BOOK REVIEW

SEX AND THE SCHOOLHOUSE

THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND. BY JUSTIN DRIVER. NEW YORK, N.Y.: PANTHEON BOOKS. Pp. vii, 564. $35.00.

Reviewed by Melissa Murray[*]

INTRODUCTION

At a 2015 speech at Catholic University's Columbus School of Law, then-Judge Brett Kavanaugh pondered Chief Justice John G. Roberts's famous statement that judges should behave like umpires, limiting themselves to simply calling "balls and strikes."[1] But even as Judge Kavanaugh weighed the parameters of the judicial role, he also disclosed his personal connections to the host institution. As he explained to the audience, "[b]y coincidence, three classmates of mine at Georgetown Prep were graduates of this law school in 1990 and are really, really good friends of mine."[2] And apparently, Georgetown Prep was also well-known to those at the law school. As Judge Kavanaugh related to the audience in the 2015 speech, "we had a good saying that we've held firm to to this day, as the Dean was reminding me before the talk, which is 'what happens at Georgetown Prep stays at Georgetown Prep.' That's been a good thing for all of us, I think."[3]

In 2015, "what happens at Georgetown Prep stays at Georgetown Prep," struck the desired note, sparking laughter throughout the audience.[4] The phrase, which riffed on an earlier Las Vegas marketing campaign ("What happens in Vegas, stays in Vegas!"), connoted a benign strain of high school omertà that assumed youthful hijinks but properly consigned such puerile indiscretions to the past to be forgotten.

Three years later, when Judge Kavanaugh appeared before the Senate Judiciary Committee to rebut Dr. Christine Blasey Ford's claims that, while they were both high school students, he drunkenly groped

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1 CUA Law School, *The Judge as Umpire Delivered by the Honorable Brett M. Kavanaugh*, YOUTUBE (Apr. 1, 2015), https://www.youtube.com/watch?v=SXKX_whwVzs [https://perma.cc/8843-F2W7].

2 *Id.*

3 *Id.*

4 *Id.*

her and pinned her down on a bed while a friend watched,[5] "what happens at Georgetown Prep stays at Georgetown Prep" took on a more sinister cast. The statement, coupled with yearbook entries professing membership in "Renate Alumnius" and the "Keg City Club,"[6] as well as recollections of "boofing" and "Beach Week,"[7] gestured toward the tony private school's "fratty" culture, where "[t]here was a lot of talk and presumably a lot of action about sexual conquest with girls."[8]

"What happens at Georgetown Prep" hit a cultural nerve that went beyond the charged atmosphere of the confirmation hearings. The statement suggested a permissive sexual culture in which certain conduct was blithely condoned — a sexual culture of which, in the era of #MeToo and Title IX,[9] many are wary.

But even as the statement encapsulated extant sexual culture, for many, it also seemed surprisingly inaccurate as a reflection of the interactions between schools and society at large. Most of us understand, however unconsciously, that what happens at school never simply "stays" within the confines of the schoolhouse. What happens in schools fundamentally affects the people — whether students, teachers, or staff — who walk out the schoolhouse doors and into the wider world. This may be especially true of public schools, whose inextricable ties to the state ensure that "private" controversies might at any time become public battlegrounds.

But to say that what happens in schools extends beyond the schoolhouse gate is not just to say that the actions of students and teachers have repercussions on those in the wider world. It is to say that schools are sites of values inculcation — places where the state may instruct a common core of citizenship values. Some of these values — patriotism and civic-mindedness — have traditionally been associated with the project of constructing citizens. But schools often go beyond these values in instilling citizenship norms. Schools also inculcate values of sexual citizenship. In schools, students learn more than reading, writing, and arithmetic; they also learn values and skills that have profound implications for their lives as sexual citizens. They learn notions of consent and how to draw and observe respectful boundaries with one another. In

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[5] Sheryl Gay Stolberg & Nicholas Fandos, *Brett Kavanaugh and Christine Blasey Ford Duel with Tears and Fury*, N.Y. TIMES (Sept. 27, 2018), https://nyti.ms/2NOOYzD [https://perma.cc/K9NT-67W2].

[6] Kate Kelly & David Enrich, *Kavanaugh's Yearbook Page Is "Horrible, Hurtful" to a Woman It Named*, N.Y. TIMES (Sept. 24, 2018), https://nyti.ms/2xwCsKP [https://perma.cc/C4WY-A2WK].

[7] Dara Lind, *Brett Kavanaugh's High School Yearbook Entry, Annotated*, VOX (Oct. 2, 2018, 12:52 PM), https://www.vox.com/2018/9/26/17901368/kavanaugh-yearbook-boof-devil-triangle-renate-beach-week [https://perma.cc/8JEJ-J58U].

[8] Kelly & Enrich, *supra* note 6.

[9] Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (2012).

this regard, schools are not solely sites for educational and civic development; they are places of holistic personal development. And, through the enforcement (or lack thereof) of particular rights relating to sex and sexuality, schools, in tandem with other institutions,[10] help define the scope of sexual citizenship and belonging.

In his important new book, *The Schoolhouse Gate: Public Education, the Supreme Court, and the Battle for the American Mind*, Professor Justin Driver reminds us that private controversies that arise within the confines of public schools are part of a broader historical arc — one that tracks a range of cultural and intellectual flashpoints in U.S. history. Moreover, Driver explains, these tensions are reflected in constitutional law, and indeed in the history and jurisprudence of the Supreme Court. As such, debates that arise in the context of public education are not simply about the conflict between academic freedom, public safety, and student rights. They mirror our persistent struggle to reconcile our interest in fostering a pluralistic society, rooted in the ideal of individual autonomy, with our desire to cultivate a sense of national unity and shared identity (or, put differently, our effort to reconcile our desire to forge common norms of citizenship with our fear of state indoctrination and overencroachment). In this regard, these debates reflect the unique role that both the school and the courts have played in defining and enforcing the boundaries of American citizenship.

Not surprisingly, *The Schoolhouse Gate* is a terrific book — deeply researched and trenchantly observed with the journalistic flair that is typical of Driver's writing. In his capable hands, well-worn constitutional law cases take on new life and color. Not content to simply profile the Court and its rulings, Driver widens the lens to locate at the heart of the story the litigants, their communities, and the real-world conflicts and contexts that ultimately propelled these cases to the nation's highest court. In addition to imbuing the cases with these human elements, Driver also takes care to center the narrative on two institutions that are, in his view, inextricably intertwined: the public school and the Supreme Court.

As Driver frames it, a book that focuses on the interaction between the Supreme Court and public education is not simply overdue, but also deeply urgent if we wish to understand these two institutions that are both crucial to democracy and our understanding of citizenship and belonging. As Driver explains:

> One cannot plausibly claim to understand public education in the United States today . . . without appreciating how the Supreme Court's decisions

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[10] As I have elsewhere written, criminal law and marriage have been important (though not exclusive) sites for marking and enforcing the boundaries of acceptable sex and sexuality, and so for defining the nature of sexual citizenship. *See* Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 53 (2012); Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1266–68 (2009).

> 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. (p. 9)

Public education, from kindergarten to university, is a "distinctively American" phenomenon (p. 7). "[T]he vast majority" of people in the United States spend some portion of their lives being educated under the auspices of the state (p. 9). But it is not simply the "sheer magnitude" of public elementary and secondary education in the United States that justifies attention to them (p. 9); it is the fact that, by virtue of their public administration, public schools are subject to constitutional limits — and the authority of the Supreme Court.

And if public education is distinctively American, then so too is a Supreme Court with the authority to overrule the pronouncements of those elected by the majority (p. 8). As Driver explains, assessing these two institutions in tandem makes clear that "the public school has served as the single most significant site of constitutional interpretation within the nation's history" (p. 9) and underscores the fact that "[i]n no other sphere of constitutional meaning do the Supreme Court's major interventions so closely reflect the nation's larger social concerns" (p. 11). In this regard, the public school, Driver maintains, is more than just the "preeminent site of constitutional interpretation"; it is a crucible of citizenship[11] and a critical "venue for shaping attitudes toward the nation's governing document" (p. 12).

Because it is compulsively readable and sharp in its analysis, one is hard-pressed to find fault with *The Schoolhouse Gate*. Throughout, Driver compellingly — and persuasively — makes the case that the symbiosis between the Court and the public schools can illuminate our understanding of the Constitution and the way in which the rights it confers have expanded and contracted over time. Indeed, because Driver makes such an excellent case for viewing the Court and public schools in tandem, one can more easily intuit the way in which the interplay of these two institutions affects other citizenship values.

Take, for example, issues of sex and sexuality. To be clear, when I say "sex," I do not mean biological sex or gender identity. Rather, when I say "sex," I am referring instead to issues of sex and sexuality, sexual citizenship, and more particularly, questions of sexual *rights*. Although *The Schoolhouse Gate* provides a thorough account of some of the most important issues that the Court and public education have faced over

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[11] Again, the public schools are not the only site for the cultivation of citizenship. As has been argued elsewhere, families and religious institutions are also sites for the cultivation of values that may be critical for citizenship. *See* Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1243–46 (2010).

the last century, questions of sex, sexual citizenship, and sexual rights are not at the forefront. Indeed, these topics are rendered liminal — a sub-theme to the book's broader coverage of free speech, equality, and discipline.

This is unfortunate. If *Fast Times at Ridgemont High* and *Beverly Hills 90210* — or for Generation Z, *Riverdale* and *Pretty Little Liars* — are to be believed, sex, as much as contests over speech, race, or discipline, is part of the fabric of the American public school experience and a frequent catalyst for debates over the scope of students' rights. Should sex education be compulsory? If it is compulsory, what should be the nature and scope of its content? Are parents permitted to opt out on a student's behalf? Should schools distribute condoms or information regarding contraception to students? Can pregnant students — and teachers — remain in public schools? Do teachers' private lives impact their work in the classroom?

Just as questions of sex and sexuality dot the landscape of public education, these questions have punctuated the Supreme Court's docket over the last sixty years. Many of the landmark cases of the last sixty years — *Griswold v. Connecticut*,[12] *Roe v. Wade*,[13] and *Obergefell v. Hodges*[14] are among those that immediately come to mind — involve core questions of sex, sexuality, and whether the state may, through public institutions, impose a kind of sexual conformity on citizens. If Driver is correct that cases related to public education reveal the depth of our relationship as citizens to the Court and the Constitution, it surely follows that cases relating to sex and sexuality within the public school setting would reveal important aspects of the often fraught relationship between citizens and the state in the context of sexual rights. Sex — as much as the issues chronicled in *The Schoolhouse Gate* — has been a core feature of the battle for the American mind and, indeed, for the soul of this country.

As Driver has framed his project, it is perhaps unsurprising that sex does not feature more prominently. Driver takes care to precisely delineate the book's scope. Because his exploration considers the intersection of the Court and the public school, its focus is on the Court's education law jurisprudence (pp. 7, 23). This body of law, for the most part, has been preoccupied with issues like school integration, busing, free speech, and procedural rights — topics that, at first blush, seem quite distant from issues of sexuality and sexual rights, which are often assumed to be confined to the Court's consideration of cases involving marriage, contraception, and reproductive rights.

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[12] 381 U.S. 479 (1965).
[13] 410 U.S. 113 (1973).
[14] 135 S. Ct. 2584 (2015).

As importantly, Driver confines his inquiry to the work of the Supreme Court and cases that involve the rights of students (p. 23). Focusing on the Supreme Court is an obvious and reasonable choice, but it limits the range of cases that might populate Driver's narrative. To my knowledge, the Court has yet to decide a case that focuses squarely on sexual rights in the context of public schools (though lower federal courts have done so on a number of occasions).[15]

The decision to focus on cases involving the rights of students is a more curious choice — one that also narrows the range of cases available for discussion. Obviously, students are a large — indeed, the largest — constituency in public schools. But expanding the frame to include the other denizens of the public school milieu — teachers, administrators, and other staff — would provide another lens through which to assess the "battle for the American mind" — one that would clearly surface issues of sex and sexual rights.

While these authorial choices help explain why sex is not foregrounded in Driver's narrative, sex's liminality nevertheless casts a shadow. Even if the Supreme Court has never squarely confronted the question of sexual rights in the public school context, these questions clearly lurk at the periphery — in the dockets of lower federal courts and state courts and in other cases, including cases that consider the rights of teachers and administrators. If Driver is correct that "the cultural anxieties that pervade the larger society often flash where law and education converge" (p. 10), what has prompted more flashpoints in American society over the last century than questions of sex and sexuality?

In the same vein, the focus on the Court and past cases is necessarily retrospective. In thinking about citizenship and rights through the lens of the past, we may fail to appreciate how these issues unfold in the present and future. Further, we may overlook the other institutions that work in tandem with, and perhaps in opposition to, the Court to produce a more dynamic understanding of citizenship and rights — one that is not confined to the rights conferred by the Constitution and constitutional law.

With this in mind, this Book Review takes up Driver's call to consider the interplay between the Supreme Court's jurisprudence and the public school in negotiating the relationship between citizens, the Court, and the Constitution. However, instead of consigning sex to the margins of the narrative, this Review puts it front and center. To do so, the Review widens the lens to consider cases involving teachers and staff,

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[15] *See infra* Part II, pp. 1456–84. The arbitrariness of the distinction is evident in Driver's brief discussion of restroom access for transgender students (pp. 343–49). Because the Supreme Court ultimately declined to decide the issue, *see* Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, 137 S. Ct. 1239 (2017) (mem.), Driver's discussion is effectively limited to the controversy as it played out in the lower courts — but the issue is no less important, or any less a model of constitutional contestation in the schools, for it.

as well as lower court cases that were not selected for Supreme Court review. As the Review argues, including coverage of sex and sexuality bolsters many of Driver's principal arguments. But this Review also considers what additional insights might flow from foregrounding sex and sexual rights. If the public school is a crucible of citizenship, and an essential site for citizens to develop and nurture a relationship to the Constitution as rights-bearers, the subordination of sex in the narrative is a telling choice — one that makes clear the contingent status of sexual rights in the universe of constitutional entitlements, as well as the Court's fraught relationship with questions of sex and sexuality. On this account, expanding the narrative to consider sex and sexual rights would underscore that the conflict at the heart of the American experience is not simply a battle for the American mind but rather a battle for the minds, hearts, and *bodies* of all citizens.

This Review proceeds in three Parts. Part I rehearses the book's central premise and core arguments. Part II expands the narrative to consider issues of sexual rights — of students and adults — in the context of the public school setting. Part III considers the implications of consigning sex to the sidelines of the story of the Court and the public school.

I. THE SCHOOLHOUSE GATE

For a book that discusses sex only sparingly, *The Schoolhouse Gate* opens — surprisingly — with a wedding: the 1940 nuptials of Katharine Meyer and Philip Graham (p. 3). Although the wedding took place well before Katharine Graham would assume her role as an owner of the *Washington Post* and a doyenne of Washington, D.C., society,[16] it already had the trappings of a society event — a stately setting, considerable wealth, and a collection of the great and the good, including Justice Felix Frankfurter, who had been the groom's law school mentor (p. 3).

Unfortunately, however, the wedding coincided with the Court's decision in *Minersville School District v. Gobitis*,[17] which upheld a Pennsylvania school district's expulsion of a ten-year-old student and his sister because the children, as practicing Jehovah's Witnesses, refused to pledge allegiance to the flag.[18] Whatever discomfort Justice Frankfurter may have felt at the prospect of the school board mandating this display of patriotism and national unity, ultimately, he deferred to the school administration's decision.[19] "The wisdom of training children

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[16] *See* Evan Thomas, *An American Original*, NEWSWEEK (July 29, 2001, 8:00 PM), https://www.newsweek.com/american-original-155159 [https://perma.cc/ 8YNM-LQXR].

[17] 310 U.S. 586 (1940), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[18] *Id.* at 591, 598.

[19] *See id.* at 598–600.

in patriotic impulses by . . . compulsions which necessarily pervade so much of the educational process is not for our independent judgment," Justice Frankfurter reasoned.[20] Indeed, to subject the decisions of school administrators to judicial review would, in Justice Frankfurter's view, exceed the Court's constitutional role, transforming it into "the school board for the country."[21] Many wedding guests were appalled by the decision, and told Justice Frankfurter so, prompting a debate so lengthy and impassioned that it delayed the start of the ceremony (p. 4).

Perhaps Justice Frankfurter should not have been surprised by the reception the opinion engendered. *Gobitis* presented the familiar tension between individual rights — here, the First Amendment rights of Jehovah's Witness students — and the academic freedom of school officials charged with administering an academic program that at once sought to inculcate common values of citizenship while also respecting the differences inherent among those living in a diverse and pluralistic society. Although the decision upholding the children's expulsion was heralded as a win for patriotism and local authority in many parts of the country, for the wedding guests, and the national media, Justice Frankfurter's opinion struck a discordant note (pp. 4, 7). As an initial matter, the opinion's deference to the school board's interest in fostering "national unity" veered dangerously close to totalitarianism in its emphasis on state-sponsored intellectual and cultural homogenization. Justice Frankfurter's view that such decisions would render the Supreme Court akin to a national school board did little to allay these concerns of an aggrandizement of state power and struck many as impermissibly dismissive of the Court's role in securing and protecting religious minorities from the tyranny of the majority (p. 7).

If *Gobitis* represented the Court's skepticism of students' rights in the context of public education, and its extreme deference to local school officials, then it was blessedly short-lived. Three years later, in *West Virginia State Board of Education v. Barnette*,[22] the Court would do an abrupt about-face, overruling *Gobitis* and concluding that it was unconstitutional to expel students who refused to salute the American flag.[23] In doing so, the Court spoke forcefully of limits on state power and identified individual rights as a bulwark against the state's totalitarian impulses:

> Government of limited power need not be anemic government. Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support. . . . To enforce those rights today is not to choose weak government

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[20] *Id.* at 598.
[21] *Id.*
[22] 319 U.S. 624.
[23] *Id.* at 642.

> over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.[24]

In its early cases in this area, the Court began to evince "an increased willingness . . . to interpret the Constitution in a manner that prevented states and educators from exercising unfettered authority over schools and students" (p. 30). Later, in 1954's *Brown v. Board of Education*,[25] the Court famously began the process of dismantling *de jure* segregation by demanding the integration of public schools.[26] Critically, the Court acknowledged the importance of both student rights and the public school setting as a crucible of citizenship.[27] In *Tinker v. Des Moines Independent Community School District*,[28] decided in 1969, the Court went further, upholding the free speech rights of students who were protesting the Vietnam War by wearing black armbands to school.[29] In recognizing that "students are entitled to freedom of expression of their views,"[30] the Court also issued strong words about the value of dissenting voices — even student voices — in a healthy democracy. Citing *Meyer v. Nebraska*,[31] where the Court earlier had invalidated a prohibition on foreign language instruction on the ground that it unconstitutionally violated the fundamental rights of parents and teachers in its attempt to "foster a homogeneous people,"[32] the *Tinker* Court made clear that public schools could not function as "enclaves of totalitarianism," where students were "regarded as closed-circuit recipients of only that which the State chooses to communicate."[33]

As Driver notes, in *Tinker*, *Brown*, and *Barnette*, the Court waded into some of the most controversial issues of the day — segregation and the Vietnam War among them — to make clear that, even within the domain of the schoolhouse, the state's authority was not unfettered (pp. 16–17). As the Court noted in *Tinker*, "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[34]

But if *Tinker* is regarded as a high-water mark in the Court's understanding of students' free speech rights, "the water from that . . . opinion should have crested much higher still" (p. 91). Even as it recognized the

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[24] *Id.* at 636–37.
[25] 347 U.S. 483 (1954).
[26] *See id.* at 495.
[27] *See id.* at 493–94.
[28] 393 U.S. 503 (1969).
[29] *Id.* at 514.
[30] *Id.* at 511.
[31] 262 U.S. 390 (1923).
[32] *Id.* at 402; *see id.* at 402–03.
[33] *Tinker*, 393 U.S. at 511; *see id.* at 511–12 (quoting *Meyer*, 262 U.S. at 402).
[34] *Id.* at 506.

students' right to wear black armbands in protest of the Vietnam War, the *Tinker* Court's opinion introduced "major frailties" (p. 84) into the jurisprudence concerning student speech. As an initial matter, the Court's majority opinion downplayed the potential for student speech to "inflame [other] students . . . creat[ing] a volatile situation in school" (pp. 84–85). As Driver notes, there were a number of vocal supporters of the war effort in the school and in the wider Des Moines community (pp. 84–86).[35] Not only did Justice Abe Fortas's majority opinion ignore the complex political and social dynamics within the high school and community (p. 86), but it also created a test — the reasonable-forecast-of-substantial-disruption test, used to gauge when a school administration was authorized to restrict student speech[36] — that offered only limited protection for student speech. Under the *Tinker* Court's formulation, dissenting voices would be free to deploy a heckler's veto to silence speech to which they objected (p. 88). As Driver notes, more robust protections for student speech would have flowed from a different test — like the actual disruption test that the Fifth Circuit deployed in a contemporaneous case (p. 91).

Tinker's "frailties" help explain, to some extent, why the Court's solicitude for the exercise of constitutional rights in the context of public education was regrettably short-lived. In *Tinker*'s wake, the Court "subsequently handed pupils a series of First Amendment defeats" (p. 91). Indeed, the pro-student-speech sentiments expressed in opinions like *Tinker* and *Barnette* are now more likely to be expressed by the Court's dissenters.

As Driver documents, in a series of decisions, from *Bethel School District No. 403 v. Fraser*[37] to *Morse v. Frederick*[38] (the famed "BONG HiTS 4 JESUS" case), the Court articulated a more limited vision of the First Amendment's protections for student speech — one that lower courts have adopted, with troubling implications.[39]

And while the First Amendment provides perhaps the most fruitful vein of student rights protections, Driver makes clear that the Court has interpreted other constitutional protections in a similarly limited way in

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[35] As Driver recounts, the Tinker family home was a "steady target[] for anonymous hatred," including death threats against its occupants and red paint splattered on the front door, "the apparent message being that only a communist would oppose the Vietnam War" (p. 86).

[36] *See Tinker*, 393 U.S. at 514.

[37] 478 U.S. 675 (1986).

[38] 551 U.S. 393 (2007).

[39] As Driver explains, "lower courts have interpreted [*Frederick*'s] reasoning to encompass student speech that has nothing to do with drugs" (p. 121), such as speech a school censors for fear of its "psychological effects" or of it resulting in "an upsurge in truancy" (p. 122).

recent years.[40] *New Jersey v. T.L.O.*[41] is instructive on this point. There, the Court took up a Fourth Amendment challenge that arose in the context of a school's search of a student's purse.[42] The young woman and a companion were discovered smoking cigarettes in a school lavatory, in violation of school rules.[43] When the school's assistant vice principal searched the student's purse, he found not only cigarettes (the student had denied smoking) but also a small amount of marijuana, rolling papers, a pipe, empty plastic bags, a large amount of money in $1 bills, an index card that appeared to list students who owed T.L.O. money, and two letters that implicated the student in dealing marijuana.[44] The student was suspended and eventually charged in juvenile court for possession of marijuana with intent to distribute (p. 188).

In upholding the search, the Court made clear that while the Fourth Amendment provided students with some constitutional protections against unreasonable search and seizure,[45] school administrators had broad discretion to conduct searches for evidence of unlawful behavior (or even violations of school rules).[46] Indeed, the Court held that school administrators need not satisfy the probable cause standard that typically applied in the context of a government search and seizure. Instead of probable cause, administrators were obliged to meet a less demanding standard — reasonable suspicion — which required only that the search be "justified at its inception"[47] and "reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[48] As Justice John Paul Stevens warned, the new reduced standard was so broad and deferential to administrators that it risked making the Fourth Amendment "virtually meaningless in the school context."[49]

As Driver explains, *Frederick* and *T.L.O.* reflected a shift in the Court's efforts to balance the competing interests of students and administrators — a shift in which the needs of administrators frequently outweighed the constitutional rights of students (pp. 120–21, 194–96). More importantly, the impact of this jurisprudential shift was as conceptual as it was doctrinal. As Justice Stevens explained, "[s]chools are

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[40] To this end, Driver canvasses a broad array of topics, from school funding and religion to due process rights and corporal punishment — all of which, to varying degrees, evince the Court's increasingly crabbed understanding of student rights.

[41] 469 U.S. 325 (1985).

[42] *Id.* at 328–29.

[43] *Id.* at 328.

[44] *Id.*

[45] *Id.* at 341.

[46] *Id.* at 339–40.

[47] *Id.* at 341 (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)).

[48] *Id.* at 342.

[49] *Id.* at 385 (Stevens, J., concurring in part and dissenting in part).

places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry."[50] Moreover, because school was often the first place where citizens "experience the power of government,"[51] "[t]he values they learn there, they take with them in life."[52] On this account, if students could not expect to receive the Constitution's protections against the excesses of the state in school, how could they expect to appreciate its protections and the value of limited state power as adults? In Justice Stevens's view, the decision in *T.L.O.* posed "a curious moral for the Nation's youth."[53] The impact on the nation's youth — and their appreciation for constitutional values and rights — is, in Driver's view, the most damning consequence of the Court's jurisprudential shift (pp. 12–13).

Driver is rightly concerned. But if the Court's education jurisprudence has left the next generation with an impoverished understanding of the Constitution and its values — and of their constitutional rights — then these fears are even more pronounced in the context of sex and sexual rights. In the following Part, I elaborate on this claim. As I explain, *The Schoolhouse Gate* attends to questions of sex only peripherally, a fact that likely reflects the Court's crabbed understanding of constitutional sex rights for students — and everyone else.

Critically, the Court's limited vision of constitutional protections for sex and sexuality, in and outside of schools, leads to many of the same problems that Driver attributes to the Court's diminished understanding of student rights more generally. With this in mind, the following Part seeks to augment Driver's account by foregrounding sex, rather than relegating it to the margins. To do so, it focuses on cases in which the Court, as well as lower courts, considered constitutional sexual rights in the context of public schooling. Part III goes on to argue that the limited account of sexual rights in the school context reflects the precarious nature of these rights in the constitutional landscape writ large. As I explain, the failure to account for these rights has meaningful costs — for students, teachers, and the public at large.

II. SEXING THE SCHOOLHOUSE

The Schoolhouse Gate will be remembered for its detailed and nuanced treatment of the interaction between the Court and the public schools. Nevertheless, despite the book's many virtues, discussion of sex and sexuality is subaltern to *The Schoolhouse Gate*'s in-depth treatment of other constitutional values, such as free speech. Indeed, the most

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[50] *Id.* at 373.
[51] *Id.* at 385.
[52] *Id.* at 386.
[53] *Id.*

sustained engagement of sex and sexuality arises in Driver's discussions of *Bethel School District No. 403 v. Fraser*, *Brown v. Board of Education*, and corporal punishment.[54] *Fraser* involved a high school student's speech endorsing a friend's campaign for student government vice president. Before an assembly that included students and teachers, Matthew Fraser lauded Jeff Kuhlman as a firm "man who will go to the very end, even the climax, for each and every one of you" (p. 92). The school administrators were not amused; they suspended Fraser for three days and struck his name from the ballot for graduation speakers (p. 92). Though the case involved "sexually explicit" speech (p. 95), it did not involve any claim of sexual rights. Accordingly, the Court's opinion upholding the suspension focused on whether the speech was subject to First Amendment protections (it was not) (pp. 93–95).

Driver's discussion of *Fraser* flows from his assessment of the Court's post-*Tinker* jurisprudence. In this regard, it is perhaps unsurprising that the Court — and Driver — emphasized *Fraser*'s implications for student speech rights, rather than its relationship to questions of sex and sexuality. But another post-*Tinker* case more obviously implicated questions of sex and sexuality. In *Fricke v. Lynch*,[55] high school senior Aaron Fricke challenged his school administration's refusal to allow him to attend his senior prom with a male date.[56] As the school's principal testified, the decision was animated by concerns about violence and Fricke's own safety (upon filing the lawsuit, he had been targeted for attack by disgruntled students).[57]

Driver presents *Fricke* as a relatively bright spot in the bleak post-*Tinker* landscape (pp. 124–26). That is, even as the Court seemed to narrow protections for student speech post-*Tinker*, the Rhode Island federal district court invalidated the school's actions on the ground that the school granted objecting students a "heckler's veto" to decide what speech would be heard through "prohibited and violent methods."[58] In so doing, the school's actions impermissibly infringed upon Fricke's First Amendment rights.[59]

If *Fricke* is a surprising turn in what is otherwise a bleak landscape for student speech rights, what is perhaps more surprising is the fact

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[54] To be clear, I do not claim that Driver is completely inattentive to sex in his discussion. Indeed, the book touches on themes and issues that are germane to questions of sex and sexuality, including dress codes (p. 132 n.*), sexual orientation–based student groups (p. 399 n.†), sexual harassment (p. 134 n.*), sexually explicit speech (p. 121), sexually explicit books (p. 114 n.*), and antigay speech (pp. 127–28). Tellingly, most of the discussion of these cases, and their attendant issues, is oriented around the First Amendment and free speech.

[55] 491 F. Supp. 381 (D.R.I. 1980).

[56] *Id.* at 383–84.

[57] *Id.*

[58] *Id.* at 387.

[59] *Id.*

that Driver's discussion of the case is framed in terms of free speech and as part of *Tinker*'s legacy, rather than as a case about the sexual rights of students. The framing is especially regrettable when one considers that Fricke explicitly presented his claims in terms that gestured toward sexual rights. In his testimony before the federal district court, Fricke testified that he wished to attend the prom with the companion of his choice because he "ha[d] a right to attend and participate just like all the other students and that it would be dishonest to his own sexual identity to take a girl to the dance."[60] He conceded that his attendance with a male companion would take on a certain political valence — it "would be a statement for equal rights and human rights."[61] While Driver mentions this aspect of the case, he does so in the endnotes (p. 460 n.160). Driver's textual discussion of *Fricke* focuses instead on free speech and *Tinker*'s legacy (p. 126).

In this regard, Driver's authorial decisions reflect the district court's prioritization of Fricke's claims. As the district court reported in a footnote, Fricke's case could also have been analyzed as an equal protection claim, since the school's policy "afforded disparate treatment to a certain class of students — those wishing to attend the reception with companions of the same sex."[62] Critically, the court's decision to resolve the case on First Amendment, rather than equal protection, grounds reflected practical considerations. Because "[c]ounsel ha[d] conceded that homosexuals are not a suspect class sufficient to trigger a higher standard of scrutiny," the court instead focused on the "significant first amendment component to Aaron's desire to attend the reception with another male" because "[w]here, as here, government classification impinges on a first amendment right, the government is held to a higher level of scrutiny."[63] The district court's explanation contextualizes its prioritization of Fricke's claims — and Driver's authorial choices. Still, greater textual attention to *Fricke*'s implications for sexual rights would have surfaced these strategic considerations, while also illuminating the reasons why so many of the cases concerning sexuality and sexual identity in the public school context likewise were resolved on First Amendment grounds.[64]

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[60] *Id.* at 385.

[61] *Id.*

[62] *Id.* at 388 n.6.

[63] *Id.*

[64] In this regard, *Fricke* is consistent with more recent cases in which federal courts have issued opinions crediting students' First Amendment rights to promote gay equality by wearing paraphernalia that read "Gay? Fine by Me," "I Support Gays," and "Pro–Gay Marriage." *See* Gillman v. Sch. Bd., 567 F. Supp. 2d 1359, 1362 (N.D. Fla. 2008). Driver also notes these cases (p. 125). However, in keeping with the courts' focus on these cases as vindicating speech, rather than rights relating to sex and sexuality, his discussion focuses on these cases as part of the canon of student speech rights.

Driver's discussion of *Hazelwood School District v. Kuhlmeier*[65] also sidelines that case's implications for sex and sexuality and sexual rights. In *Hazelwood*, students at Hazelwood East High School in St. Louis, Missouri, wrote and edited the school paper, *Spectrum*, as part of a journalism class.[66] The students wished to publish an issue that would include articles about teen pregnancy and the impact of divorce on students.[67] Concerned that the proposed content was too sensitive for younger students and contained too many personal details, the school's principal refused to publish the proposed stories.[68] The students filed suit, claiming that the principal's decision violated their First Amendment rights.[69] In a 5–3 decision, the Supreme Court upheld the principal's decision, determining that school administrators could exercise restraint of school-sponsored expression, such as curriculum-based student newspapers and assembly speeches, if the censorship is "reasonably related to legitimate pedagogical concerns."[70] In so doing, *Hazelwood* distinguished *Tinker* on the ground that "[t]he question whether the First Amendment requires a school to tolerate particular student speech — the question that [the Court] addressed in *Tinker* — is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech."[71] While *Tinker* considered educators' ability to silence student speech that occurred on school grounds, *Hazelwood* concerned "educators' authority over school-sponsored publications, theatrical productions, and other expressive activities" that might reasonably be perceived as bearing "the imprimatur of the school."[72]

Driver's coverage of *Hazelwood* focuses on the decision's relationship to *Tinker* — that is, *Hazelwood* is presented as part of the Court's retrenchment from a more expansive understanding of student speech rights (pp. 102–15). But even as *Hazelwood* solidified the Court's post-*Tinker* retreat on the question of student speech, it proved remarkably effective at advancing sexual rights. In *Morrison v. Board of Education*,[73] parents challenged school policies concerning mandatory schoolwide training sessions for middle and high school students aimed at reducing antigay harassment.[74] In rejecting the parents' claims, the

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[65] 484 U.S. 260 (1988).
[66] *Id.* at 262.
[67] *Id.* at 263.
[68] *Id.* at 263–64.
[69] *Id.* at 264.
[70] *Id.* at 273; *see id.* at 266–70.
[71] *Id.* at 270–71.
[72] *Id.* at 271.
[73] 419 F. Supp. 2d 937 (E.D. Ky. 2006), *aff'd on other grounds*, 521 F.3d 602 (6th Cir. 2008).
[74] *Id.* at 939–40.

federal district court relied on *Hazelwood*[75] to conclude that the parents "do not have the right to impede the [School] Board's reasonable pedagogical prerogative, nor do they have the right to opt-out [sic] of the same."[76]

Morrison's deference to the "reasonable pedagogical prerogative[s]" of school administrators has helped insulate diversity training and antiharassment programs aimed at promoting greater respect and acceptance of those within the school community. These measures, in tandem with the Equal Access Act,[77] which has facilitated the creation and support of gay-straight alliances on campuses, have done much to improve the quality of life of LGBTQ students within schools.[78] In this way, even as *Hazelwood* further diminished protections for student speech, it, perhaps surprisingly, laid a foundation for schools to function as a place — in some cases, the only place — where LGBTQ youth can openly express their sexual orientation and identity. The focus on *Tinker*, speech, and religion overshadows these aspects of *Hazelwood* and the Equal Access Act. Although Driver discusses gay-straight alliances, this discussion is literally consigned to the margins — in the book's footnotes (p. 399 n.†).

Driver's treatment of *Brown v. Board of Education* suggests how greater attention to questions of sex and sexual rights might sharpen the narrative and amplify the book's central themes. *Brown*'s relationship to questions of sex and sexuality is perhaps less obvious than *Fricke*'s. Nevertheless, Driver does an admirable job of bringing sex and sexual rights to the foreground of this landmark equality case. The questions presented to the Court in *Brown* focused squarely on whether segregation in public schools violated the Fourteenth Amendment's guarantee of equal protection of the laws.[79] For Southerners, the question of integrated classrooms was inextricably linked to the much-feared prospect of integrated bedrooms. To this end, Driver recounts a stunning vignette that took place at the Eisenhower White House in the spring of 1954, as the Court was considering *Brown* and a group of related cases (pp. 258–60). The dinner party guest list was intimate, and included Chief Justice Earl Warren and, more surprisingly, John W. Davis, who had represented South Carolina in one of the cases that had been consolidated

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[75] *See id.* at 942.

[76] *Id.* at 946.

[77] Driver discusses at length the Equal Access Act and its origins as an effort to protect religious groups (pp. 395–99). Although he does note that, "[i]n addition to religious groups, the major extracurricular groups that have benefited from the Equal Access Act are those based on sexual orientation," this mention of the Act's relationship to the sexual rights of LGBTQ students appears in a footnote (p. 399 n.†).

[78] *See* N. Eugene Walls et al., *Gay-Straight Alliances and School Experiences of Sexual Minority Youth*, 41 YOUTH & SOC'Y 307, 323–25 (2010) (showing that "the overall picture that is emerging suggests that [gay-straight alliances] have the potential to make a positive impact on the educational experiences of sexual minority youth," *id.* at 311).

[79] Brown v. Bd. of Educ., 347 U.S. 483, 488 (1954).

with *Brown*. Not only had President Eisenhower seated Chief Justice Warren and Davis in close proximity to one another, but the President also "sang Davis's praises at length to Warren" (p. 259). And as the party withdrew to a different room for coffee, President Eisenhower corralled Chief Justice Warren to explain that white Southerners were "not bad people" (p. 259). Rather, their objections to, and antipathy for, integration stemmed from their concern that "their sweet little girls" would be "required to sit in school alongside some big black bucks" (p. 259). As South Carolina Governor Jimmy Byrnes explained to *U.S. News and World Report*, integration would "break down social barriers in childhood and the period of adolescence, and ultimately bring about the intermarriage of the races" (p. 260).

Driver is not the first to note *Brown*'s sexual subtext.[80] But his attention to this aspect of the case makes clear the extent to which questions of race and racial equality were inextricably intertwined with questions of sex and sexual liberty, framing the Court's consideration of the case and catalyzing Southern resistance to the landmark decision. Indeed, one could argue that foregrounding sex and sexual rights throughout the book would have surfaced interesting connections between Driver's case studies. For example, Driver's treatment of *Vorchheimer v. School District*[81] and single-sex public schools (pp. 330–43) would have been richer still if he had incorporated his insights on sex and *Brown* into the discussion. As Professor Serena Mayeri has documented, concerns about interracial marriage, and the desire to keep white girls and black boys separated, provided Southerners with a potent justification for maintaining and expanding single-sex public schools in *Brown*'s wake.[82] While Driver adverts to this history, it is in a footnote (p. 336 n.*) — again, at the margins of the main text.

As in *Brown*, where questions of sex roiled just beneath the surface, Driver's account of the Court's encounters with corporal punishment also suggests the degree to which issues of sex and sexuality may lurk at the heart of questions that, on their face, seem devoid of such content. As Driver explains, "[i]f corporal punishment's connection to race receives abundant attention, one of the most underutilized objections to

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[80] *See, e.g.*, Jill Elaine Hasday, *The Principle and Practice of Women's "Full Citizenship": A Case Study of Sex-Segregated Public Education*, 101 MICH. L. REV. 755, 788–89, 789 n.141 (2002) (outlining "white America's obsessive fears about interracial sex and marriage," *id.* at 789, after *Brown*); Randall Kennedy, *Interracial Intimacies: Sex, Marriage, Identity, Adoption*, 17 HARV. BLACKLETTER L.J. 57, 75 (2001) (discussing segregationist and "anti-miscegenation demagoguery" both pre- and post-*Brown*); Serena Mayeri, *The Strange Career of Jane Crow: Sex Segregation and the Transformation of Anti-Discrimination Discourse*, 18 YALE J.L. & HUMAN. 187, 189 (2006) (discussing the way in which concerns about racial "amalgamation" and "mongrelization" dogged desegregation efforts).

[81] 400 F. Supp. 326 (E.D. Pa. 1975), *rev'd*, 532 F.2d 880 (3d Cir. 1976).

[82] Mayeri, *supra* note 80, at 191–92.

corporal punishment stems from the practice's relationship to sex" (p. 177). Specifically, Driver highlights the fact that male educators and administrators often administer corporal punishment to female students "in manners that seem highly objectionable" (p. 177) — and indeed, sexualized — to most observers. The facts of *Serafin v. School of Excellence in Education*,[83] in which the Court denied certiorari, bear this out. There, 18-year-old high school senior Jessica Serafin was forced "to bend over a chair with her buttocks raised" in order to be paddled by her school principal, a man in his early thirties (p. 178). The paddling — bestowed with a four-foot-long wooden paddle nicknamed "Ole Thunder" — was punishment for the relatively minor offense of walking across the street to purchase a breakfast taco, in violation of the school's closed campus policy (p. 178).[84]

This brief discussion of corporal punishment is one of the few places where the question of student and teacher sexuality is broached. Meaningfully, the book's interest in the sexual undertones of corporal punishment immediately yields to a broader discussion of the Eighth Amendment concerns that the practice engenders (pp. 168–71, 178–84). But questions of sexual rights, of both teachers and students, dot the landscape of education law — if one looks beyond Supreme Court decisions related to student rights. In the sections that follow, I focus on a series of cases that squarely confront the sexual rights of teachers and students. Although one of these cases percolated up to the Court, most of them did not. And indeed, the fact that they did not reach the Court is a fact as much worthy of discussion as the circumstances of the cases themselves. As I maintain, these cases make clear the degree to which sexual rights have been part of the constitutional landscape of public schools — and their omission from an account of the Court's education law jurisprudence points to deeper questions about the status of sexual rights in our constitutional order.

A. The Sexual Rights of Teachers

The secret (sexual) lives of teachers have always been a subject of popular interest — *Glee*'s Will Schuester,[85] Miss Jean Brodie,[86] and Van Halen's *Hot for Teacher*[87] all come to mind — if for no other reason than we expect that at some point, the personal will inevitably bleed into the professional. Unsurprisingly, concerns that teachers' private conduct will have implications for their performance in the classroom

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[83] 252 F. App'x 684 (5th Cir. 2007), *cert. denied*, 554 U.S. 922 (2008).

[84] *See also id.* at 685.

[85] *See, e.g.*, *Glee: Ballad* (Fox television broadcast Nov. 18, 2009).

[86] *See* MURIEL SPARK, THE PRIME OF MISS JEAN BRODIE (1961).

[87] *See* VAN HALEN, *Hot for Teacher*, *on* 1984 (Warner Bros. Records 1984).

have been at the heart of litigation concerning the sexual rights of teachers. Consider *Cleveland Board of Education v. LaFleur*.[88] There, a group of junior high school teachers challenged the constitutionality of maternity leave policies that required all pregnant teachers to take unpaid maternity leaves of employment four to five months before giving birth.[89] The Court struck down the policies as an impermissible imposition on plaintiffs' due process rights, concluding that the policies amounted to an impermissible presumption that teachers who reach a certain month in their pregnancies are in every situation incapable of continuing in their employment.[90] As importantly, the Court held the prescribed cutoff dates for leaving and returning to employment were needlessly arbitrary and bore no rational relationship to the state's purported interest in preserving continuity of instruction for students, because in any case, teachers would be required to provide advance notice of their leave.[91]

LaFleur is often described as an employment discrimination or pregnancy discrimination case.[92] But it was also a case about sex and sexuality, and specifically the sexual and reproductive rights of teachers. Although the school board rationalized the leave policies as necessary to ensure continuity of instruction, the timing of the required departure from the classroom was telling. In both the challenged Ohio and Virginia policies, teachers were required to depart the classroom at precisely the time when their pregnancies would become visible to students.[93] In this regard, the Ohio and Virginia policies were not anomalous. For decades, pregnant school teachers had been shooed out of the classroom when they began "to show," for fear that their visible pregnancies would prompt uncomfortable student inquiries about sex.[94] As

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[88] 414 U.S. 632 (1974).

[89] *Id.* at 634–38.

[90] *Id.* at 643–46.

[91] *Id.* at 640–43.

[92] *See, e.g.*, Kim Shayo Buchanan, *The Sex Discount*, 57 UCLA L. REV. 1149, 1161–62, 1162 n.89 (2010) (citing *LaFleur* as an example of the Supreme Court's condemnation of "employment practices that penalize women workers for becoming mothers," *id.* at 1162); Joanna L. Grossman & Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act's Capacity-Based Model*, 21 YALE J.L. & FEMINISM 15, 23 (2009) (observing that *LaFleur* helped "usher[] in the modern era of pregnancy discrimination law"); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 268 (1992) (noting that *LaFleur* presented the Supreme Court with a "classic instance[] of pregnancy discrimination in employment").

[93] *See LaFleur*, 414 U.S. at 641 n.9.

[94] Deborah Dinner, *Recovering the* LaFleur *Doctrine*, 22 YALE J.L. & FEMINISM 343, 352 (2010) (discussing the pervasiveness of mandatory leave policies in public schooling); Linda Greenhouse, Marvin Anderson Lecture, *Harry Blackmun: Independence and Path Dependence*, 56 HASTINGS L.J. 1235, 1242 (2005) ("Mandatory (and unpaid) maternity leaves were extremely common, especially in public school systems, where teachers were expected to leave the classroom before their pregnancy would become visible to students.").

importantly, the visibility of the teacher's pregnancy would also make obvious to students the teacher's own sexual activity, perhaps compromising her status as a model of female virtue for students.

Concerns about the moral and professional dimensions of adult sexuality have also shadowed school policies concerning unmarried teachers. In *Andrews v. Drew Municipal Separate School District*,[95] two teacher's aides, who were also unwed mothers, challenged the Drew Municipal Separate School District's unmarried parent policy, which automatically disqualified unwed parents from employment in the school system.[96] According to the superintendent who enacted the policy, "school personnel should be charged with the responsibility for the moral as well as the intellectual development of the enrolled students."[97] The fact that a teacher or administrator had a child outside of marriage was, under all circumstances, "conclusive proof of . . . immorality or bad moral character," and as such, was "a proper basis for precluding the employment of such persons in an educational environment" that primarily served "minority disadvantaged children."[98] The administration further opined that "the employment of a parent of an illegitimate child for instructional purposes materially contributes to the problem of schoolgirl pregnancies."[99]

Meaningfully, *Andrews* arose in the charged political climate of post-*Brown* Mississippi, where unmarried black mothers were routinely decried as morally lax welfare scourges eager to bear children for the purpose of increasing public assistance benefits.[100] To diffuse these views, and to underscore the unmarried parent policy's disparate impact on black women, famed civil rights leaders Fannie Lou Hamer and Kenneth Clark testified on behalf of plaintiffs Lestine Rogers and Katie Mae Andrews, black women who were denied positions as teacher's aides because they were unmarried mothers.[101] Clark's testimony underscored that sexual morality "did not differ appreciably along racial

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[95] 371 F. Supp. 27 (N.D. Miss. 1973), *aff'd*, 507 F.2d 611 (5th Cir.), *cert. granted*, 423 U.S. 820 (1975), *cert. dismissed as improvidently granted*, 425 U.S. 559 (1976) (per curiam).

[96] *See id.* at 28–30.

[97] *Id.* at 30; *see id.* at 29–30.

[98] *Id.* at 30.

[99] *Id.*

[100] *See* Catherine R. Albiston & Laura Beth Nielsen, *Welfare Queens and Other Fairy Tales: Welfare Reforms and Unconstitutional Reproductive Controls*, 38 HOW. L.J. 473, 486 (1995) ("The term 'welfare mother' brings to mind several key characteristics, all of which connect to stereotypes of women of color. First, a 'welfare mother' is presumed to be black. Second, she is by definition poor. Third, she is presumed to be single and under the age of eighteen. Finally, she is commonly portrayed as the mother of several children, all of whom were conceived out of wedlock because of the availability of generous welfare benefits.").

[101] Serena Mayeri, *Intersectionality and the Constitution of Family Status*, 32 CONST. COMMENT. 377, 389–92 (2017).

lines," as blacks and whites alike routinely defied prohibitions on nonmarital sex.[102] The difference, he countered, was that poor blacks "lacked access to contraception and to information about preventing pregnancy" — and were more likely to be penalized for their lapses than whites.[103] Hamer concurred while also noting the hypocrisy of the state's position. As she put it, the state could not bemoan the number of black women in receipt of public assistance while also depriving those who sought regular employment of the opportunity to support their children through paid work.[104]

And while Rogers and Andrews tried to comport with the norms of respectability politics, presenting themselves as "churchgoing Sunday school teachers who had become parents because of ignorance or inability to access birth control,"[105] other plaintiffs were unapologetic in asserting their rights to sexual and reproductive freedom. One plaintiff, teacher's aide applicant Violet Burnett, steadfastly refused to model abstinence or denounce premarital sex. Indeed, when asked how she would advise students about sex, Burnett said that she saw no harm in premarital sex and would advise students to do as they wished.[106]

While *Andrews* squarely confronted the tension between administrative policy and the sexual rights of teachers, unlike *LaFleur*, the case was not decided by the Supreme Court. The plaintiffs prevailed with the district court, which concluded that the unmarried parent policy constituted "invidious discrimination" in violation of the plaintiffs' equal protection rights.[107] On appeal, the Fifth Circuit affirmed, finding that the policy constituted both a due process and an equal protection violation.[108] But while the Supreme Court initially granted certiorari,[109] it later dismissed the case on the ground that certioriari had been improvidently granted.[110]

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[102] *Id.* at 391.

[103] *Id.*

[104] *See* Brief of Respondents at 23–25, Drew Mun. Separate Sch. Dist. v. Andrews, 425 U.S. 559 (1976) (No. 74-1318), 1976 WL 181168, at *23–25.

[105] Mayeri, *supra* note 101, at 392.

[106] *Id.*

[107] Andrews v. Drew Mun. Separate Sch. Dist., 371 F. Supp. 27, 34 (D. Conn. 1973), *aff'd*, 507 F.2d 611, 612–14 (5th Cir.), *cert. granted*, 423 U.S. 820 (1975), *cert. dismissed as improvidently granted*, 425 U.S. 559 (1976) (per curiam).

[108] *Andrews*, 507 F.2d at 612–14.

[109] *Andrews*, 423 U.S. 820.

[110] *Andrews*, 425 U.S. 559. As Mayeri explains, the Justices initially granted certiorari to resolve the "close" question of whether or not the school district's policy of refusing to hire unwed mothers had a constitutionally sufficient rational basis. SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION 162 (2011). Upon further reflection, however, some Justices expressed great reluctance to "wade into the murky waters" of the intersecting and unsettled constitutional questions that *Andrews* presented. *Id.*; *see id.* at 162–65. Moreover, new Title IX regulations that appeared to squarely prohibit the school district's policy "diminishe[d] the need for resolving the broad constitutional issues briefed by the parties." Memorandum for the

In much the same way *Andrews* and *LaFleur* highlighted the sexual and reproductive rights of female teachers, a series of cases decided in the lower courts would bring to the fore the rights of LGBTQ school personnel. During the 1970s, in a series of cases that reached the federal circuit and state supreme courts, gay teachers sued the school systems when, upon discovery of the teachers' homosexuality, the schools dismissed them from their teaching positions. In *Acanfora v. Board of Education*,[111] for instance, a Maryland eighth-grade science teacher was transferred to a nonteaching position when his supervisors learned of his homosexuality.[112] The teacher, who had been involved in another lawsuit alleging discrimination by Penn State University, sued, seeking a reinstatement of his position.[113] However, after his transfer, he began making frequent appearances on television and radio shows, including *60 Minutes*, publicly decrying the school board's actions.[114] Although the trial court concluded that homosexuality, without more, was insufficient to justify a transfer or a dismissal, it nonetheless found that the teacher's frequent media appearances were "indifferen[t] to the bounds of propriety" and were "likely to incite or produce imminent effects deleterious to the educational process."[115] On appeal, the Fourth Circuit affirmed the trial court's ruling on different grounds, rejecting the trial court's view that the teacher's public statements warranted a transfer, but nonetheless concluding that the transfer was justified because he had deliberately withheld information about his homosexuality in his initial teaching application.[116]

Acanfora was not anomalous. Throughout the country, school boards, enforcing morality clauses, frequently discharged teachers for being "practicing homosexual[s]."[117] These antigay policies were typically animated by the view that an openly gay teacher, or a teacher engaged in "public homosexuality," posed a threat to students and was

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United States as Amicus Curiae at 2, *Andrews*, 425 U.S. 559 (No. 74-1318); *see* MAYERI, *supra*, at 163–64. By dismissing certiorari in *Andrews* as improvidently granted, the Court let stand the lower court rulings that invalidated the school district's discriminatory policy. But, as Mayeri makes clear, the Court's dismissal ensured that *Andrews* "would remain outside the feminist canon." MAYERI, *supra*, at 165. Further, by declining to issue a decision in a rare case centering "reproductive freedom for poor women of color," the Court missed an opportunity to confront the intersection of race, sex, and nonmarital parentage. *Id.*; *see id.* at 162–67.

111 359 F. Supp. 843 (D. Md. 1973), *aff'd*, 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974).

112 *Id.* at 845.

113 *Id.* at 844–46.

114 *Id.* at 846.

115 *Id.* at 857.

116 *Acanfora*, 491 F.2d at 500–01, 504.

117 *E.g.*, Burton v. Cascade Sch. Dist. Union High Sch. No. 5, 353 F. Supp. 254, 254 (D. Or. 1973), *aff'd*, 512 F.2d 850 (9th Cir.) (per curiam), *cert. denied*, 423 U.S. 839 (1975); Gaylord v. Tacoma Sch. Dist. No. 10, 559 P.2d 1340, 1341, 1343 (Wash.) (en banc), *cert. denied*, 434 U.S. 879 (1977); *see also* Rowland v. Mad River Local Sch. Dist., 730 F.2d 444, 446 (6th Cir. 1984), *cert. denied*, 470 U.S. 1009 (1985).

unfit to serve as a teacher. On this account, the perceived threat was undergirded by various suspicions that LGBTQ persons were sexual predators who would engage in sex with students, "recruit" them to homosexuality, or, more simply, fail to model appropriate gender roles and moral conduct.[118]

When teachers challenged their discharges, citing a range of constitutional theories from equal protection and due process privacy rights to free speech, courts often rejected their claims in favor of the school boards' interests. *Gaylord v. Tacoma School District No. 10*[119] is instructive. Based on a former student's suspicion, the vice principal confronted James Gaylord, a Washington high school teacher, about his sexuality.[120] When Gaylord admitted that he was gay, the vice principal pursued dismissal proceedings, which Gaylord challenged in court.[121] Because the status of homosexuality carried a presumption of engaging in criminal acts, including sodomy and lewdness, the trial court concluded that homosexuality constituted immorality, and therefore justified Gaylord's discharge.[122] While Gaylord's appeal was pending, Washington repealed its criminal prohibition on sodomy.[123] Despite this change, the Washington Supreme Court nonetheless affirmed the lower court's ruling, concluding that, at present, sodomy remained widely condemned as immoral and was considered immoral during biblical times.[124] The court further concluded that Gaylord's status as a homosexual "impair[ed] his efficiency as a teacher"[125] and injured the school because it compromised his relationships with students and the school community.[126]

In reaching this conclusion, the court noted that Gaylord's homosexual conduct "must be considered in the context of his position of teaching high school students."[127] Allowing Gaylord to maintain his teaching position would indicate to students "adult approval of his homosexuality."[128] Moreover, allowing an admitted homosexual to serve as a high school teacher might "encourag[e] expression of approval and . . . imitation [of homosexuality]," not to mention the possibility that "one who

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118 *See* Clifford J. Rosky, *Fear of the Queer Child*, 61 BUFF. L. REV. 607, 640–41 (2013) (discussing fears about the indoctrination, seduction, and recruitment of students by gay teachers).

119 559 P.2d 1340.

120 *Id.* at 1342.

121 *Id.*

122 *Id.* at 1342–46.

123 *Id.* at 1346.

124 *Id.* at 1345–46.

125 *Id.* at 1346 (internal quotation marks omitted).

126 *Id.* at 1346–47.

127 *Id.* at 1347.

128 *Id.*

chooses to remain 'erotically attracted to a notable degree towards persons of his own sex'" might be inclined "to engage in sexual activity prompted by this attraction" while employed by the high school.[129] Vindicating Gaylord's rights to sexual expression and freedom thus would require "the school directors to take an unacceptable risk in discharging their fiduciary responsibility of managing the affairs of the school district."[130]

Although all of these cases surfaced questions about the interplay between the sexual rights of teachers and the school boards' interests in maintaining an appropriate educational environment, only one — *LaFleur* — was decided by the Supreme Court. This, by itself, is notable. The issue of teachers' sexual rights was more obscured in *LaFleur* than in the other cases, where the question of the impact of one's sexual choices on one's professional abilities was explicitly considered. And indeed, the Court framed *LaFleur* as relating to pregnant women's employment, rather than as a case about whether teachers were permitted to visibly display their pregnancies (and thus the evidence of their sexual lives) before students.

But if the Court chose to frame the issues in *LaFleur* as exclusively about employment, it chose to avoid altogether the questions of sexual rights and freedom that *Andrews* and the gay teacher cases presented. While the Court dismissed *Andrews* as improvidently granted, allowing the circuit court's opinion invalidating the unmarried parent policy to stand, it did little to cement the rights to sexual freedom tentatively advanced in cases like *Griswold v. Connecticut*, *Eisenstadt v. Baird*,[131] and *Roe v. Wade*. The Court's silence in the cases involving the employment of gay teachers was more damning. There, the denial of certiorari allowed the lower courts' prioritization of the school boards' interests, and the view that a teacher's homosexuality was *per se* disruptive to the educational environment, to go unquestioned.

B. The Sexual Rights of Students

As with teachers, questions of the sexual rights of students have often vexed school administrators and courts. In some cases, the conflicts are quite similar to those raised by cases involving teachers. Just as teachers have been expected to sublimate their sexual identities as a condition of employment, students are expected to sublimate their sexual identities in order to participate in the academic and extracurricular life of the school. And just as concerns about moral role modeling often animate rules and policies aimed at closeting the sexual lives of teachers, corollary concerns about peer-to-peer role modeling frequently underlie efforts to cloak the sexual lives of students.

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[129] *Id.*
[130] *Id.*
[131] 405 U.S. 438 (1972).

But conflicts over student sexuality may present themselves in ways that are markedly different from conflicts over the sexual rights of teachers. In particular, controversies involving the sexual rights of students are often framed as conflicts over access to knowledge — sex education, for example programs and access to and distribution of contraception — and parental autonomy.

This section considers challenges to school policies concerning pregnant and sexually active teens, as well as challenges to school policies regarding sexual education and access to contraception. As this section makes clear, despite their different postures, these cases reflect many of the themes raised throughout *The Schoolhouse Gate*.

1. Policies Concerning Pregnant and Sexually Active Teens. — In both *LaFleur* and *Andrews*, policies regarding pregnant teachers and teachers who were unmarried parents were animated, in part, by the sense that teachers serve as moral role models for their impressionable students.[132] Related concerns about role modeling and the impressionability of minors also attend policies aimed at sequestering pregnant or sexually active teens from the rest of the student population. In *Perry v. Grenada Municipal Separate School District*,[133] for instance, a school board policy excluded two unmarried mothers from high school admission.[134] Before trial, a district court denied their request for a preliminary injunction ordering the school to allow them to attend.[135] In doing so, the court rationalized the school district's actions on the ground that "a large segment of the people in this area" believed "that it is sinful, or immoral for unwed people to engage in sexual intercourse and that an unwed mother is not a fit associate for teenage children in a public school or elsewhere," as "[t]he fact of such motherhood demonstrates such sinful, or immoral conduct."[136]

The court's post-trial opinion, however, while still emphasizing such concerns, concluded that "it seems patently unreasonable that [an unwed mother] should not have the opportunity to go before some administrative body of the school and seek readmission on the basis of her changed moral and physical condition."[137] Noting the importance of education, the court maintained that "[t]he continued exclusion of a girl without a hearing or some other opportunity to demonstrate her qualification for readmission serves no useful purpose," as it would prevent

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[132] *See supra* pp. 1462–65.

[133] 300 F. Supp. 748 (N.D. Miss. 1969).

[134] *Id.* at 749.

[135] Perry v. Grenada Mun. Separate Sch. Dist., No. WC6736 (N.D. Miss. Dec. 22, 1967), *cited in* Thomas A. Schweitzer, *"A" Students Go to Court: Is Membership in the National Honor Society a Cognizable Legal Right?*, 50 SYRACUSE L. REV. 63, 80–81, 81 n.99 (2000).

[136] Schweitzer, *supra* note 135, at 81 (quoting *Perry*, No. WC6736, at 3 (footnote omitted)).

[137] *Perry*, 300 F. Supp. at 752.

her from completing high school and pursuing higher education.[138] Indeed, such a decision would leave her "ill equipped for life," and hard pressed to support her child.[139] In this regard, the court's concerns about education were inextricably intertwined with anxieties that linked illegitimacy to poverty and perpetual "dependence on the public fisc."[140]

In *Ordway v. Hargraves*,[141] a district court ordered an unmarried pregnant teen readmitted to school.[142] Upon disclosing her pregnancy to her high school's administration, Fay Ordway was dismissed from regular classes.[143] Excluded from the classroom, she was allowed to "[s]eek extra help" from teachers "during after school help sessions" and to make use of "all school facilities such as library, guidance, administrative, teaching, etc., on any school day *after the normal dismissal time*."[144]

When pressed to justify these decisions, the principal could not identify "any educational purpose to be served by excluding [Ordway] from regular class hours," and he conceded that, per *Tinker*, her pregnancy "ha[d] not occasioned any disruptive incident nor ha[d] it otherwise interfered with school activities."[145] The principal, however, did imply that the policy of excluding pregnant teenagers from classes likely stemmed from "a desire on the part of the school . . . not to appear to condone conduct on the part of unmarried students of a nature to cause pregnancy."[146] As it happened, the school served both junior high and high school students and there was particular concern that junior high students were "flexible in their attitudes" and "might be led to believe that the school authorities [were] condoning premarital relations if they were to allow girl students in [Ordway's] situation to remain in school."[147] In this regard, although it had sparked no actual disruption in the classroom, Ordway's status as an unmarried[148] pregnant teen was

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138 *Id.* at 753.

139 *Id.*

140 Melissa Murray, *What's So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL'Y & L. 387, 393–94 (2012). Critically, advocates for the plaintiffs in *Andrews* highlighted similar concerns about illegitimacy and public dependency in challenging the exclusion of unmarried parents from the ranks of the school district's cadre of teachers and teaching assistants. *See* Serena Mayeri, Essay, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277, 1320 (2015).

141 323 F. Supp. 1155 (D. Mass. 1971).

142 *Id.* at 1156, 1158.

143 *Id.* at 1156.

144 *Id.* (emphasis added).

145 *Id.* at 1157 (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969)).

146 *Id.* at 1158.

147 *Id.*

148 It was made clear at the hearing "that were [Ordway] married, she would be allowed to remain in class during regular school hours despite her pregnancy." *Id.* at 1157.

seen by the school board as a disruptive episode sufficient to warrant sequestering her from other students.

Ordway's experience was not uncommon. For decades, the prospect of pregnant schoolgirls has prompted incredible anxieties and has produced policies aimed at limiting contact between the pregnant girl and her classmates. In many jurisdictions, pregnant teenagers were expelled from their existing schools and forced to enroll in alternative schools specifically designated for pregnant and parenting students.[149] The liberalization of norms around sex and sexuality has been slow to root out these measures. As recently as 2002, the New York Civil Liberties Union fired off a strongly worded letter to New York City Schools Chancellor Harold Levy, decrying the "[h]ostility, harassment and outright discrimination" that continued to discourage pregnant and parenting girls from remaining in school.[150]

More recently, high school students have brought suit against their local chapters of the National Honor Society (NHS), an organization that recognizes high-achieving high school students, on the ground that the NHS had excluded the students from membership because of their sexual activity.[151] Although local chapters are required to adopt the NHS constitution, each chapter may establish its own admissions criteria so long as those criteria are consistent with the NHS constitution.[152] The NHS constitution made clear that while federal law precluded the organization from using "pregnancy — whether within or without wedlock" — as a basis for automatic denial of membership, pregnancy could "properly be considered . . . like any other circumstance, as a factor to be assessed in determining character as it applies to the National Honor Society," so long as "evidence of paternity is similarly regarded."[153]

In one of the cases, *Chipman v. Grant County School District*,[154] two female high school students maintained that although they were otherwise qualified, they were excluded from membership because they had given birth to children out of wedlock.[155] The two students successfully moved for a preliminary injunction enjoining the school administration

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149 *See* Brittany Ducker, Note, *Overcoming the Hurdles: Title IX and Equal Educational Attainment for Pregnant and Parenting Students*, 36 J.L. & EDUC. 445, 448–49 (2007); Monica J. Stamm, Note, *A Skeleton in the Closet: Single-Sex Schools for Pregnant Girls*, 98 COLUM. L. REV. 1203, 1203–04 (1998).

150 *NYCLU Gives Schools Chancellor Levy an "F" for Failing to Stop Discrimination Against Pregnant and Parenting Girls*, N.Y. CIVIL LIBERTIES UNION (Mar. 24, 2002), https://www.nyclu.org/en/press-releases/nyclu-gives-schools-chancellor-levy-f-failing-stop-discrimination-against-pregnant [https://perma.cc/8T25-3Q4B].

151 *See* Schweitzer, *supra* note 135, at 63–65.

152 *Id.* at 65 n.9.

153 *Id.* at 72 n.41.

154 30 F. Supp. 2d 975 (E.D. Ky. 1998).

155 *See id.* at 976–77.

to admit them to the organization.[156] In granting the motion for the preliminary injunction, a federal district court concluded that, based on the record, the students' probability of successfully proving discrimination was "very high using either a disparate impact or disparate treatment method of proof."[157] Not all students fared as well.

In *Pfeiffer v. Marion Center Area School District*,[158] Arlene Pfeiffer, "a good student who earned high grades and participated in a wide variety of school organizations, including serving as president of the student council," was dismissed from her high school's chapter of the NHS when she became pregnant.[159] The school board did not specify whether pregnancy was the root cause of her dismissal and said only that its action was justified on the ground that Pfeiffer had "[f]ail[ed] to uphold the high standards of leadership and character required for admission and maintenance of membership."[160]

Pfeiffer sought to introduce into the record evidence that no male student had ever been dismissed from the school's NHS chapter because of his premarital sexual activity, as well as the testimony of a male student, who, while a senior at the high school, impregnated his girlfriend but was not dismissed from the chapter.[161] The federal district court excluded this evidence.[162] After considering the evidence that had been admitted, the court found that Pfeiffer was not dismissed for her pregnancy but rather because she had "failed to uphold the standards of the National Honor Society by engaging in premarital sexual intercourse."[163] As the district court reasoned, "[f]aced with the task of educating hundreds of young people, and with constant demand by the public that the schools instill attributes of good character as part of the educational process, the Council and the Board can scarcely be criticized for taking the action which was taken."[164] Likewise, in *Cazares v. Barber*[165]:

> [T]he pregnant plaintiff who was otherwise qualified was denied admission to the NHS while a male student who was an unmarried father was admitted. The court found that the only reason plaintiff was denied admission was because she was pregnant, unmarried, and not living with the child's father. Accordingly, the court issued a permanent injunction, ordering that

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156 *Id.* at 980.
157 *Id.* at 978.
158 917 F.2d 779 (3d Cir. 1990).
159 *Id.* at 782.
160 *Id.*
161 *Id.* at 783.
162 *Id.*
163 *Id.*
164 *Id.* at 785 (alteration in original) (quoting the trial court order).
165 No. 90-cv-0128 (D. Ariz. May 31, 1990), *aff'd*, 959 F.2d 753 (9th Cir. 1992), *cited in* Schweitzer, *supra* note 135, at 68 n.15, 77.

> the NHS initiation ceremony at her high school not take place without plaintiff Cazares. The school authorities reacted by cancelling the entire induction ceremony rather than include Cazares. As a result, the court found that the school authorities had acted in bad faith and awarded plaintiff attorneys' fees in excess of the statutory cap of $75 per hour under the Equal Access to Justice Act.[166]

In all, the cases challenging policies dealing with pregnant and sexually active students make clear the degree to which the schoolhouse has functioned as a microcosm of broader societal angst about teen pregnancy and the consequences of premarital sex and sexuality.

2. Policies Concerning Sexual Education. — While the cases concerning policies related to pregnant or sexually active teens illuminate the tensions between the sexual (and educational) rights of students and administrators' efforts to maintain order within the schoolhouse, the cases dealing with policies concerning sexual education and access to knowledge focus more clearly on the rights of parents to control their children's upbringing. As Driver notes at the outset of *The Schoolhouse Gate*, the central tension of education law — the need to temper the state's impulse to use public education as a means of indoctrinating youth — has often arisen under the auspices of conflicts between parents and state officials in the context of public education.

Indeed, in *Meyer v. Nebraska* and *Pierce v. Society of Sisters*,[167] two *Lochner*-era[168] cases, the Court recognized parental autonomy as a fundamental right, and made clear that while the state could "compel attendance at some school and . . . make reasonable regulations for all schools," it could not go so far as to use public education as a means of "foster[ing] a homogeneous people," at least in a "time of peace and domestic tranquility."[169] As the Court announced in *Pierce*: "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[170]

It is no surprise then that school curricula and programming aimed at providing students with knowledge and information about sex and sexuality draw complaints from parents, who argue that such programming conflicts with the exercise of parental rights. In *Cornwell v. State Board of Education*,[171] the Maryland State Board of Education adopted a resolution requiring that a "comprehensive program of family life and

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166 Schweitzer, *supra* note 135, at 77 (footnotes omitted). The Fifth Amendment was implicated because the school was located on a Native American reservation. *Id.* at 77 n.80.

167 268 U.S. 510 (1925).

168 Lochner v. New York, 198 U.S. 45 (1905).

169 Meyer v. Nebraska, 262 U.S. 390, 402 (1923).

170 *Pierce*, 268 U.S. at 535.

171 314 F. Supp. 340 (D. Md. 1969), *aff'd*, 428 F.2d 471 (4th Cir. 1970) (per curiam), *cert. denied*, 400 U.S. 942 (1970).

sex education" be taught in all schools.[172] Students and parents sued to prevent the implementation of the sex education program, alleging that the program violated their rights under the First Amendment, the Equal Protection Clause, and the Due Process Clause.[173] A federal district court granted the school board's motions to dismiss on all counts, rejecting all of the plaintiffs' constitutional claims.[174] The court specifically addressed the plaintiffs' claim that, as a matter of parental autonomy, they enjoyed an "exclusive constitutional right to teach their children about sexual matters in their own homes, and that such exclusive right would prohibit the teaching of sex in the schools."[175] The court rejected this "novel proposition" out of hand, concluding it knew of "no such constitutional right."[176] On appeal, the Fourth Circuit affirmed the district court's findings.[177] The Supreme Court denied review.[178]

If *Cornwell* presented a challenge to a relatively vanilla sex-ed program, courts would soon be faced with more cutting-edge sex-ed programming. In an effort to educate students about AIDS, Chelmsford High School hired Hot, Sexy and Safer Productions to conduct a mandatory, school-wide AIDS-awareness assembly.[179] In an effort to capture — and maintain — the attention of the student audience, the program contained comedic material referring to masturbation and anal sex and solicited student participation.[180] One male student was asked to display his "orgasm face," while a female student was asked to pull a condom over another individual's head.[181] References were made to group sexual experiences, genitals, and "homosexual sexual activity."[182] In a suit brought by two students and their parents, the plaintiffs' objections to the program clustered around familiar themes of parental autonomy,[183] as well as claims that the program's sexually explicit content had "humiliated and intimidated" the children.[184] The district court granted the defendants' motion to dismiss for failure to state a claim.[185]

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172 *Id.* at 341.

173 *Id.*

174 *Id.* at 341, 344.

175 *Id.* at 342.

176 *Id.*

177 Cornwell v. State Bd. of Educ., 428 F.2d 471, 471–72 (4th Cir. 1970) (per curiam), *cert. denied*, 400 U.S. 942 (1970).

178 Cornwell v. State Bd. of Educ., 400 U.S. 942 (1970).

179 *See* Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525, 529 (1st Cir. 1995), *cert. denied*, 516 U.S. 1159 (1996). Driver discusses the case, and its central free exercise claim, in his chapter on religion and public schools (pp. 403, 530 n.119).

180 *Hot, Sexy & Safer*, 68 F.3d at 529.

181 *Id.*

182 *Id.*

183 *See id.* at 529–30.

184 *Id.* at 529.

185 *Id.* at 530.

On appeal, the First Circuit concluded that Hot, Sexy and Safer's actions at the assembly did not constitute "conscience shocking" behavior sufficient for a violation of substantive due process.[186] Moreover, the court held that, regardless of protections for parental autonomy, parents do not enjoy a broad and unfettered "right to restrict the flow of information in . . . public schools."[187] The Supreme Court denied certiorari.[188]

As *Cornwell* and *Brown v. Hot, Sexy and Safer Productions, Inc.*[189] suggest, despite constitutional protections for parental autonomy, courts afford schools considerable deference in sex-ed instruction,[190] and generally in instruction that implicates questions of sex and sexuality.[191] This solicitude for this type of instruction is perhaps wholly consistent with the interest in promoting access to knowledge and ideas glimpsed in the Court's First Amendment jurisprudence, including many of the cases that Driver highlights. Despite the interest in promoting access to knowledge, one might reasonably expect that school initiatives aimed at providing students with contraceptive materials might test the limits of judicial deference to school administrators. After all, given the concerns about the presence of unmarried mothers in the school community, the distribution of contraceptives in a public school might give the impression that the administration condoned student sexual activity.

Yet, even in these circumstances, at least one court prioritized the school administration's interests above parental objections. In *Curtis v. School Committee*,[192] parents and students sued the school committee after it enacted a program that made condoms available for free to students at Falmouth High School who requested them from the school nurse.[193] Before getting the condoms, the students would receive counseling, as well as literature on sexually transmitted diseases.[194] The objecting parents alleged that the program violated their free exercise rights, rights of familial privacy, and rights to control the education of their children because, although the program was not compulsory, there was no opportunity for parents to "opt out" by prohibiting their children from requesting contraceptives.[195]

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[186] *Id.* at 531–32.

[187] *Id.* at 534.

[188] Brown v. Hot, Sexy & Safer Prods., Inc., 516 U.S. 1159 (1996).

[189] 68 F.3d at 529.

[190] *See also* Fields v. Palmdale Sch. Dist., 271 F. Supp. 2d 1217, 1223 (C.D. Cal. 2003), *aff'd*, 427 F.3d 1197 (9th Cir. 2005), *reh'g denied*, 447 F.3d 1187 (9th Cir. 2006) (per curiam), *cert. denied*, 549 U.S. 1089 (2006).

[191] *See also* Parker v. Hurley, 474 F. Supp. 2d 261, 263 (D. Mass. 2007), *aff'd*, 514 F.3d 87 (1st Cir. 2008), *cert. denied*, 555 U.S. 815 (2008).

[192] 652 N.E.2d 580 (Mass. 1995), *cert. denied*, 516 U.S. 1067 (1996).

[193] *Id.* at 582.

[194] *Id.* at 582–83.

[195] *Id.*

The trial court granted summary judgment in favor of the school committee, finding that the plaintiffs could not show that "the condom-availability program placed a coercive burden on their rights."[196] The Massachusetts Supreme Judicial Court affirmed the judgment,[197] concluding that while "parents possess a fundamental liberty interest . . . to be free from unnecessary governmental intrusion in the rearing of their children," the objecting parents "failed to demonstrate how the interests are burdened by the condom-availability program to an extent which would constitute an unconstitutional interference by the State."[198]

Taken together, these cases challenging school administrators' decisions to include sexual education as part of the public school curriculum highlight a central theme of *The Schoolhouse Gate* — the tension that inevitably results when the state, through the public school, seeks to expose students to certain values, even as parents and families object to the imposition on their own "high duty[] to recognize and prepare [their children] for additional obligations."[199]

Critically, the cases also gesture toward the book's missed opportunities. Recall that the Court's deference to a school's "legitimate pedagogical concerns" in *Hazelwood* facilitated judicial support for gay-straight alliances in cases like *Morrison*.[200] In the same vein, judicial deference to school administrators' discretion in promulgating sex education policies has, perhaps paradoxically, enabled more progressive policies that facilitate the exercise of sexual rights. In this regard, foregrounding issues of sexual rights in the narrative would have allowed Driver to explore the connections between these seemingly disparate cases and, more importantly, to consider the degree to which deference to curriculum content and school boards' local control may actually enable progressive sexual policies more effectively than explicitly recognizing students' (or teachers') sexual rights.

Meaningfully, these are not the only opportunities that are surrendered in the marginalization of sex and sexual rights in Driver's narrative. The following section provides in more detail what is lost when questions of sex and sexuality are sidelined in the discussion of public education and the Court.

C. The Costs of Unsexing the Schoolhouse

As the foregoing discussion makes clear, all of these cases reflect many of the tensions central to *The Schoolhouse Gate*: how to reconcile individual rights with the state's interest in fostering a safe and effective

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196 *Id.* at 583.

197 *Id.* at 589.

198 *Id.* at 585.

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

200 Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988); *see* Morrison v. Bd. of Educ., 419 F. Supp. 2d 937, 942 (E.D. Ky. 2006) (citing *Hazelwood*, 484 U.S. at 273).

learning environment, how to equip students with the knowledge needed for a successful future while suppressing the impulse toward state encroachment, and how to honor and respect the diversity of a pluralistic democracy while also recognizing the unique susceptibility of children to new viewpoints. Put simply, sex — and the questions and concerns that it produces — is as much a part of the landscape of the Court and the public schools as issues of free speech, racial equality, or religion. The liminal position (and in some cases, the absence) of these cases in Driver's narrative then is an unfortunate, if entirely understandable, consequence of the need to draw — and enforce — scholarly boundaries. One simply cannot cover everything.

But even as we acknowledge this truth, one cannot help but be wistful for what might have been — especially in Driver's capable hands. As these cases demonstrate, sexual rights and sexual freedom are inextricably linked to the themes of aggrandizement of state power, state indoctrination and homogenization, access to knowledge, and freedom of expression glimpsed in cases like *Barnette* and *Tinker*. As such, sustained engagement with these other cases might have elaborated many of Driver's arguments, providing other relevant examples of the social and political tensions that have framed the Court's consideration of the conflict between individual rights and the educational mission of public schools.

The conflicts over the sexual rights of students are instructive on this point. The cases involving sexual education and the distribution of contraception highlight a tension between a fear of state indoctrination and homogenization of students on the one hand, and the concept of the school as a site for inculcating particular values and norms — including those of a sexual nature — on the other.[201] Cases like *Ordway v. Hargraves* and the legal challenges to the exclusion of pregnant students from the NHS all arose in the context of considerable anxiety around teen pregnancy and teen sexuality — a theme that Driver touches on in his discussion of *Hazelwood* (pp. 102–11). While these debates did not rise to the fever pitch of the Vietnam War protests glimpsed in *Tinker*, they nonetheless captured the country's attention, sparking major media coverage.[202] And as *Ordway* and the NHS cases

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[201] *See supra* section II.B.2, pp. 1473–77.

[202] *See, e.g.*, Michael Castleman, *Why Teenagers Get Pregnant*, THE NATION, Nov. 26, 1977, at 549; George Flynn, *Pregnant Cheerleaders Inspire Intense Debate*, HOUS. CHRON., Oct. 2, 1993, at 29A; Barbara Kantrowitz et al., *Kids and Contraceptives*, NEWSWEEK, Feb. 16, 1987, at 54; Ronald Kotulak, *The Alarming Cost of Teenage Sex*, CHI. TRIB., Jan. 4, 1987; Gabriella Stern, *Learning Curve: School Day Care Helps Teen Moms, but Risks Condoning Pregnancies — District Weighs Involvement in Girls' Personal Lives as Foes Grouse Loudly — Math Tests and Froot Loops*, WALL ST. J., May 27, 1993, at A1. Some periodicals even ran multipart series devoted to these issues. *See, e.g.*, Laurie Becklund, *The Teen Birth Explosion* (pts. 1–3), L.A. TIMES, Mar. 14, 1993, at E1; M.A.J. McKenna, *Teens & Pregnancy* (pts. 1–5), ATLANTA J.-CONST., Jan. 14, 1996, at 08A.

demonstrate, these national anxieties about teenage pregnancy were not simply about the fact of teenage pregnancy but rather about the concern that these perceived moral lapses could be contagious and would quickly infect the entire student body if the offending students were not swiftly punished and effectively quarantined.[203]

And just as the cases concerning the sexual rights of students would have provided additional depth and support for Driver's view that our societal anxieties and preoccupations are often refracted through the lens of the Court's interplay with the public schools, the cases concerning the sexual rights of teachers would have provided a widened aperture from which to consider some of the most vexing issues of our time. Take, for example, Driver's incisive analysis of free speech and the dissemination of ideas in the context of the schoolhouse. In his discussion of *Tinker*, Driver notes that the Court's decision did not go far enough, as it would have allowed a "heckler's veto" to suppress speech in order to avoid a disruptive response or reaction from the audience (p. 88). The cases concerning the sexual rights of LGBTQ teachers would have provided an interesting grace note to the discussion — and an important complement to Driver's brief discussion of *Fricke*. In these cases, school boards advanced — and courts credited — arguments about the impact of sex and sexuality in a manner that recalls the Court's approach to the problem of controversial speech.[204] In *Gaylord*, like many other cases, the Washington Supreme Court rationalized the termination of a gay teacher on the ground that the school community's reactions to the teacher's sexuality, if known, would be unduly disruptive to the educational environment.[205] The Washington court's reasoning was consistent with the Supreme Court's logic in *Tinker*. Essentially, the *Gaylord* court allowed the school board to wield a heckler's veto with regard to homosexuality, allowing the prospect of dissenting viewpoints about sex and sexuality (and even mere discomfort with the prospect of homosexuality) to justify the state's demand for moral and sexual conformity as a condition of employment. In this regard, consideration of *Gaylord* and other cases involving LGBTQ teachers would have sharpened Driver's discussion of speech rights in *Tinker* and its progeny, while also gesturing toward the broader consequences of the Court's prioritization of peace and order in the public school context.

Likewise, consideration of the sexual rights of teachers would have usefully elaborated Driver's revealing discussion of *Brown v. Board of Education* and the complicated political and social milieu in which the Court's integration mandate was received. Driver's account of *Brown* is one of the book's most important interventions insofar as it surfaces the important, but often overlooked, connection between objections to

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[203] *See supra* section II.B.1, pp. 1469–73.

[204] *See supra* pp. 1466–68.

[205] *See* Gaylord v. Tacoma Sch. Dist. No. 10, 559 P.2d 1340, 1346–47 (Wash. 1977) (en banc).

integration and concerns about miscegenation and interracial marriage (pp. 259–61). Still, Driver's illuminating discussion of *Brown*'s sexual subtext would have been further enhanced by reference to cases like *Andrews* that explore the intersections of race and sexuality against the backdrop of Southern resistance to integration.[206]

Professor Serena Mayeri's work on *Andrews* suggests these possibilities. Recall that *Andrews* involved a challenge to school board policy that prevented unmarried parents from serving as teachers or teacher's aides.[207] As Mayeri explains, although the Drew school board defended its unmarried parent policy as a modest effort to ensure that teachers were positive moral influences in the classroom,[208] the truth was far more complicated. In fact, the unmarried parent policy was part of a broad effort to resist *Brown*'s integration mandate.[209] In *Brown*'s wake, many white families had decamped to "segregation academies" — private, (often) Christian schools that did not admit blacks and were intended to serve as an alternative to the prospect of integrated public schools.[210] As a result of this "white flight," the student population of the public schools was mostly black.[211] Still, the ranks of teachers and administrators in the Drew Municipal Separate School District remained largely white — and the district intended to keep it that way.[212] The unmarried parent policy was part of the effort to resist integration and maintain a staff of mostly white teachers.[213] And indeed, the policy had a disproportionate impact on African Americans, who were less likely to have formalized their relationships and were more likely to have borne children outside of marriage.[214] All of the rejected applicants who filed suit in *Andrews* were black women.[215]

But it is not just that attention to issues of sex and sexuality would have allowed Driver to elaborate many of the themes discussed in the book; these cases would also have surfaced other important jurisprudential developments that go unmentioned in *The Schoolhouse Gate*, even as they played out in the landscape of public education. For example,

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[206] Critically, in showcasing the range of efforts undertaken for the purpose of resisting *Brown*, discussing *Andrews* could have allowed Driver to draw another connection between his discussion of *Brown* and his consideration of sex-segregated public schools.

[207] *See* Andrews v. Drew Mun. Separate Sch. Dist., 371 F. Supp. 27, 28 (N.D. Miss. 1973).

[208] *See id.* at 30–31.

[209] *See* MAYERI, *supra* note 110, at 146–47; Mayeri, *supra* note 101, at 389.

[210] Mayeri, *supra* note 101, at 389; *see also* Case Comment, *Racial Exclusion by Religious Schools:* Brown v. Dade Christian Schools, Inc., 91 HARV. L. REV. 879, 881 n.21 (1978).

[211] Mayeri, *supra* note 101, at 389.

[212] *See id.*

[213] *See id.* (describing how the Drew Municipal Separate School District "mightily resisted desegregation").

[214] *Id.*

[215] *Id.*

the cases involving pregnant students highlight the degree to which statutory law has been used to address gaps in the Court's interpretation of constitutional rights. Tellingly, when these cases were resolved in the student's favor, it was typically due not to a vindication of constitutional rights but rather to a successful appeal to statutory rights — Title IX and the Pregnancy Discrimination Act of 1978.[216]

Meaningfully, Title IX was enacted in 1972, in part as a statutory response to the Court's initial reluctance to denominate gender a suspect class for purposes of equal protection doctrine.[217] Likewise, the Pregnancy Discrimination Act was passed in 1978[218] as a direct response to the Supreme Court's decisions in *Geduldig v. Aiello*,[219] in which the Court concluded that the exclusion of pregnancy from disability insurance coverage did not violate the Equal Protection Clause,[220] and *General Electric Co. v. Gilbert*,[221] where the Court concluded that pregnancy discrimination did not constitute sex discrimination under the Civil Rights Act of 1964.[222]

With this history in mind, *Ordway* and the NHS cases are doubly illuminating. Not only do they make clear that issues of pregnancy discrimination and sex equality were present within the landscape of public education, but they also show that these issues are often ill served by

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[216] 42 U.S.C. § 2000e(k) (2012). For examples of courts resolving students' claims under Title IX only, see *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779, 780–81 (3d Cir. 1990); and *Chipman v. Grant Cty. Sch. Dist.*, 30 F. Supp. 2d 975, 976 n.1 (E.D. Ky. 1998). *But see* Wort v. Vierling, No. 82-3169, slip op. at 8 (C.D. Ill. Sept. 4, 1984) (resolving claim on Title IX and constitutional grounds), *cited in* Schweitzer, *supra* note 135, at 76–77; Cazares v. Barber, No. CIV-90-0128-TUC-ACM, slip op. at 2 (D. Ariz. May 31, 1990) (same), *cited in* Schweitzer, *supra* note 135, at 77.

[217] Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373 (1972) (codified as amended at 20 U.S.C. §§ 1681–1688 (2012)); *see also* U.S. DEP'T OF JUSTICE, EQUAL ACCESS TO EDUCATION: FORTY YEARS OF TITLE IX, at 1–2 (2012), https://www.justice.gov/sites/default/files/crt/legacy/2012/06/20/titleixreport.pdf [https://perma.cc/SU62-6UST]. For a discussion of Title IX's role in addressing voids in constitutional doctrine, see David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217, 245–46 (2005) ("[B]ecause the Constitution did not provide much protection against sex discrimination in 1972, Congress must have intended Title IX to protect against more forms of sex discrimination than the Constitution." *Id.* at 246.). *See also* 117 CONG. REC. 30,403 (1971) (statement of Sen. Bayh) ("While racial discrimination has been explicitly prohibited for nearly 20 years, only a few months ago the Supreme Court summarily affirmed a lower court decision upholding the constitutionality of a State's maintenance of a branch of its public university system on a sexually segregated basis.").

[218] Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (2012)).

[219] 417 U.S. 484 (1974).

[220] *Id.* at 494–95.

[221] 429 U.S. 125 (1976).

[222] *Id.* at 145–46; 123 CONG. REC. 29,655 (1977) (statement of Sen. Javits) ("What we are doing is leaving the situation the way it was before the Supreme Court decided the Gilbert case last year."); Reva B. Siegel, *You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in* Hibbs, 58 STAN. L. REV. 1871, 1878 (2006); *see also* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 678 (1983) ("When Congress amended Title VII in 1978, it unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the *Gilbert* decision.").

extant constitutional law doctrine.[223] On this account, just as cases like *Tinker*, *Barnette*, and *Frederick* all help to flesh out the Court's development of First Amendment principles, *Ordway* and the NHS cases cast light on the Court's impoverished account of pregnancy discrimination, as well as ongoing efforts to secure redress for pregnancy discrimination and sex discrimination through statutory avenues.

In addition to surfacing the tension between existing constitutional doctrine and claims of pregnancy discrimination, cases concerning sex and sexuality also bring to the fore broader questions of sex equality. Although state efforts to regulate sex and sexuality have operated to restrict the sexual freedom of men and women, because restrictions on sex and sexuality often reflect particular stereotypes about gender roles, the burdens of such regulations may be especially acute for women — and frequently go beyond the question of sexual liberty to implicate questions of sex equality. Indeed, Driver's discussion of religiously oriented homeschooling highlights the degree to which anxieties about gender roles within the family, and gender equality more generally, play out in the context of public education (pp. 401–05).

With this in mind, the omission of *Andrews* and *LaFleur* is especially regrettable, as both cases would further underscore the role of schools as sites of conflict over questions of sexual liberty *and* sex equality. That the public schools should be a proving ground for sex equality is unsurprising. Historically, teaching was one of the few careers available to women. But even in a traditionally female occupation, sex stereotypes favoring motherhood and family over paid labor remained stubbornly durable, as *LaFleur* illustrates. By requiring teachers to depart the classroom when their pregnancies became visible, and to return only when their children had reached a particular age,[224] the leave policies challenged in *LaFleur* not only penalized the visible manifestation of female sexuality, but they also reinforced a "separate spheres" ideology that consigned women to "the noble and benign offices of wife and

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[223] *See Geduldig*, 417 U.S. at 494–95 (finding that a pregnancy-based classification did not violate the Equal Protection Clause). *But see* Siegel, *supra* note 222, at 1891–92 (reading *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), to indicate that "[w]here regulation of pregnant women rests on sex-role stereotypes, it is sex-based state action within the meaning of the Equal Protection Clause," Siegel, *supra*, at 1892). In the decades since *Geduldig*, observers have questioned the reasoning and the clarity of the Court's pregnancy-related decisions under the Equal Protection Clause. *See, e.g.*, Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 982–84 (1984) (describing scholarly criticism of *Geduldig*); Reva B. Siegel, Cutler Lecture, *Pregnancy as a Normal Condition of Employment: Comparative and Role-Based Accounts of Discrimination*, 59 WM. & MARY L. REV. 969, 980 n.36 (2018) ("The Court's decision in *Geduldig* seemingly allows government to single out pregnant women without raising equal protection questions. Yet *Geduldig* has not been cited in a majority opinion in over two decades.").

[224] Cleveland Bd. of Educ. v. LaFleur, 414 U.S 632, 634–35 (1974).

mother"[225] while limiting their access to "the marketplace and the world of ideas."[226]

In *Andrews*, the sex-role stereotyping that consigned women to the home and hearth, and discouraged their participation in paid labor, was made more complicated by the overlay of race and the political and cultural milieu of desegregation. The fact that the *Andrews* plaintiffs were black women underscored the intersectionality of the legal conflict as well as black women's complicated relationship to the reproductive rights movement. Decided in 1973, only six months after the Supreme Court decided *Roe v. Wade*, *Andrews* offered an alternative framing of reproductive rights — one that decentered the question of abortion as the principal issue of women's reproductive autonomy and instead focused on the unique social and economic challenges that women of color and low-income women faced in exercising the right to procreate and raise children.

As the plaintiffs and their witnesses relayed to the courts, black women's sexuality and reproductive autonomy had historically been subject to state regulation and restriction, and often were characterized as pathological and socially destructive.[227] Rather than terminate their pregnancies, the plaintiffs in *Andrews* chose to carry their pregnancies to term and raise their children as single parents. And they were penalized for doing so. Their briefs before the courts made clear that they viewed the right to procreate, in and outside of marriage, to be as important for personal autonomy as the decision to choose an abortion — and that they viewed efforts to punish their procreation as part of a broader effort to pathologize black motherhood, while also limiting their rights as citizens and workers.[228]

Testifying on behalf of the *Andrews* plaintiffs, Fannie Lou Hamer highlighted the connection between the pathologization of black women's sexuality and the recognition of their rights as citizens.[229] As

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[225] Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring).

[226] Stanton v. Stanton, 421 U.S. 7, 14–15 (1975).

[227] Contemporary commentators continue to note the intersecting constraints that are placed on black women's sexuality. As Professor Brittney Cooper writes:

> Black girls and Black women, particularly those who have had any sustained encounter with Christianity, are often immobilized by the hyperregulation of their sexuality from both the church and the state. These messages about excessive and unregulated Black flesh that converge from both the nation-state and the church form a double helix of sexual ideas that form the core of cultural ideas about Black sexuality. These messages constitute a critical strand in a sticky social web that immobilizes Black women caught at the intersections of race, class, gender, and lack of access to normative modes of sexual behavior.

BRITTNEY COOPER, ELOQUENT RAGE: A BLACK FEMINIST DISCOVERS HER SUPERPOWER 131–32 (2018).

[228] *Id.* at 64–75.

[229] *Id.* at 23–25; Mayeri, *supra* note 101, at 393.

she explained to the court, black women faced a double bind. Derided if they received public assistance, black women were expected to support their families through steady employment. Nevertheless, policies like the unmarried parent policy, which was designed to stymie the racial integration of the teacher corps, effectively prevented black women from working and made it likely that they would be forced to seek state aid. As Hamer emphasized, in a legal landscape that recognized race discrimination and gender discrimination, but not the degree to which these forms of discrimination routinely coincided, the rights of black women and other women of color often went unrecognized.[230]

* * *

Taken together, these cases make clear the ways in which the public school has been a site of conflict and contestation over questions of sex and sexuality. And critically, the school has been a place where the sexual rights of students and teachers have, at times, been subordinated to the school administrators' broader interests in maintaining order and safety. As such, these cases would have done much to elaborate Driver's central arguments about the way in which the schoolhouse setting has amplified contests over essential freedoms for much of our history. Sex, as much as any other issue, has been a core component of the "battle for the American mind."

But these cases go beyond merely reiterating the book's central themes; they also introduce new themes that go to the heart of Driver's claim that the interaction between the public school and the Supreme Court has been the backdrop for some of the most important social and political issues of our time. These cases highlight the controversial nature of sexual rights in our constitutional order, but, more importantly, they make clear the way in which sexual rights impinge on other important constitutional freedoms and values, from questions of racial justice and sex equality to intersectionality and sexual liberty. As such, the neglect of these cases is regrettable, if entirely understandable. And, as the following Part maintains, the oversight is one that is costly in terms of articulating the roles that the school and the Supreme Court play in constructing sexual culture and valuing sexual rights.

III. TAKING SEXUAL RIGHTS TO SCHOOL

The Schoolhouse Gate is a stunning work of considerable achievement — one that is a must-read for anyone interested in the work of the Court and the uniquely American commitment to public education. Nevertheless, the marginalization of sex and sexual rights from the discussion of the Court's relationship with public education comes at a cost,

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[230] *See* Brief of Respondents, *supra* note 104, at 24, 1976 WL 181168, at *24; MAYERI, *supra* note 110, at 151; Mayeri, *supra* note 101, at 389–90.

even if the liminal treatment proceeds from sensible choices about the scope of the scholarly inquiry to be undertaken.

These costs seem even more profound in light of our current political and cultural moment, when questions of sex, sexuality, sexual assault, and sexual violence abound. While Driver is rightly concerned with the public school's role as a crucible for citizenship formation, *The Schoolhouse Gate* contemplates only *specific* citizenship values. It does not consider the question of *sexual citizenship*, nor does it consider the public school as a site for the development of sexual citizens.

But make no mistake about it, the schoolhouse *is* a site — perhaps the preeminent site — for the inculcation of values of sexual citizenship. In the confines of the "schoolhouse," children learn not only how to read and write, but also how to interact with those around them — an exercise that necessarily implicates sexual values. In our schools, students learn how to play, to talk, to listen, to draw boundaries, to say yes, to say no, and to recognize the difference. On this account, the schoolhouse is not only a site for educational development; it is also one where a whole person develops, an individual who will, in time, leave the schoolhouse for adulthood armed with her own perspectives and experiences about sex and sexuality.

And schools, as much as families, are where those experiences and perspectives are formed and defined. If the sexual culture of a school is toxic and rife with abuse and disrespect, it will send toxic sexual citizens out into the adult world — into relationships, homes, and workplaces, where their interactions may have lasting emotional, and even physical, consequences.

Put simply, schools are a place where our children learn to interact with one another — principally as classmates, and also on a more intimate level. Schools, as much as families, are places where we begin the process of instructing children in how to be responsible sexual citizens. To be sure, this aspect of the schoolhouse is controversial. As I have written elsewhere, parents have often registered concern — and strong opposition — to the state's role in shaping minors' views of sex and sexuality.[231] But whether one agrees that the state, as a normative matter, *should* play a role in how children develop as sexual citizens, it clearly *does* play a role, as a descriptive matter. And any account of the public school and constitutional law would do well to acknowledge that fact — and the disputes it may engender.

But it is not just that students leave the schoolhouse having formed particular ideas about sexual culture and appropriate sex and sexuality.

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[231] *See* Melissa Murray, *Marriage Rights and Parental Rights: Parents, the State, and Proposition 8*, 5 STAN. J. C.R. & C.L. 357, 380–85 (2009) (discussing parental objections to state-endorsed curricula regarding same-sex marriage).

As Justice Stevens observed in *New Jersey v. T.L.O.*, the school "is the first opportunity most citizens have to experience the power of government. . . . The values they learn there, they take with them in life."[232] Justice Stevens made this statement in the context of what he viewed as a search and seizure that violated the Fourth Amendment,[233] but the observation is equally apt in the context of sex and sexuality.

The school is likely the first place where students may witness firsthand the state's role in shaping attitudes toward sex, defining the parameters of acceptable sex and sexuality, and cultivating a robust understanding of sexual rights. With this in mind, Driver's caveats about the diminution of constitutional protections in the school take on a more alarming cast. As Driver compellingly argues, if basic civil rights are unevenly enforced in the schoolhouse, students will be hard pressed to develop an understanding of these rights — and a zeal to defend them as adults (pp. 425–27).

By the same token, if schools are inattentive to the question of sexual rights, whether those of teachers or of students, how can we expect those students to develop an appreciation for these rights as adults? This question is especially pertinent given that sexual rights are among the most precarious in the constellation of rights that the Court may vindicate and defend. If schools sequester pregnant teens or openly terminate gay teachers and administrators, students will learn that certain expressions of sexuality and sexual identity are verboten and disfavored. If schools compel pregnant teachers to take maternity leaves when their pregnancies become visible, students are likely to receive the impression that pregnancy — and the act that leads to it — should be shrouded and hidden from view. They may also inadvertently register the view that upon childbirth, women should remain at home with their children, regardless of their desire to return to the workforce or build a life outside of their identity as mothers.

These are not hyperbolic prospects. Indeed, only a generation ago, these were the messages that students received from their schools — and these messages, in many cases, were credited by the Supreme Court.[234] As such, it is not surprising that sexual rights are not viewed as rooted and inevitable in our current legal landscape. If students are educated with a view that these rights are thin or contingent, they will continue to regard the Constitution's protections for the most intimate aspects of our lives as precarious and ill-defined.

In many ways, this is what is most troubling about *The Schoolhouse Gate*'s marginalization of sex and sexual rights. The book seeks to focus our attention on the dynamic between the public school and the Supreme Court, as the interaction between these two institutions has

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[232] 469 U.S. 325, 385–86 (1985) (Stevens, J., concurring in part and dissenting in part).
[233] *See id.* at 370–71.
[234] *See supra* sections II.A–B, pp. 1462–77.

touched on some of the most consequential issues of our time. The book's marginalization of issues concerning sex and sexuality suggests, however unconsciously, that sexual rights are somehow less weighty — less important — than the constellation of other constitutional protections upon which Driver focuses.

But if *The Schoolhouse Gate* gives the impression that these rights are less consequential than First or Fourth Amendment rights, Driver alone cannot be faulted. His prioritization of these constitutional rights over sexual rights directly reflects the Supreme Court's own thin vision of sexual rights. As I have argued elsewhere, the Court's recognition of rights relating to sex and sexuality has been deeply contingent. As cases like *Griswold v. Connecticut*, *Loving v. Virginia*,[235] and *Obergefell v. Hodges* make clear, constitutional protections for sex and sexuality are at their most robust when sex is confined to marriage and the marital family.[236] While constitutional protections for sex outside of marriage are available, they are not always assured.[237]

By the same token, constitutional protections for sexual rights relating to abortion and contraception are also constrained. While the Court recognizes a right to use contraception, exercising the right depends on having the financial wherewithal to do so.[238] There is no constitutional obligation for the state to facilitate access to contraception.[239] Nor is there an affirmative obligation for the state to facilitate abortion access.[240]

It is not simply that sexual rights are primarily limited to negative rights that prevent undue state interference in certain matters of sex and sexuality, as opposed to affirmative obligations to facilitate the exercise

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[235] 388 U.S. 1 (1967).

[236] Melissa Murray, Obergefell v. Hodges *and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1239–40 (2016) [hereinafter Murray, *Nonmarriage Inequality*]; Melissa Murray, Essay, *Rights and Regulation: The Evolution of Sexual Regulation*, 116 COLUM. L. REV. 573, 579–80 (2016); Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 40–43 (2012).

[237] *See* Murray, *Nonmarriage Inequality*, *supra* note 236, at 1238–39.

[238] Cary Franklin, Griswold *and the Public Dimension of the Right to Privacy*, 124 YALE L.J.F. 332, 338 (2015) (noting that "the kind of decisional autonomy the Court protected in *Griswold*" will "often depend[] . . . on an infrastructure of provision").

[239] Although the Court has recognized a fundamental right to use contraception, *see* Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965); Eisenstadt v. Baird, 405 U.S. 438, 440–43 (1972), it has never recognized a constitutional right to government support or subsidization of contraceptive use. Indeed, in the context of abortion, the Court has made clear that the right to choose does not include a concomitant right to public subsidization of abortion care. *See* Harris v. McRae, 448 U.S. 297, 316–17 (1980). But while there is no federal constitutional right to public support for contraceptive use, the Affordable Care Act's contraceptive mandate confers a statutory right, in most cases, to employer-subsidized contraceptive coverage, though efforts have been made to limit access through the use of healthcare refusals and religious and moral exemptions. *See* Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. REV. 1417, 1418–29 (2012).

[240] *See Harris*, 448 U.S. at 316–17.

of these rights; it is that even these negative rights are precariously positioned in our current political and legal climate. Decisions like *Griswold v. Connecticut* and *Roe v. Wade* have been derided as the made-up musings of activist judges.[241] Indeed, some current members of the Supreme Court have cast doubt on the idea that the Constitution protects as fundamental many of the rights associated with sex and sexuality.[242] Accordingly, when a book as important as *The Schoolhouse Gate* elides the discussion of sexual rights, it risks endorsing the view that sexual rights — whether of students or anyone else — are somehow less weighty and profound than other constitutional rights and values.

The consequences of viewing sexual rights as less profound than other constitutional values are considerable. The subordination of sexual rights leads to a sex-negative sexual culture where sex is taboo, sexual identity must be mediated and domesticated through marriage, and sexual development and sexual harm are too shameful to be discussed openly. Recent developments suggest interesting opportunities for cultural change. The #MeToo movement and the resulting national dialogue about sex and sexual norms have begun, slowly, to dismantle the web of shame and silence that has attended sexual harassment and assault.[243] But more is needed if we are to achieve the cultural and political changes to which the #MeToo movement aspires.

As Professor Brenda Cossman notes, citizenship "is about the process of becoming recognized subjects, about the practices of inclusion and membership."[244] But as she explains, the process of becoming a citizen demands interrogation — "Becoming what exactly? What kinds of citizens are being produced? What are the norms of good and bad citizenship?"[245]

The Schoolhouse Gate makes clear that the production of citizens and the inculcation of citizenship values are part of the central mission of the public school and, indeed, is part of the Court's understanding of the role of public education in a democratic society. But citizenship is not limited to one's relationship to the country or constitutional rights — it involves the relationships that students form with one another and the other denizens of the schoolhouse. As the Court's decision in *Brown* suggested, public schools are places where students of diverse and pluralistic backgrounds may come together and learn to get along, forging

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[241] *See, e.g.*, Michael J. Perry, *Judicial Activism*, 7 HARV. J.L. & PUB. POL'Y 69, 69–71 (1984).

[242] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2631–34 (2015) (Thomas, J., dissenting); *id.* at 2640–41 (Alito, J., dissenting); United States v. Windsor, 570 U.S. 744, 808 (2013) (Alito, J., dissenting).

[243] For a discussion of the #MeToo movement, see Melissa Murray, *Consequential Sex: #MeToo,* Masterpiece Cakeshop*, and Private Sexual Regulation*, 113 NW. U. L. REV. 825 (2019).

[244] BRENDA COSSMAN, SEXUAL CITIZENS: THE LEGAL AND CULTURAL REGULATION OF SEX AND BELONGING 2 (2007).

[245] *Id.*

a more cohesive polity and union.[246] It is also a place where we lodge our most fervent hopes and wishes for the next generation and its future.

If we aspire to a citizenry that is equipped to cultivate a sex-positive culture in which sexual rights are as firmly rooted as other constitutional values, we must understand sexual citizenship as part and parcel of the struggle for the American mind. And this citizenship project must begin at the schoolhouse gate.

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[246] *See* Brown v. Bd. of Educ., 347 U.S. 483, 492–95 (1954).