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The Public School as the Preeminent Site of Constitutional Law

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This is my first trip to Nebraska, but it has long been a land of fascination for me. I remember being eight years old and watching Mike Rozier, the incredible running back for the University of Nebraska, run all over the nation. He was my favorite player when I was a kid and I thought, "Someday I will make my way to Nebraska." That I am doing so today as the Lane lecturer is truly an honor. This is a wonderful, even august institution. I am humbled to join the distinguished collection of scholars who have previously delivered this lecture, and I am grateful to you all for attending.

I thought that I would begin my telling you a little bit about how I got interested in this subject. One of the first questions that people ask about my book is, "How long did it take to write?" Whatever else its virtues, it is not a short book. The answer to that question is that it took me either four years to write or three decades to write, depending upon how you count. After I joined the University of Chicago faculty in 2014, I turned my attention in earnest to writing the book and got away from law review articles for a while. But the roots of the project

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* Professor of Law, Yale Law School. This speech, which I delivered as the Lane Lecture in Lincoln, Nebraska, on Friday, November 8, 2019, is drawn from my first book, THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND, which Pantheon Books published in 2018. I am deeply grateful to audience members for engaging with my work, and to the editors of the *Nebraska Law Review* for assistance in preparing this text for publication.

go back to my being a kid growing up in Washington, D.C. in the 1980s.

I grew up in Southeast Washington, east of the Anacostia River, which is a predominately black neighborhood. Starting at a very young age, I traveled from far Southeast to upper Northwest Washington to attend fifth grade where the demographics of the city are quite different. Upper Northwest is the most privileged segment of Washington, D.C. That required me to get on a bus and two different subway lines and have a pretty long walk as well. I would think during this daily journey, "Why in the world am I having to wake up so early to get to fifth grade?" Also, "What are the opportunities that I am gaining as a result of this trek?" Conversely, "What are the opportunities that my neighbors are losing out on as a result of attending the neighborhood school?"

I also remember learning about *Brown v. Board of Education* right after I started fifth grade at John Eaton Elementary in the Cleveland Park section of Washington, D.C. This was 1985, just a few years after I was cheering for Mike Rozier, and I remember thinking, "Even though integration has theoretically been handed down, there are many all-black schools within shouting distance of the Supreme Court's Marble Palace." From a very young age, that made me think that there is often a yawning gap between law on the books and life in the streets. It is one thing for the Supreme Court of the United States to hand down a decision; it is quite another thing for it to become lived reality.

I thought I was going to become a public school teacher when I graduated from college. I got certified to teach public school. As part of that certification process, I taught U.S. history and civics. The truth is that at this point I knew desperately little about the students' constitutional rights. Therefore, one of the goals I have for the book is to try to render, in an accessible way, students' constitutional rights for teachers like me—or my former self—who are interested in students' constitutional rights but might have difficulty grappling with the legal materials. Too often law professors write about law in this incredibly abstract and rarefied way that is accessible only to fellow law professors. One of the goals that I have for the book is to try to democratize constitutional law—to try to make it accessible to non-lawyers. I want law professors to read my book, but I do not want *only* law professors to read my book.

One of the more gratifying experiences that I have had is being interviewed by a high school student who asked me really wonderful questions and offered pushback on some of the book. I thought that I reached my target audience; she was a high school junior at the time. Her name is Anna Salvatore. It is true that she is an unusual high school student—she is quite precocious. She runs a terrific blog called

"High School SCOTUS," so that is a strong indication that she is a fellow Supreme Court nerd. But nevertheless, Salvatore's engagement suggests the book is accessible, at least to particularly enterprising high school students.

This book examines the intersection of two distinctively American institutions: the public school and the Supreme Court. The United States has long exhibited an uncommonly strong belief in the importance of public education and its centrality to national identity. As Adlai Stevenson once remarked, "The free common school system is the most American thing about America."[1] But many other observers have suggested that the nation's faith in public education may be rivaled only by the faith it places in the judiciary to resolve critical disputes. In the 1830s, Alexis de Tocqueville's Democracy in America offered what remains the most famous formulation of this idea. "There is hardly a political question in the United States which does not sooner or later turn into a judicial one," Tocqueville contended.[2] Since this statement appeared, the federal judiciary—with the Supreme Court at its apex—has assumed only a more expansive role in American society.

For a long season, however, many observers believed that these two institutions should have nothing to do with each other. Elementary and secondary public schools, the thinking ran, were singularly local endeavors that educators should be free to administer without needing to worry about anything so grand as the Supreme Court's decisions interpreting the Constitution. Yet, as matters would turn out, the Supreme Court abandoned its traditional noninterventionist approach to public schools. In 1943, the Court dramatically reversed course in West Virginia State Board of Education v. Barnette, declaring it unconstitutional for public schools to expel students for refusing to salute the American flag. Barnette insisted that the Constitution "protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights."[3] Ultimately, Barnette marked merely the Court's first meaningful step on the path to-

1. DAVID TYACK, SEEKING COMMON GROUND: PUBLIC SCHOOLS IN A DIVERSE SOCIETY 1 (2003). Claudia Goldin, among others, has explained how the expansion of secondary education in the United States during the first third of the twentieth century created the conditions for the U.S. economy to thrive. This widespread investment in education was a uniquely American phenomenon during this era, and—indeed—for several decades thereafter. *See* Claudia Goldin, *America's Graduation from High School: The Evolution and Spread of Secondary Schooling in the Twentieth Century*, 58 J. ECON. HIST. 345 (1998).

2. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 270 (J.P. Mayer ed., 1969, George Lawrence trans.) (1835).

3. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

ward establishing that students retained a wide array of constitutional rights within public schools. Even if those rights do not assume precisely the same contours that minors enjoy outside the public school context, the Court has consistently held that educators cannot disregard the Constitution's central protections. By 1969, less than three decades after Gobitis, the Supreme Court broadly announced that the era of separate spheres for law and education had ended: "It can hardly be argued that . . . students . . . shed their constitutional rights . . . at the schoolhouse gate."[4]

Although education and constitutional law were once viewed as fundamentally distinct entities, a panoramic view of this area now establishes that, without exploring the extensive interaction of the public school and the Supreme Court, it is impossible to grasp the full meaning of either quintessentially American institution. One cannot plausibly claim to understand public education in the United States today, that is, without appreciating how the Supreme Court's decisions involving students' constitutional rights shape the everyday realities of schools across the country. Conversely, one cannot plausibly hope to comprehend the role of the Supreme Court in American society without appreciating how its opinions involving public education reveal the judiciary's underappreciated capacity for both spurring and forestalling major social change.

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. No other arena of constitutional decision making—not churches, not hotels, not hospitals, not restaurants, not police stations, not military bases, not automobiles, not even homes—comes close to matching the cultural import of the Supreme Court's jurisprudence governing public schools. Houses of public education, though seldom viewed as legal entities by the general public, claim this mantle due to four closely related reasons.

The first reason that schools should be deemed our most significant theaters of constitutional conflict is owed to the sheer magnitude of public elementary and secondary education. Today, more than fifty million students attend public schools in the United States, and in order to function, they require a few million adults to serve as teachers, administrators, and support staff. Those figures mean that on any given weekday, during school hours, at least one-sixth of the U.S. population can be found in a public school—making it easily the single largest governmental entity that Americans encounter for sustained periods on a near-daily basis. Those ubiquitous interactions are, of course, governed by the constitutional parameters that the Supreme Court and lower courts have articulated for public education. Yet even

4. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

this large fraction dramatically underestimates the constitutional footprint of public schools; not only does it fail to account for the parents of those students who currently attend public schools, but it also overlooks that the vast majority of adults in the United States are themselves products of those schools. Given that—as the Supreme Court has recognized—the attitudes students develop during their first sustained exposure to governmental authority do not simply vanish on graduation day, moreover, it seems eminently reasonable to hold that everyone in the country has a vested interest in the form that constitutional meaning assumes in public schools.[5]

Second, the school's great significance in our constitutional order stems from the fact that cases arising in this setting offer an excellent prism for examining the preceding one hundred years of American history, as the cultural anxieties that pervade the larger society often flash where law and education converge. The legal history of the Court's educational encounters thus illuminates both the hopes and the fears that have captivated the American people during the last century.

Consider only a few examples of this phenomenon. In the wake of World War I—when the nation wrestled with how to assimilate its swelling immigrant population—the Court confronted laws that prohibited schools from teaching young pupils in languages other than English and that mandated attendance at public schools (because speaking the mother tongue and attending parochial schools were both thought to shield minorities from "Americanization"). During World War II, the Court contemplated patriotism by weighing whether schools could expel students for refusing to salute the American flag. In the aftermath of World War II, the Court in the 1950s considered anew whether the nation that had so recently toppled Aryan supremacy abroad could allow schools to separate children by race at home. During the 1960s, the Court weighed whether students who opposed the Vietnam War could express their views without facing reprisals from educators. Within that same decade, the Court accelerated its lengthy and ongoing examination of how, in a nation characterized by increasing religious diversity, various religious groups might peacefully coexist within public schools. When the Silent Majority of the 1970s feared that American youth culture had spiraled dangerously out of control, the Court contemplated what limits, if any, should exist on schools that attempt to impose discipline on students through suspensions or corporal punishment. In the late 1970s, as the nation debated the Equal Rights Amendment, the Court weighed

5. *See* 2016 DIGEST OF EDUCATION STATISTICS (noting millions of students and teachers in public schools); *see also* Nicholas Lemann, in School: The Story of American Public Education (Sarah Mondale & Sarah B. Patton 2001) (noting the magnitude of the populations within U.S. public school buildings on school days).

whether single-sex public schools could be reconciled with gender equality. During the 1980s, when prominent political figures expressed deep concern about the effects of exposing youngsters to explicit content, the Court entertained cases asking whether a school could punish a student for delivering a speech laced with sexual innuendo and whether a school newspaper could be forced to publish student-written articles addressing teen sexuality. One year after First Lady Nancy Reagan launched her "Just Say No" campaign, the Supreme Court for the first time contemplated what tolls the war on drugs may exact upon students' privacy rights. The Court has repeatedly visited this same terrain during the twenty-first century, as it has addressed whether exigencies created by the war on drugs can justify subjecting students both to suspicionless drug tests and to strip searches and limiting their free speech rights.[6] In no other sphere of constitutional meaning do the Supreme Court's major interventions so closely reflect the nation's larger social concerns.

Third, as the previous paragraph intimated, cases arising from the schooling context involve many of the most doctrinally consequential, hotly contested constitutional questions that the Supreme Court has ever addressed—including lawsuits related to sex, race, crime, safety, liberty, equality, religion, and patriotism. That thumbnail sketch, moreover, omits the Court's momentous cases addressing the permissibility of massive funding disparities between school districts in the same metropolitan area and efforts to exclude unauthorized immigrants from public schools—among many other contentious lawsuits. Outside the schooling context, cases implicating these various issues contain ample capability of rousing strong emotions. But bringing these matters into the educational arena elevates the temperature higher still, both because the cases tend to involve minors and because of the central place that public schools occupy in the nation's cultural imagination. The recent legal controversy that exploded over transgender students' access to restrooms offers but the latest illustration of public schools' penchant for hosting the most incendiary legal debates that divide American society.

Well-known commentators have repeatedly noted the deep bitterness that engulfs legal disputes involving students' rights. 1928, the noted intellectual Walter Lippmann—remarking upon the controversies in state courts then raging over teaching evolution—observed that "the struggles for the control of the schools are among the bitterest political struggles" and claimed further, "It is inevitable that it

6. For an elegant articulation of the idea that constitutional cases involving education reflect larger cultural anxieties, with particular attention to opinions involving freedom of expression, see Allen Rostron, *Intellectual Seriousness and the First Amendment's Protection of Free Speech for Students*, 81 UMKC L. REV. 635, 636–39 (2013).

should be so. Wherever two or more groups within a state differ in religion, or in language and in nationality, the immediate concern of each group is to use the schools to preserve its own faith and tradition."[7] In 1973, Hillary Rodham—then a recent graduate of Yale Law School, affiliated with the Children's Defense Fund—wrote an article in the Harvard Educational Review that echoed Lippmann's assessment. "From the first confrontations between parents and the state," Rodham noted, "education has been the subject of continuous and often bitter struggles, primarily over the proper social role of education and the proper treatment of children within the schools."[8] The last four decades have, if anything, only deepened this statement's accuracy, as the Court's subsequent student rights decisions have continued to reveal an unusually powerful capacity for eliciting fervent sentiments in American society. What is true of society generally, moreover, also holds within the Supreme Court's marble walls. An unusually large percentage of these cases witness justices adopting seldom-used techniques to signal their profound disagreement with the majority—either by reading their opinions from the bench or by omitting the standard claim that they dissent from the majority "respectfully." It is hardly mysterious why disputes in this arena spark such passion: when we disagree over what the Constitution means in public schools, we engage in an argument that is fundamentally about what sort of nation we want the United States to be.[9]

The final reason that the public school should be viewed as the preeminent site of constitutional interpretation is that the Supreme Court itself has repeatedly, and convincingly, highlighted the importance of that venue for shaping attitudes toward the nation's governing document. Beginning in the 1940s, the Court made several high-profile declarations that public schools had a special responsibility to honor constitutional rights; otherwise students would incorrectly conclude that governmental authority had no limits. No one expressed this proposition better than Justice Robert Jackson in *Barnette* in 1943: "That [public schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source

7. WALTER LIPPMANN, AMERICAN INQUISITORS 22–23 (1928) (quoted in JONATHAN ZIMMERMAN, WHOSE AMERICA? CULTURE WARS IN THE PUBLIC SCHOOLS 1–2 (2002)). For an impressive treatment of these controversies, see EDWARD J. LARSON, SUMMER FOR THE GODS: THE SCOPES TRIAL AND AMERICA'S CONTINUING DEBATE OVER SCIENCE AND RELIGION (1997).

8. Hillary Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487, 498 (1973). Rodham would not marry Bill Clinton until 1975.

9. *See* David Tyack, *Introduction* to SCHOOL: THE STORY OF AMERICAN PUBLIC EDUCATION 1, 2 (Sarah Mondale & Sarah B. Patton eds., 2001) ("When citizens deliberate about the education of the young, they are also debating the shape of the future for the whole nation.").

and teach youth to discount important principles of our government as mere platitudes."[10] In Brown v. Board of Education, moreover, Chief Justice Earl Warren in 1954 testified to "the importance of education to our democratic society," before he concluded that permitting racial segregation in schools could harm black students' "hearts and minds in a way unlikely ever to be undone."[11] Six years later, Justice Potter Stewart wrote an opinion for the Court that explicitly identified the public school as a constitutional setting of paramount import: "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[12]

In recent decades, however, such sentiments appear more often in the Court's dissenting opinions than in its majority opinions. Justice John Paul Stevens, for example, advanced this idea in 1985 when he dissented in part from an opinion offering an anemic conception of the Fourth Amendment's protection against unreasonable governmental searches in the context of public schools. "The schoolroom is the first opportunity most citizens have to experience the power of government," Stevens wrote.

> Through it passes every citizen and public official, from schoolteachers to policemen and prison guards. The values they learn there, they take with them in life. One of our most cherished ideals is the one contained in the Fourth Amendment: that the government may not intrude on the personal privacy of its citizens without a warrant or compelling circumstance. The Court's decision today is a curious moral for the Nation's youth.[13]

Transforming public schools into Constitution-free zones, Justice Stevens sagely warned, was dangerous because when today's students become tomorrow's adults, they may well retain their anemic understanding of constitutional protections. That risk, if realized, would harm the nation as a whole by distorting the relationship between citizens and their government. The Fourth Amendment, alas, represents only one of many constitutional areas where the Court has in recent decades taught student-citizens regrettable lessons about our constitutional protections.

Given the vast significance of judicial opinions regarding students' constitutional rights, one might suspect this body of decisions has been explored ad nauseam. Yet this volume is the first effort to present this narrative in its full range—providing portraits of the students and their families who have challenged school policies in the most important disputes, distilling the decisions in a manner accessible to a general audience, placing those decisions in their relevant his-

10. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

11. Brown v. Bd. of Educ., 347 U.S. 483, 493–94 (1954).

12. Shelton v. Tucker, 364 U.S. 479, 487 (1960).

13. New Jersey v. T.L.O., 469 U.S. 325, 385–86 (1985) (Stevens, J., concurring in part and dissenting in part).

torical context, and evaluating critically how existing legal doctrine should change in the future.

The absence of such a book is lamentable because many citizens harbor deep interests in constitutional law and public education but lack a firm grasp of how the one informs the other. Various subcommunities have certainly scrutinized discrete aspects of the material canvassed in the pages that follow. But those fragmented approaches by definition cannot yield work that adequately wrestles with the mass of cases involving students' constitutional rights. Instead of viewing this body of law as a coherent whole, a wide array of groups—including educators, judges, lawyers, legislators, pundits, and scholars—have fractured that body into its component parts. Decisions arising from the school context involving free speech, due process, criminal procedure, racial equality, sex equality, and religion—to name only a few areas—have all been hauled off and placed into their own intellectual silos. Within their various silos, moreover, school cases are often relegated to the margins of some larger animating concern or are not primarily understood as cases involving students' rights. Sometimes, school cases do not even make it into the relevant silo at all. This book aims to move beyond these isolated approaches by reconceptualizing students' constitutional rights as forming a cohesive whole, and in so doing seeks to reinvigorate education law as a field of intellectual inquiry. To be sure, some authors have produced insightful work on important parts of schooling law in recent years; indeed, this book draws upon those scholars' work where relevant. But no one other than a partisan would seriously maintain that the field of education law consistently claims the attention of many prominent scholars in legal academia. Notably, at several of the nation's leading law schools, not a single member of the academic faculty regularly offers a class focused on the law of schools.[14]

14. Four scholars have produced works that most closely resemble THE SCHOOLHOUSE GATE. *See* James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335 (2000); Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647 (1986); Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49 (1996); and TYLL VAN GEEL, THE COURTS AND AMERICAN EDUCATION LAW (1987). While I have learned much from each of these writings, my project differs in substantial ways. First, as a matter of audience, these works all target judges, lawyers, and legislators. While my book certainly seeks readership among those audiences, I also aim to make my work accessible to the uninitiated, for I believe that these issues demand consideration by every segment of American society. Second, as a matter of approach, my work expends substantial energy both in placing these opinions in their historical context and in making vivid the litigants' backstories. Third, as a matter of normative commitments, the views I advance in this book depart meaningfully from previous efforts. The law review articles—characteristic of the genre—espouse the most readily discernible opinions. Professor Ryan aimed to marshal an analytically defensible reading of the Court's existing decisions,

If we examine the Supreme Court's decisions weighing students' constitutional rights in a holistic fashion, several patterns and themes emerge that elude detection when these issues are viewed in isolation. First, this body of decisions reveals that students and their families who contest school practices must often exhibit deep reservoirs of courage when the Supreme Court addresses their disputes. In most instances, these lawsuits witness genuinely brave families resist not only the wishes of local educators but also the norms of their surrounding communities. Members of these communities, in response, frequently announce their displeasure with litigants by showering them with an assortment of insults, hate mail, intimidating telephone calls, and even death threats. Thus, even if one disagrees with the underlying constitutional claims, it is often difficult not to admire the students and their families for being willing to stand up for their understandings of the Constitution. Accordingly, in the pages that follow, I endeavor where possible to chronicle the personal ordeals that have habitually accompanied the judicial recognition of students' constitutional rights. Although analysis of constitutional law often veers toward the arid and the abstract, detailing these concrete personal sacrifices underscores that many otherwise ordinary citizens have exhibited extraordinary valor to make enduring contributions to our constitutional order.

Appreciating the toll that litigation exacts on the families of students who contest school policies is critical because members of the Supreme Court themselves have on occasion appeared to lose sight of

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drawing a distinction whereby the judiciary may regulate schools acting in their social capacities but refuses to do so when schools act in their educational capacities. For her part, Professor Dupre asserted that the Supreme Court's opinions interfered far too much with school autonomy, and in the process undermined educators' authority. To place these positions on a crude political spectrum, both viewpoints sit well to the right of the positions that I advocate herein, as I frequently—though not invariably—contend that the Court's modern jurisprudence evinces an unduly parsimonious conception of students' constitutional rights. In contrast, Professor Levin's viewpoint sits well to the left of mine, because she contends that students' constitutional rights should assume precisely the same form beyond the schoolhouse gate that they assume within the schoolhouse gate. As will become clear during the course of this volume, I believe that Professor Levin's approach would be unsound. Finally, as a matter of simple timing, the Supreme Court's jurisprudence in this arena has evolved dramatically since 2000 (when Professor Ryan's article appeared) to say nothing of the 1980s (when Professor Levin's article and Professor van Geel's book appeared). Since the turn of the century, major cases adjudicating students' constitutional rights have occurred in the following realms: the First Amendment's Free Speech Clause, the First Amendment's Establishment Clause, the Fourth Amendment's prohibition on unreasonable searches, the Fifth Amendment's right to remain silent, and the Fourteenth Amendment's Equal Protection Clause. At a minimum, then, this book is necessary to account for the major constitutional developments that have transpired during the last eighteen years.

this essential lesson. In 2004, the Court heard oral argument in a case from Northern California, where Michael Newdow, an atheist, contended that having his daughter's class recite "under God" as part of the Pledge of Allegiance violated the First Amendment's Establishment Clause. The Court dubiously invoked a legal technicality to avoid reaching a decision on the merits in the case, and in so doing suggested that Newdow had behaved imprudently by filing a lawsuit that thrust his daughter into the fiercely contested issue. According to the Supreme Court, the "most important" considerations leading it to sidestep the case's underlying question included that the lawsuit "implicates the interests of a young child who finds herself at the center of a highly public debate over . . . the propriety of a widespread national ritual, and the meaning of our Constitution."[15]

Yet the logic of this argument sweeps much too broadly. After all, many of the Court's important decisions involving schools have similarly placed minors in the middle of an intense national dispute over the meaning of constitutional rights. To take the foremost example, Oliver Brown thrust his seven-year-old daughter, Linda, into the teeth of a raging debate over racial equality when he agreed to challenge the constitutionality of segregated schools in Topeka, Kansas, during the 1950s. The same criticisms, moreover, could easily have been leveled at both the Barnette family for challenging the flag-salute mandate during the height of World War II and the Tinker family for refusing to accept educators' efforts to censor student speech protesting the Vietnam War in Des Moines, Iowa, during the 1960s. However one assesses the merits of Newdow's basic legal claim, it seems bizarre to construe the controversial nature of his lawsuit as somehow rendering his actions verboten; it comes closer to the mark to view Newdow as participating in an honored American tradition.

Second, surveying the full scale of this jurisprudence highlights the futility of the many reflexive objections that have resisted the Supreme Court's involvement in ensuring that public schools comply with constitutional requirements. Such objections have arisen on virtually every occasion that the Court has vindicated students' constitutional rights and typically assume one of three primary variants: the Constitution does not expressly mention "education," therefore the student's claim must fail; public schools are quintessentially local endeavors, therefore the federal government should not interfere with this domain; and the judiciary lacks the requisite knowledge to monitor public schools, a task that properly belongs in the hands of principals, school boards, or elected officials.

Each of these three broad objections is, however, vulnerable to targeted counterarguments. Regarding the Constitution's omission of

15. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 15 (2004).

the word "education," this feeble effort to construe constitutional meaning—what might be termed the "Control+F" theory of constitutional interpretation—cannot possibly justify transforming schools into places where the nation's foundational document goes unrecognized. In reaction to southerners' protests during the 1950s asserting that Brown lacked legitimacy because the Constitution lacked the magic word, Professor Alexander Bickel offered perhaps the pithiest response: "Of course the Constitution does not mention education. Nor does it mention an Air Force, but the President's title to the commander-in-chief in the air as well as on land is not consequently the less."[16] This epigram suggests that Brown's invalidation of racially segregated schools was lawful because the Constitution proscribes governmental action and public schools are plainly covered subunits of larger governmental entities.

Regarding the invocation of federalism, whatever authority this argument once wielded, the notion that Washington, D.C., plays no role in educational matters has long since been abandoned. Dating back to at least the 1980s, presidents of both parties have sought (often successfully) to influence aspects of elementary and secondary education policy. Going back even further still, Congress has appropriated significant sums to public schools in order to shape educational approaches at the local level. If the judiciary suddenly announced a total retreat from the educational sphere, it would become the only branch of the federal government to vacate the field. Joel Klein, the former chancellor of New York City's Department of Education, recently dispatched the federalism claim with notable vigor: "The historically quaint notion that communities should control their kids' education—long a hobby horse of conservatives who fear anything originating from the federal government—has led neither to active citizen involvement nor to real experimentation at the local level."[17]

16. Alexander M. Bickel, *Ninety-Six Congressmen Versus the Nine Justices*, NEW REPUBLIC, Apr. 23, 1956, at 11, 13. For an early claim that the Constitution does not touch education, see ELLWOOD P. CUBBERLEY, PUBLIC EDUCATION IN THE UNITED STATES: A STUDY AND INTERPRETATION OF AMERICAN EDUCATIONAL HISTORY 54 (1919) ("By the tenth amendment to the Constitution . . . the control of schools and education passed, as one of the unmentioned powers thus reserved, to the people of the different States to handle in any manner which they saw fit."). For a more recent claim, which elicited Bickel's response, see *Text of 96 Congressmen's Declaration on Integration*, N.Y. TIMES, Mar. 12, 1956, at 19 (known as "the Southern Manifesto") ("The original Constitution does not mention education. Neither does the Fourteenth Amendment nor any other Amendment.").

17. JOEL KLEIN, LESSONS OF HOPE: HOW TO FIX OUR SCHOOLS 27 (2014). For judicial opinions that invoke the belief in local control over schools as a justification for nonengagement, see United States v. Lopez, 514 U.S. 549, 565–66 (1995); *id.* at 580–81 (Kennedy, J., concurring); Milliken v. Bradley, 418 U.S. 717, 741–42 (1974). For similar reasoning in the legal literature, see ANNE PROFFITT DUPRE, SPEAKING UP: THE UNINTENDED COSTS OF FREE SPEECH IN PUBLIC SCHOOLS 31 (2009) ("After Tinker, the last word regarding student speech within this singu-

Regarding judges' alleged incompetence to adjudicate school litigation, it seems worth observing that members of the Supreme Court—as a result of having once been students themselves—possess much richer experiences with schools than they do with many contexts that consistently appear on their docket. Justices do not, for instance, usually spend much time walking police beats before ascending to the bench; yet the Court cannot, of course, permit that inexperience to prevent it from interpreting the Constitution to regulate the conduct of law enforcement officers. Justice Jackson in Barnette memorably defeated this expertise-based objection by noting that at least sometimes the Constitution compels the judiciary to enter schools: "We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed."[18]

Yet perhaps the most powerful response to these habitual complaints assumes the general form, rather than the particular: the Supreme Court's extensive jurisprudence vindicating students' constitutional rights—ranging over a period of several decades and touching on a multitude of constitutional provisions—establishes that generic objections to its involvement in this arena simply have not carried the day. As a descriptive matter, then, the broad noninterventionist position toward public schools would constitute a demand for radically reassessing a major area of constitutional law. When courts entertain students' constitutional challenges in the future, they should do so fully aware that the judiciary's long-standing and deep-seated involvement in this sphere complicates the instinctual protests holding that judges should avoid engaging with schools.

This claim should not, of course, be mistaken to contend that the Constitution resolves every dispute that arises within public schools. That view is nothing less than absurd. Take only two of the many po-

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larly local endeavor—the schoolhouse—resides in unelected federal judges, rather than elected school board members or their agents [school principals]."). For works chronicling the expanded federal role within the educational sphere, see GARETH DAVIES, SEE GOVERNMENT GROW: EDUCATION POLITICS FROM JOHNSON TO REAGAN (2007); Carl F. Kaestle & Marshall S. Smith, *The Federal Role in Elementary and Secondary Education, 1940–1980*, 52 HARV. EDUC. REV. 384 (1982); WILLIAM J. REESE, AMERICA'S PUBLIC SCHOOLS: FROM THE COMMON SCHOOL TO "NO CHILD LEFT BEHIND" (2005).

18. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 640 (1943). *See* J. Harvie Wilkinson III, Goss v. Lopez: *The Supreme Court as School Superintendent*, 1975 SUP. CT. REV. 25, 63 (contending that in recent education decisions "the modern Court has demonstrated a faith that judicial competence knows few horizons"); *see also* Lino A. Graglia, *Constitutional Law Without the Constitution: The Supreme Court's Remaking of America*, *in* "A COUNTRY I DO NOT RECOGNIZE": THE LEGAL ASSAULT ON AMERICAN VALUES 1, 29–30 (Robert H. Bork ed., 2005) (contending that the Court's education decisions demonstrate unwarranted faith in matters beyond its ken).

tential schoolhouse quarrels where the Constitution plays no role: students who dislike their grades have no cognizable right under the Fourteenth Amendment's Due Process Clause to challenge their marks; nor do students assigned to write a paper about the American Revolution—who would prefer to tackle the Cuban Revolution—have a legitimate claim to their preferred topic under the First Amendment's right to free expression. While many excellent reasons exist for refusing to recognize these matters—and many others besides—as posing live constitutional questions, modern judges should not automatically retreat to prefabricated claims of nonengagement with schools. Had their predecessors invoked such canned reasoning, our nation's public schools would look very different—and far worse. It may well be, as two scholars recently asserted, "that the courtroom is rarely the optimal venue for education policymaking."[19] The real question, however, is not whether the courtroom offers the ideal forum for school reform but whether it has been the necessary forum. Judge J. Skelly Wright pressed this point ably in an opinion involving students' constitutional rights in 1967. "It would be far better . . . for these great social and political problems to be resolved in the political arena by other branches of government," Wright noted. "But these are social and political problems which seem at times to defy such resolution. In such situations, under our system, the judiciary must bear a hand and accept its responsibility to assist in the solution where constitutional rights hang in the balance."[20]

The third theme that emerges from assessing the judiciary's school jurisprudence through a wide lens is the vast importance of the overall contributions to American society that the Supreme Court has made in the course of protecting students' constitutional rights. This claim would once have been wholly unremarkable, simply applying to the discrete field of education law what constitutional scholars assumed was accurate as a general proposition. During an earlier era, legal academics frequently asserted—without marshaling any real evidence—that the Court had transformed the nation on a wide array of topics by extending constitutional protection to disfavored groups and causes. More recently, however, several distinguished scholars have succeeded in revising that assessment, contending that the Court was hardly the mighty institution that older professors held as an article of faith. Upon examination, these revisionist scholars insisted, the

19. Joshua M. Dunn & Martin R. West, *The Supreme Court as School Board Revisited*, *in* FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY'S ROLE IN AMERICAN EDUCATION 3, 4 (Joshua M. Dunn & Martin R. West eds., 2009).

20. Hobson v. Hansen, 269 F. Supp. 401, 517 (D.D.C. 1967). *See also* Rodham, *supra* note 8, at 506 ("Legislation granting rights in either category probably is preferable to judicial opinions decreeing them, but both governmental branches should be pressed to reexamine and revise children's status under the law. Legal positions will contribute to a new social attitude toward children's rights.").

Court's salient decisions almost invariably ratified (rather than resisted) public opinion, and should be viewed as the reflection of national consensus or the anticipation of an emerging national consensus. This revisionist band of scholars observed that the Court's decisions invalidating measures often did not challenge the legislative landscape across the country, as the prior generation had believed, but instead typically tackled practices found in a handful of states—which they labeled "outliers." While this revisionism might have begun as a relatively small intellectual movement, its views have now become dominant within legal academia, and gained purchase in popular circles as well.[21]

Scrutinizing the broad jurisprudence involving students' constitutional rights succeeds in complicating this revisionist school's unduly frail conception of the Supreme Court's capacity for shaping American society. Indeed, if constitutional professors from earlier times were wrong to believe that the institution could achieve almost anything, today's revisionist legal scholars are incorrect to suggest that it can accomplish virtually nothing. Consider some of the Court's many momentous interventions in this area that offer meaningful complications to the prevailing conception. In some instances, the available polling data and other contemporaneous indicators reveal that the Court's opinions vindicating those interests ran counter to the preferences of national majorities. This dynamic occurred when the Court upheld students' free speech rights in the 1960s and afforded students due process rights before they could be suspended or expelled from school during the 1970s. Relatedly, in other instances, the Court's decisions invalidated practices found throughout the country, not merely those concentrated in isolated pockets. This dynamic transpired when the Court rejected statutes that prohibited teaching in languages other than English during the 1920s and school requirements to salute the American flag in the 1940s. Thus, far from imposing the con-

21. For prominent scholars who have portrayed the Supreme Court as a fragile institution, one that overwhelmingly reflects the consensus views of the American people, 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 (2009); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004). For a foundational work that inspired much of the subsequent skepticism of the judiciary's role in American society, see GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991). For works that challenge these conceptions of an enfeebled Supreme Court, one basically incapable of countering majoritarian preferences, see Justin Driver, *Why Law Should Lead*, NEW REPUBLIC, Apr. 8, 2010, at 28; Justin Driver, *The Consensus Constitution*, 89 TEX. L. REV. 755 (2011); Justin Driver, *Constitutional Outliers*, 81 U. CHI. L. REV. 929 (2014); Justin Driver, *Reactionary Rhetoric and Liberal Legal Academia*, 123 YALE L.J. 2616 (2014); Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, 2010 SUP. CT. REV. 103.

sensus values of the American people and invalidating outliers, it often seems more accurate to view the Court's decisions vindicating students' constitutional rights as overcoming popular sentiment.

Even if the Court strikes down practices found in only a small number of states, moreover, it is severely mistaken to construe those judicial invalidations as representing insignificant acts in shaping our constitutional order. Thus, for example, when the Court invalidated Oregon's measure requiring all students to attend public school in the 1920s, or when it struck down Kentucky's requirement that classrooms display the Ten Commandments during the 1980s, or when it nullified Texas's measure excluding unauthorized immigrants from attending public school in that same decade, those statutes were the only ones of their kind in the nation. Yet contemporaneous evidence in all three instances suggests that the Court's actions extinguished those flickering statutory sparks before they could become a genuine blaze, as—if left unchecked—other states would have sought to enact similar policies, potentially causing substantial harm to the nation's constitutional values.

Two of the Supreme Court's most prominent interventions in history—its invalidation of racially segregated schools and its invalidation of teacher-led prayers—also succeed in complicating the revisionists' general conception. Contrary to those accounts, Brown v. Board of Education cannot convincingly be construed primarily as either the ratification of an emerging national consensus on racial equality or the invalidation of outlier legislation. Instead, the best available evidence indicates that racial attitudes—even in the supposedly enlightened North—were a good deal more ambivalent and conflicted than revisionist scholars typically allow. If the North were nearly as committed to racial egalitarianism as revisionist scholars suggest, one would have expected that integrationist project to bear a good deal more fruit than it did before the Court banned race-conscious student assignment plans in 2007. In addition, while some revisionists correctly concede that the Court's opinions banning teacher-led prayers in public schools encountered major opposition during the 1960s, they then quickly proceed to alternate ground, noting that those decisions were routinely flouted, most often in the South. Yet fixating on the Court's failure to achieve universal and immediate adherence to those decisions has succeeded in obscuring the extent to which they earned widespread adherence immediately, and nearly universal implementation over time. In a testament to the revisionist mind-set's gravitational pull within the legal community today, one scholar has recently emerged to contend that even the Court's early decisions from the 1960s on teacher-led prayer should not actually be

understood as resisting majoritarian preferences.[22] As I demonstrate in these pages, however, this latest effort to demonstrate the revisionist account's absolute supremacy ultimately proves unavailing.

In order to avoid misunderstanding, allow me to emphasize that I in no way seek to restore the older conception of an almighty Supreme Court. To the contrary, revisionists made a valuable contribution by critiquing and dislodging that flawed conception of the Court as colossus. But the revisionist effort has yielded an overcorrection in the opposite direction. Whereas scholars previously erred by portraying the judiciary as omnipotent, revisionists today err by depicting it as impotent. In contrast, this book, attempting to locate the capacious middle ground between these polar conceptions, contends that the Court is neither omnipotent nor impotent, but, simply, unambiguously potent. Thus, although this book trains its focus principally on students' constitutional rights, my examination of this particular field aims to supplant, inform, and reframe broader conceptions of the Supreme Court's role in American society.

Lest readers mistake my portrayal of the Supreme Court's work in this sphere as embracing a Panglossian vision, I should hasten to add that this book advances many pointed, far-reaching critiques of the prevailing legal order. In recent decades, the Court has often foundered badly in its commitment to vindicating constitutional rights in schools. Since the 1970s, its decisions have frequently risked "teach[ing] youth to discount important principles of our government as mere platitudes," as Barnette long ago warned, by issuing opinions finding that the following actions taken by educators pass constitutional muster: inflicting severe corporal punishment on students, without providing any procedural protections; searching students and their possessions, without probable cause, in bids to uncover violations of mere school rules; engaging in drug testing of students who are not suspected of any wrongdoing; and suppressing student speech solely for the viewpoint that it espouses.[23] The Supreme Court has also stumbled by refusing to review many wrongheaded decisions from lower courts, including opinions that have in recent years upheld repressive restrictions on off-campus speech during the internet age; misguided "zero tolerance" disciplinary policies; degrading student strip searches; permissive search regulations geared toward educators, even though uniformed police officers have now become a common sight in public schools; and the quiet resurgence of single-sex public schools, but only in inner-city communities. Such decisions should, in my view, alarm not only schoolchildren and their parents but the entire nation because—as the Supreme Court once recog-

22. *See* Corinna Barrett Lain, *God, Civic Virtue, and the American Way: Reconstructing* Engel, 67 STAN. L. REV. 479 (2015).

23. Barnette, 319 U.S. at 637.

nized—it is impossible to disregard the constitutional rights of students without ultimately damaging the republic to which students pledge allegiance.

I harbor no illusions that everyone—or perhaps even any single person—will agree with all of the particular arguments regarding students' constitutional rights contained in this book. More common ground on these issues may exist, however, than initially seems apparent, as many of the positions I endorse could appeal to a broad coalition that bridges liberalism with the libertarian-inflected vision of limited government now ascendant in some rightward-leaning circles. Nevertheless, I welcome disagreement with my suggestions, for that will reflect a substantive exchange on how public schools should be reformed to reflect our nation's foremost constitutional commitments. And serious discourse on these topics has in the recent past been notable primarily for its absence.