrines distinguishing legal from illegal entrants).

¹²⁹ *Id.* See also T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of Zadvydas v. Davis*, 16 Georgetown Immig L J 365, 387 (2002) (discussing the significance of Justice Stephen Breyer's invocation of a “basic territorial distinction” between those in and outside US borders in *Zadvydas v Davis*), citing Bosniak, 16 Georgetown Immig L J at 407 (cited in note 128); Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 Cal L Rev 373, 387 n 57 (2004) (noting that noncitizens outside the United States lack enforceable rights to enter and in some cases lack rights to other constitutional protection as well).

¹³⁰ See Adam Cox and Ryan Goodman, *Detention of Migrant Families as “Deterrence”: Ethical Flaws and Empirical Doubt* (Just Security, June 22, 2018), archived at <http://perma.cc/J6D5-SBLG> (discussing the ethical and legal questions raised by the policy of separating families arriving at the US-Mexico border and detaining families facing removal).

¹³¹ 874 F3d 735 (DC Cir 2017) (en banc).

¹³² *Id.* at 743.

¹³³ 138 S Ct 2392 (2018).

the four corners of executive orders on immigration, no matter how compelling the evidence of discriminatory intent¹³⁴—is a “disquieting” example of federal courts’ long-standing ambivalence about noncitizens’ entitlement to full constitutional protection and tendency to defer to political branch decisions on immigration policy, particularly those justified by national security.¹³⁵ Given this legal landscape, *Plyler* is often categorized as a case of school exceptionalism, the high point in an otherwise uninspiring body of constitutional doctrine.

It is also illuminating to ask if Driver’s optimism could hold in prisons. In some respects, the prison and the public school are parallel domains. Like schools, prisons are citizenship-making institutions that aim to impart (and impose) a certain model of civic membership.¹³⁶ Like schools, prisons reflect the hardest problems in American politics, including the legacies of slavery and Jim Crow. Like schools, prisons were subject to a “hands-off” jurisprudence until the middle of the twentieth century, when federal courts began to reform conditions of confinement in American prisons and jails.¹³⁷ Like schools, prisons are often framed as places that are difficult to run or properly run by subfederal governments and, thus, as institutions that federal courts should hesitate to regulate.¹³⁸ And like schools, prisons have long been

¹³⁴ *Id.* at 2417.

¹³⁵ Adam Cox, Ryan Goodman, and Cristina Rodríguez, *The Radical Supreme Court Travel Ban Opinion—But Why It Might Not Apply to Other Immigrants’ Rights Cases* (Just Security, June 27, 2018), archived at <http://perma.cc/WFS5-EVYX> (describing *Trump v Hawaii* as “radical” but noting that its holding may be limited to cases “involving questions of motive and proof” that concern “immigration policies implicating national security”).

¹³⁶ There is an enormous literature on prisons as sites of citizenship creation and social control. For two classic examples, see Jeremy Bentham, *Principles of Penal Law*, in John Bowring, ed., 1 *The Works of Jeremy Bentham* 365, 420 (William Tait 1843); Michel Foucault, *Discipline and Punish: The Birth of the Prison* 231 (Vintage Books 1995) (Alan Sheridan, trans).

¹³⁷ See Feeley and Rubin, *Judicial Policy Making and the Modern State* at 30–46 (cited in note 19); Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 *Cornell L Rev* 357, 359 (2018).

¹³⁸ Compare *Turner v Safley*, 482 US 78, 84–85 (1987):

Running a prison is an inordinately difficult undertaking that requires expertise. . . . Prison administration is, moreover, a task that has been committed to the responsibility of th[e] [political] branches, and separation of powers concerns counsel a policy of judicial restraint. Where a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities.

with *Missouri v Jenkins*, 515 US 70, 99 (1995) (“[O]ur cases recognize that local autonomy of school districts is a vital national tradition and that a district court must strive to restore state and local authorities to the control of a school system.”) (citations omitted). See

sites for heated debate over the efficacy and propriety of equitable remedies including, most famously, the structural injunction.¹³⁹

But when it comes to prisons, it is difficult to tell a story in which courts are heroes. There is no question that courts reformed American penal institutions in the 1970s and in some cases continue to do so today.¹⁴⁰ But the United States has the highest incarceration rate in the world;¹⁴¹ one in three “black American males . . . can expect to go to prison in his lifetime”;¹⁴² and prisoners in some states live in shockingly brutal circumstances for years or decades at a time.¹⁴³ Among other things, sensory deprivation and extreme isolation,¹⁴⁴ suicide and self-harm,¹⁴⁵ rape,¹⁴⁶

also *Procunier v Martinez*, 416 US 396, 409–13 (1974) (citing *Tinker* and comparing schools to prisons in a case concerning censorship of prisoner mail).

¹³⁹ See Ross Sandler and David Schoenbrod, *Democracy by Decree: What Happens When Courts Run Government* 11, 139 (Yale 2003) (critiquing the use of equitable remedies in institutional reform litigation). See also Heather Schoenfeld, *Mass Incarceration and the Paradox of Prison Conditions Litigation*, 44 L & Society Rev 731, 731–37 (2010) (describing how the “policy feedback effect[s]” of structural injunctions contributed to the growth of Florida’s prison population).

¹⁴⁰ See Feeley and Rubin, *Judicial Policy Making and the Modern State* at 39–45 (cited in note 19) (describing the 1970s reforms); *Brown v Plata*, 563 US 493, 538–45 (2011) (affirming an order imposing population limits on California state prisons).

¹⁴¹ Tyjen Tsai and Paola Scommegna, *U.S. Has World’s Highest Incarceration Rate*, (Population Reference Bureau, Aug 10, 2012), archived at <http://perma.cc/YGJ3-PT9D>.

¹⁴² *Report of the Sentencing Project to the United Nations Human Rights Committee regarding Racial Disparities in the United States Criminal Justice System* *1 (The Sentencing Project, Aug 2013), archived at <http://perma.cc/5HLG-NKW3>.

¹⁴³ See, for example, *Aiming to Reduce Time-in-Cell: Reports from Correctional Systems on the Numbers of Prisoners in Restricted Housing and on the Potential of Policy Changes to Bring About Reforms* *5 (Association of State Correctional Administrators and Arthur Liman Public Interest Program at Yale Law School, Nov 2016), archived at <http://perma.cc/AFH8-XWHY> (finding that an estimated 80,000–100,000 people were held in solitary confinement in 2014); Class Action Complaint, *Dockery v Epps*, No 3:13-cv-00326, *1–4 (SD Miss filed May 30, 2013) (describing “horrific conditions” in a Mississippi prison where prisoners lived in total darkness in cells with loose electrical wires, rats, and “gangrenous wounds”).

¹⁴⁴ See *Aiming to Reduce Time-in-Cell* at *4–6 (cited in note 143) (describing solitary confinement).

¹⁴⁵ Margaret Noonan, Harley Rohloff, and Scott Ginder, *Mortality in Local Jails and State Prisons, 2000–2013—Statistical Tables* *1 (Bureau of Justice Statistics, Aug 2015), archived at <http://perma.cc/U3BQ-LCSZ> (documenting rising suicide rates in prisons and jails).

¹⁴⁶ Allen J. Beck, Ramona R. Rantala, and Jessica Rexroat, *Sexual Victimization Reported by Adult Correctional Authorities, 2009–11* *1 (Bureau of Justice Statistics, Jan 2014), archived at <http://perma.cc/H6YD-L7HJ> (documenting rates of “sexual victimization” in prisons since 2009).

unpaid labor,¹⁴⁷ and grossly inadequate medical care¹⁴⁸ remain real problems in many prisons. This is in part because institutional dynamics in the American political system incentivize harsh prosecution and sentencing, which in turn fill prisons with far too many people.¹⁴⁹ But it is also because courts decline to regulate penal institutions, even when they can.

Take two seemingly similar cases on strip searching: *Safford Unified School District No 1 v Redding*¹⁵⁰ and *Florence v Board of Chosen Freeholders of the County of Burlington*.¹⁵¹ In *Safford*, the Roberts Court held that school searches require reasonable suspicion and that the decision to search thirteen-year-old Savannah Redding's underwear for contraband pills violated her Fourth Amendment rights. Two years later, the Court in *Florence* upheld strip searches of detainees entering jails even absent reasonable suspicion of contraband.¹⁵² Albert Florence was an ideal plaintiff: a married father of four, arrested after his wife was pulled over for speeding in her BMW, erroneously detained on an outstanding warrant for a fine he had already paid. Yet his Fourth Amendment claim failed. Institutional setting makes all the difference here.

Such outcomes are common in constitutional prison law, in large measure because of two cases: *Turner v Safley*¹⁵³ and *Sandin*

¹⁴⁷ See Ifeoma Ajunwa and Angela Onwuachi-Willig, *Combating Discrimination against the Formerly Incarcerated in the Labor Market*, 112 Nw L Rev 1385, 1408 (2018) (“[L]ow-paid or unpaid prison labor has been a longstanding feature of prison life in the United States.”); John Washington, *Florida’s Prison Laborers Are Going on Strike* (The Nation, Jan 15, 2018), archived at <http://perma.cc/4VFF-G23P>.

¹⁴⁸ See, for example, Jason Meisner, *Independent Experts Blast Quality of Medical Care in Illinois Prisons* (Chicago Tribune, May 19, 2015), online at <http://www.chicagotribune.com/news/ct-illinois-prison-medical-care-met-20150519-story.html> (visited Oct 25, 2018) (Perma archive unavailable) (describing “sweeping problems” and “poor sanitation” in Illinois state prisons).

¹⁴⁹ See generally William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich L Rev 505 (2001). See also William J. Stuntz, *The Collapse of American Criminal Justice* 6–7 (Belknap 2011); Jonathan Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* 4–5 (Oxford 2007).

¹⁵⁰ 557 US 364 (2009).

¹⁵¹ 566 US 318 (2012).

¹⁵² Note that *Florence* concerned pretrial custody. For a discussion of the distinctions between pre- and post-trial confinement, see Schlanger, 103 Cornell L Rev at 364 (cited in note 137). Although jails and prisons are governed by different liability regimes, both are subject to a deferential, context-specific prisoners' rights jurisprudence.

¹⁵³ 482 US 78, 93 (1987).

v Conner.¹⁵⁴ *Turner* established the default standard for constitutional challenges to prison policy.¹⁵⁵ This two-step standard, which is a prison-specific form of rational basis review, requires courts to ask whether prisoners retain the right at issue and, if they do, whether restriction of that right is “‘reasonably related’ to legitimate penological objectives.”¹⁵⁶ *Sandin*, by contrast, set the standard that governs prisoners’ procedural due process claims. Under that test, which arises most frequently in cases involving solitary confinement and other forms of restrictive custody, a prisoner can state a due process claim only when a prison policy imposes an “atypical and significant hardship . . . in relation to the ordinary incidents of prison life.”¹⁵⁷

Although one could parse these tests in great detail, the point for these purposes is how similar they are. *Turner* begins by asking whether a constitutional right survives imprisonment; *Sandin* asks whether prison policies depart from “ordinary” prison life.¹⁵⁸ Both of these doctrines assume that prisons are exceptional places, which ought to be judged in reference to themselves rather than a freestanding constitutional rule. These doctrines, in other words, presume and thereby ensure that the Constitution means something different inside penal institutions. This conceptual move results in a remarkably deferential body of law. I have argued elsewhere that scholars should understand the various tests in prison law as part of a coherent, trans-substantive “penal power doctrine” in which prison officials may infringe recognized constitutional rights in ways that other state actors cannot.¹⁵⁹ This judge-made doctrine emerges from and depends on a domain-specific understanding of constitutional rights.

¹⁵⁴ 515 US 472, 500 (1995).

¹⁵⁵ See Kaufman, 132 Harv L Rev at *47–48 nn 266–69 (cited in note 127) (surveying cases in which courts have applied the *Turner* test).

¹⁵⁶ *Turner*, 482 US at 87.

¹⁵⁷ *Sandin*, 515 US at 484.

¹⁵⁸ *Id.* In practice, courts have struggled to determine what “ordinary” prison life means. When applying *Sandin*, some circuits compare prison practices to “general” or statewide prison conditions, while others look to similar sites of confinement, such as other solitary confinement units. See Elli Marcus, Comment, *Toward a Standard of Meaningful Review: Examining the Actual Protections Afforded to Prisoners in Long-Term Solitary Confinement*, 163 U Pa L Rev 1159, 1173–74 (2015) (describing the circuit split on this issue).

¹⁵⁹ Kaufman, 132 Harv L Rev at *5 (cited in note 127). See also Sharon Dolovich, *Canons of Evasion in Constitutional Criminal Law*, in Sharon Dolovich and Alexandra Natapoff, eds, *The New Criminal Justice Thinking* 111, 112–14 (NYU 2017) (identifying other “canons of evasion” that limit judicial oversight of prisons and jails).

By focusing on prisons, then, one can see the promise and the perils of Driver's approach. Studying the Constitution through the institutions it regulates is bold, honest, and generative. This method is bold because it unmoors the Constitution from its text. It is honest because constitutional law is actually domain driven; it matters much more whether a plaintiff is a prisoner than whether he sues under the Eighth or Fourteenth Amendments. And this approach is generative because it exposes just how much context affects the content of constitutional rights. Prisons need not be judged as insulated legal spaces. In Germany, for example, external laws permeate the prison: German prisoners bear privacy rights and are subject to labor laws, including minimum wage and paid vacation requirements.¹⁶⁰ The idea that the prison is an exceptional space is a product of American jurisprudence. Emphasizing constitutional domains reveals this and forces us to ask why prisons should look so different than the outside world.

The danger of this approach, though, is that it could aggravate pathologies in American constitutional law—in particular, courts' reliance on an ill-supported form of exceptionalism that currently dominates constitutional prison and immigration law. To return to an earlier point, domain-centered constitutional law can be understood in one of two ways: as a descriptive claim about how courts resolve cases involving certain institutions or as a normative claim that constitutional rights *should* vary with context. The latter claim is troubling if you study institutions, like prisons, where courts routinely employ exceptionalism to limit constitutional rights.¹⁶¹ In those contexts, one might want the Constitution to look less domain sensitive. That is, one might want to resist the idea that penal (or any) institutions are special in favor of a presumption that the Constitution contains principles of general and universal applicability. The fear here is that a domain-focused theory of constitutional law could entrench a vision of the Constitution that will be bad for the many plaintiffs who are less sympathetic

¹⁶⁰ See James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe* 89 (Oxford 2003) (noting that German prisoners receive paid vacation and outlining German and French prisoners' rights); Ram Subramanian and Alison Shames, *Sentencing and Prison Practices in Germany and the Netherlands: Implications for the United States* *12 (Vera Institute of Justice, Oct 2013), archived at <http://perma.cc/S9EN-N7SR> (describing German prison policies).

¹⁶¹ To be clear, Driver does not endorse this normative theory, nor does he discuss constitutional domains in his book. These are questions *The Schoolhouse Gate* raises, not debates on which he has taken a position.

than schoolchildren. At a more basic level, it seems highly implausible that the Constitution or the judiciary would look as good in a book about prisons instead of schools.

That we even consider this possibility is a testament to Driver's contribution. Driver has written a textured, nuanced analysis of more than a century of education doctrine and in the process has resuscitated a lost form of legal liberalism. *The Schoolhouse Gate* aims to revive our faith in federal courts and to bring students from the footnotes to the foreground of constitutional law.¹⁶² The book achieves both goals. The only question is whether one is possible without the other.

¹⁶² See Owen Fiss, *Pillars of Justice: Lawyers and the Liberal Tradition* 47 (Harvard 2017) (“[Justice Brennan] resisted, tenaciously, and yet kept the faith—why can’t we?”); Kalman, 127 *Yale L J* at 1646 (cited in note 96).