

The American Society for Political and Legal Philosophy is distributing this draft to its members and registrants for our Zoom conference on “Civic Education in Polarized Times,” October 30, 2021, <https://political-theory.org/event-4317945>. Please do not distribute the draft further or quote or cite it without the permission of the author: jmmorton@sas.upenn.edu

Comments on Justin Driver’s “Civic Education, Students’ Rights, and the Supreme Court”

DRAFT

Jennifer M. Morton

University of Pennsylvania

The need for civic education is dire. As Professor Driver notes, civic knowledge and skills are dismally low. Most citizens manage to receive high school degrees without fully understanding how government works. The lack of civic education has had predictably damaging effects on our political community. In moments of crisis, like those we are living through right now, these consequences threaten our democracy. Even so, we cannot seem to agree on the remedy. The debate over critical race theory has intensified the notion that schools are a bipartisan battleground. In his essay, Professor Driver puts forward a solution to our current bipartisan impasse over civic education. His solution is brilliant not only because it has a legitimate claim to bipartisanship (in these times, that is no easy feat!), but also because it is pedagogically incisive.

Driver’s student-centered approach to civic education would have students read and discuss Supreme Court cases that have students like themselves at their center. This is an intrinsically engaging and pedagogically rich source of civic knowledge for students who love to see people like themselves as historical protagonists. Such a student-centered approach would be both forward- and backward-looking. Students would learn about the Constitution, the judicial process, their rights, and how these have changed over time. These debates—*Tinker* or *Brown*—are beautifully described in Driver’s *The Schoolhouse Gate*. Reading that book, one understands how considering even one of these Supreme Court opinions would give students a rich, nuanced, and deep understanding of the American legal and political framework within which we live.

I fear, however, that when we think through this proposal in practice, we will not avoid the kind of bitter partisan divides that Driver seeks to circumvent. More problematically, I will suggest that this approach is in tension with another critical aim of civic education—enabling students to reimagine the terms on which our society is built, including the Constitution and the legal process it enshrines. By taking Supreme Court opinions as the launching pad for a civics course, we tether civic education too closely to our institutions as they are, rather than offering students the tools to think about how these institutions ought to be. It might be possible to take an approach like the one proposed by Driver and ‘trojan horse’ a more radical vision of civic education. This would involve ‘opening up’ questions that are ‘closed’ on the more conservative interpretation of Driver’s proposal. The problem is that such an approach would fail to meet the bipartisan desideratum. Instead, we would seem to be caught anew in the grips of a partisan battle. In my conclusion, I will suggest that Driver’s approach might still be the best we can do in our current political climate. Even if we find the bipartisan middle in an anemic, little ‘c’ conservative approach to these topics, this will still constitute progress. This is a reflection not of what is possible for civic education but of how far we are from a well-functioning civic society.

I.

Civic education aims to equip students with the tools they need to participate in our political system effectively. This can be construed narrowly—understanding how government works, the basics of the Constitution, the rights and obligations of citizens—or more broadly—instilling the knowledge, reasoning, and other civic skills that allow students to become the kind of citizens who improve on our existing social

compact.¹ Schools are the battleground between the first more conservative understanding of civic education and the latter more progressive one. Could Driver's proposal thread that needle?

In the spirit of Driver's pedagogically sensitive approach, let me start with the classroom. I often teach political philosophy. In these classes, we discuss what I see as the central issue of civics—the terms under which we can live together as a political community. Students who are new to philosophy will often approach the course tentatively, unsure as to what counts as a good argument or what qualifies as evidence for a claim in this domain. These are legitimate concerns that I hope to allay as we do philosophy together. Inevitably, a few students will try their hand at offering arguments by putting forward something like: X is right because the Constitution protects X (or X is wrong because X is forbidden by the Constitution). These are not good philosophical arguments, but they stem from an understandable confusion about the difference between the normative standing of the legal framework in which they live and the critical questions I am asking them to consider about the justification for that framework.

This example helps us see essential gaps in the primary and secondary civic education students are receiving. First, students' understanding of the Constitution is lackluster, to say the least. As Driver notes, students arrive on college campuses without a good grasp of how the First Amendment—the one students tend to most readily cite in my courses—has been used in practice. They appeal to it in making arguments, but they do not understand its power. Second, too many students graduate from high school not having had the opportunity to think critically about the political and legal institutions in which they live. Many students have these conversations outside of the classroom with their friends or on social media. They just have not had many opportunities to do so in the context of a classroom where they are guided to engage in careful, evidence-based deliberation with each other. Students certainly have lots of political opinions but not a lot of experience thinking about the assumptions they make critically and systemically.² Posting a tweet about Black Lives Matter is a far cry from thinking critically about the history of racial domination in this country and the way it infects all of our institutions, even ones in which students may unwittingly participate.³ Finally, students are not given the opportunity to think creatively about how our political, legal, and social institutions could be better and different than they are. Too often they take as necessary features of our system that are anything but. All of these are deficits in civic education.

Driver's student-centered approach to civic education has the potential to make inroads here. In the first place, students who learn about *Tinker*, for example, would have a deeper understanding of the First Amendment and how it has been deployed in historically critical moments. As Driver notes, this would not only teach students about their First Amendment rights but help them start to see themselves as having agency in the political domain. Understanding a case like *Tinker* can also allow students to think critically about the educational institutions through which they move. The drive that motivated those students to don black armbands is a critical, political one. Learning about these students can validate that same motivation in today's students. It is with respect to the third goal, rethinking the terms of our political project, that the limitations of Driver's approach are more evident.

One way of understanding a case like *Tinker* is that it shows us the power of the First Amendment to protect the rights of students. In so doing, it enshrines the brilliance of the document and sets the limits of the

¹ Lee, C. D., White, G., & Dong, D. (Eds.). (2021). *Educating for Civic Reasoning and Discourse*. Washington, DC: National Academy of Education.

² Hess, D. E., & McAvoy, P. (2014). *The political classroom: Evidence and ethics in democratic education*. Routledge.

³ Of course, some students have done this and more. However, those are not the students that we worry about when thinking about the lack of civic education in schools.

debate. It takes the Constitution's authority to use Diana Hess and Paul McAvoy's language to be a closed question.⁴ Another approach would encourage students to take the Constitution's authority to be an open question. In the age of social media, one might ask whether the Constitution is limited in the guidance it can offer us out of the morass of misinformation. To take the First Amendment's authority within our shared political project as unsettled would require that students consider alternatives and think creatively about what a better system might be. I contend that a more progressive and ambitious civic education should encourage students to engage with *Tinker* in this second way.

It is here that we start to see the tension in Driver's proposal. On the one hand, these cases offer common ground that a bipartisan group could use as the basis of a civic education curriculum. But, on the other, finding that common ground would likely lead us to take questions as closed that we would see as open if we were to educate students to critically reflect on the very foundations of our system of shared government.

II.

To further make my case let me turn to *Brown v. Board of Education*. A seminal case in the 'schoolhouse cases' that would comprise the material for Driver's civic education proposal. I am not a legal scholar, so you will have to excuse my cursory understanding of the depths of the *Brown* debate.⁵ One way of looking at *Brown* is as a victory for racial equality. This is, I expect, how many would be inclined to teach *Brown* if they were motivated by the drive to seek consensus with the opposing side. We might imagine this playing very well in an affluent majority White suburban school. Moreover, we cannot deny, that as Driver writes, "*Brown*, properly understood, provided supporters of racial equality with a powerful rhetorical and moral weapon that helped to catalyze the nation toward the goal of racial equality."⁶ Nevertheless, it is precisely the rhetorical power of *Brown* that might obscure questions that we should be asking in a civic education classroom.

Another analysis of *Brown*, put forward by critical legal theorists, takes it to be a regressive decision. They hold that the decision was motivated by a desire to satisfy calls for racial equity without making meaningful changes to the education received by most Black and Brown Americans. Derrick Bell suggests that "viewing *Brown* as a symbol of what might have been, however, only serves to mask the continuing manifestations of inequality that divide us along lines of color and class. These divisions are exploited to enable an uneasy social stability, but at a cost that is no less onerous because it is all too obvious to blacks, and all but oblivious to a great many whites."⁷ According to this alternative analysis, *Brown* allows those who benefit from racial discrimination to feel that this issue has been taken care of while it continues to damage the lives of those who suffer the effects of underfunded, segregated schools. This reading of *Brown* might be more resonant to the many Black and Brown low-income students who are still attending segregated schools. This approach would have us consider the limitations of a strategy for advancing racial equality through the courts.

Here we have two radically different ways of thinking about the same case—one that would see in this case the continuing power of the founding documents of the United States, and one that would focus on its inherent limitations. The first would take the courts as an effective path through which to seek an ever more perfect union. The second sees the courts as often playing the role of an obstacle to achieving true equality. I suspect that citizens aligned with the two parties might also be split on which version of the case to teach in

⁴ Hess, D. E., & McAvoy, P. (2014). *The political classroom: Evidence and ethics in democratic education*.

⁵ Though we should note that most teachers, administrators, and others who would be involved in making these decisions will also have a superficial understanding of these issues.

⁶ Driver, J. (2018). *The schoolhouse gate: Public education, the Supreme Court, and the battle for the American mind*. Pantheon, p. 312.

⁷ Bell Jr, D. A. (2005). The unintended lessons in *Brown v. Board of Education*. *NYLS Law Review*, 49(4), p. 1065.

K-12 schools. It would seem, then, that we cannot get away from the bitter partisan divides that we see in current debates regarding how to teach American history.

If we are to teach *Brown* as a civics lesson, can we do so without talking to students about how this is “a nation borne on the backs of two evils of history—the violent takeover of Indigenous territory and near decimation of Indigenous peoples as the nation’s borders advanced, and what many refer to as the holocaust of African enslavement?”⁸ Even in discussing which ‘facts’ count as such we see political polarization at play. For example, some Texas schools are encouraging teachers teaching about the Holocaust to teach students about countervailing perspectives on this mass atrocity.⁹ Even the most settled historical facts are up for contention as ‘opinions’ in our current political climate.

However, if we retreat from confronting these facts because they might be potentially polarizing, can we truly be said to be teaching students the critical thinking skills they need to be good citizens? Critical thinking requires that students be well versed in “uncovering how power operates” in their civic communities.¹⁰ To fail to do so is to inculcate in students a conservatism that is at odds with fashioning a better future. The approach put forward by Driver has the materials from which we could ‘trojan horse’ a more progressive, radical approach to civic education, but it is difficult to see how we might do so without challenging the very premises of what makes this approach potentially bipartisan.

Citing Professor Robert Gordon, Derrick Bell writes that “things seem to change in history when people break out of their accustomed ways of responding to domination by acting as if the constraints on them are not real and they have the power to change things.”¹¹ (1066). For many, taking the normative framework of our shared political project to be defined by where the current political climate would set it is a habit that is hard to break. Civic education should, in my view, disrupt that impulse. But it is hard to see how we might do so if we tether too closely to the court’s interpretation of the limits to what we can accomplish, particularly, with this very conservative set of justices.

II.

Where does this leave us? In *The Political Classroom*, Diana Hess and Paul McAvoy describe how two very ideologically like-minded schools, one liberal and one conservative, sought to discuss controversial issues in the classroom and equip future citizens with the skills to be engaged, thoughtful citizens. Their richly described cases show the potential and limitations of doing so within classrooms that lacked diversity. If we envision Driver’s schoolhouse cases being taught in those classrooms, we start to get a sense of what we might expect. In some school districts, teachers, parents, and administrators will be open to the more critical version of this course. There, different questions will be open. In others, the more conservative version will prevail. One might argue that the flexibility of the approach is a strength of the account; it has room for many interpretations. Still, others might argue that even if students learn, for example, that *Brown* was a great victory in the fight for racial equality, discussing it with their peers in the way that Professor Driver envisions would function as a ‘trojan horse’ to deeper, more complex debates about the role of the courts, America’s history of racial domination, and the failures of the education system.

However, we must remember that this civic education course would be happening against the background of socioeconomic, racial, and political segregation. Consequently, we should be wary of making assumptions

⁸ Lee, C. D., White, G., & Dong, D. (Eds.). (2021). *Education for Civic Reasoning & Discourse*. Washington D.C.: National Academy of Education, p. 9.

⁹ <https://www.theguardian.com/commentisfree/2021/oct/19/texas-holocaust-curriculum-schools-hb-3979>

¹⁰ Lee, C. D., White, G., & Dong, D. (Eds.). (2021). *Education for Civic Reasoning & Discourse*. p. 33.

¹¹ Bell Jr, D. A. (2005). *The unintended lessons in Brown v. Board of Education*. P. 1066.

about how these lessons will play out in the current climate. Creating a more engaged and civically minded citizenship requires that we learn how to live together across differences. A civic education curriculum that allows students to walk away with vastly different ways of understanding our joint political project might not sufficiently narrow existing divides.

Recently, the National Academy of Education put together a thorough report on Civic Reasoning and Discourse. The group, convened by Carol Lee, brought scholars from across the academy—philosophers, historians, cognitive scientists, education researchers, political scientists—together to discuss how to put forward a program for civic education. In their chapter on the history of education, Nancy Beadie and Zoe Burkholder show how the umbrella of civic education has “often functioned as a program of forced assimilation and violence against Native, Black, and Latinx communities.”¹² Their report also details how civic education has been used to advance the cause of racial and gender equality. What they argue is that civic education is a big umbrella—in some historical contexts, it has reified existing inequalities, and in others, it has bucked against them. They write that to be effective, “we must understand *where we are in history, understand ourselves as historical agents, and believe that engagement matters*” (original emphasis).¹³

This lesson is essential for us as we consider avenues towards building consensus around civic education. It might very well be that we cannot do better at this historical moment in the United States than aiming for common ground around understanding one of the branches of government that still retains some credibility. Building civic education by discussing the Schoolhouse cases with students could be seen as a way of going back to basics. With this approach, we are rebuilding the foundation of civic understanding that is necessary, though not sufficient, for the solidarity and civic friendship¹⁴ required to embark on more ambitious progressive projects. However, as I have noted, there is a risk—one that we can see most plainly in the legacy of *Brown*. Sometimes a little bit of progress can prevent us from agitating for a more radical refashioning of the political project.

In closing, let me share another classroom story. One of my high school teachers, Leilani Hall, had our class reenact Rawls’ original position. She did not tell us about Rawls or about political philosophy, she simply framed it as a class activity. We were asked to devise the laws for our imagined community without knowing who we would be in society. As I remember it, my schoolmates were excited and engaged with this exercise. For that entire class period, we talked about the correct principles for distribution, what sort of protections we would want our government to guarantee, and how we would want to live together in a political community. We offered arguments for our suggestions and talked through the various alternatives. It was obviously a formative moment for me since here I am, still thinking through those questions. But it was also a model for how to engage in the kind of progressive civic deliberation necessary to move beyond the current impasse.

¹² Lee, C. D., White, G., & Dong, D. (Eds.). (2021). Education for Civic Reasoning & Discourse. p. 143.

¹³ Lee, C. D., White, G., & Dong, D. (Eds.). (2021). Education for Civic Reasoning & Discourse. p. 143.

¹⁴ Allen, D. S. (2006). *Talking to strangers. anxieties of citizenship since brown v. board of education* (No. 23, pp. 47-58). Editions Hermann.