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Civic Education, Students' Rights, and the Supreme Court

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Toward the end of every year, in a practice that dates back decades, the Chief Justice of the United States has released a document titled the “Year-End Report on the Federal Judiciary.”¹ Despite their New Year’s Eve timing, these reports consistently elicit less celebration than somnolence. Standard fare includes the stagnant salaries of Article III judges and how many cases the Justices decided during the Term that concluded a few months prior—items painstakingly illustrated with bar graphs and the occasional chart. Even among the closest of Supreme Court watchers, these annual reports seldom garner sustained attention, as they seem deliberately designed to evade notice. More often than not, they realize their modest ambitions. As one journalist who covers the Supreme Court and its intricacies noted with considerable understatement: “The year-end report is usually devoid of anything controversial.”²

In 2019, however, Chief Justice John G. Roberts, Jr. issued that rarest of items: a year-end report that actually proved momentous. That unusual report explored the judiciary’s myriad connections to civic education. Among other intersections, Roberts contended that the American judiciary can be construed as intrinsically promoting awareness of the nation’s foundational legal commitments and thereby fostering civic education. “By virtue of their judicial responsibilities, judges are necessarily engaged in civic education,” Roberts wrote.³ “When judges render their judgments through written opinions that explain their reasoning, they advance public understanding of the law.”⁴ The Supreme Court’s iconic decision invalidating school segregation in *Brown v. Board of Education*, Roberts noted, could helpfully be viewed through this prism.⁵ Chief Justice Earl Warren saw to it that the *Brown* opinion would be sufficiently concise—running only eleven pages—so that it could be reprinted in newspapers around the nation. *Brown*, Roberts wrote, thus vividly exemplifies “the power of a judicial decision as a teaching tool,” as it provided “every citizen [an opportunity to] understand the Court’s rationale.”⁶ But Roberts did not content himself by basking in *Brown*’s reflected glory. Rather, he also delivered a sobering assessment of the nation’s disregard for democratic ideals and the attendant decline of

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¹ Chief Justice Warren Burger appears to have inaugurated this tradition in 1970, though he used a slightly different title for the documents. Chief Justice Burger, “The State of the Judiciary—1970,” *American Bar Association Journal* 56, no. 10 (1970). Chief Justice William Rehnquist and Chief Justice John G. Roberts, Jr. have continued the custom.

² Mark Walsh, “Chief Justice Warns That ‘Civic Education Has Fallen by the Wayside,’” *Education Week*, December 31, 2019, <https://www.edweek.org>.

³ Chief Justice John G. Roberts, Jr., “2019 Year-End Report on the Federal Judiciary,” 2, <https://www.supremecourt.gov>.

⁴ *Ibid.*

⁵ 347 U.S. 543 (1954).

⁶ Roberts, “2019 Year-End Report,” 2.

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civic education. “[W]e have come to take democracy for granted,” Roberts lamented, “and civic education has fallen by the wayside.”⁷

Since Roberts issued this *cri de coeur* two years ago, these concerns regarding democracy and civic education have only intensified. Most prominently, of course, the atrocities of January 6 represented the starkest repudiation of democracy on American soil in decades. That insurrection has been termed “a sputnik moment for an ambitious revival of civics instruction.”⁸ Somewhat improbably, moreover, controversies involving civic education have become a salient, persistent topic of national controversy over the last several months. Two years ago, the *New York Times* released its 1619 Project, which emphasized the nation’s deep connections to race-based chattel slavery and the ongoing legacy of that odious institution.⁹ In response, President Donald Trump formed the 1776 Commission with an eye toward attacking and displacing 1619’s slavery-based narrative. The ensuing report undertook precisely that mission.¹⁰

I have no interest whatsoever here in relitigating the merits and demerits of these competing reports. Those debates have already received ample airtime. I do, however, wish to make two observations. First, although the documents were not widely understood in this fashion at the time, both the 1619 Project and the 1776 Report expressly conceived of themselves as tools of civic education. Each document contemplated how schools could implement their animating ideas, and various educators across the nation have in fact done just that.¹¹ Second, the competing reports, which hotly dispute the nation’s true origins, embody the profound polarization that currently afflicts American society. As a nation, our two dominant political tribes appear perilously close to singing in unison: “You say 1619. I say 1776. Let’s call the

⁷ *Ibid.*, 2.

⁸ Andrea Gabor, “Democracy Needs to Be Taught in School,” *Bloomberg Opinion*, January 14, 2021, <https://www.bloomberg.com/opinion>.

⁹ “The 1619 Project,” *New York Times*, September 4, 2019, <https://www.nytimes.com>.

¹⁰ Michael Crowley and Jennifer Schuessler, “In Report, White House Tries to Revise U.S. History,” *New York Times*, January 20, 2021, A16. The 1776 Report stated: “By turning to bitterness and judgment, distorted histories like Howard Zinn or the journalists behind the ‘1619 Project’ have prevented students from learning to think inductively with a rich repository of cultural, historical, and literary referents.” The President’s Advisory 1776 Commission, *The 1776 Report* (Washington, DC: The White House, 2021), 36.

¹¹ The *New York Times* 1619 Project devised a curriculum. Leslie M. Harris, “I Helped Fact-Check the 1619 Project. The Times Ignored Me,” *Politico*, March 6, 2020, <https://www.politico.com> (“The *Times* [as part of the 1619 Project] produced not just a magazine, but podcasts, a newspaper section, and even a curriculum designed to inject a new version of American history into schools.”). Many schools across the country have implemented aspects of the 1619 curriculum. See, e.g., Chantal Da Silva, “U.S. Schools Have Openly Taught the 1619 Project for Months,” *Newsweek*, September 7, 2020, <https://www.newsweek.com>. President Trump stated that the goal of the 1776 Commission was to “restore patriotic education to our schools.” “President Trump Remarks at White House History Conference,” *C-Span*, September 17, 2020, <https://www.c-span.org>. Some schools have also adopted the 1776 curriculum. See, e.g., “Dr. Matthew Spalding of Hillsdale College Talks 1776 Commission Curriculum and New Resources for K12 Parents,” *Tennessee Star*, September 21, 2021, <https://tennesseestar.com>; see also Rob Way and Jared Kofsky, “SC Lawmakers May Use Trump’s 1776 Report to Shape US History Curriculum,” *WMBF News*, March 31, 2021, <https://www.wmbfnews.com>.

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whole thing off.”¹² Professor Ronald Dworkin memorably captured the depth of American polarization:

American politics are in an appalling state. We disagree, fiercely, about almost everything. We disagree about terror and security, social justice, religion in politics, who is fit to be a judge and what democracy is. These are not civil disagreements: each side has no respect for the other. We are no longer partners in self-government; our politics are a form of war.¹³

Dworkin offered this evaluation way back in 2006. From today’s vantagepoint, fifteen years ago resembles nothing less than the halcyon days of American political consensus.¹⁴ In addition to the salient disagreements that Dworkin long ago identified—which have only grown more hostile with the passage time—Democrats and Republicans have in recent months managed somehow to adopt ferociously conflicting positions on a pandemic.

It sometimes seems that agreeing to disagree (often angrily) is the only thing that Blue America and Red America can agree upon. Yet the nation would be well served by attempting to identify some common ground on the question of civic education. Rather than fighting exclusively about what should *not* be taught in the nation’s public schools, it seems far more profitable to expend at least some intellectual energy contemplating approaches to civic education that could plausibly garner widespread support.

Even in our intensely polarized era, however, it is important to realize that there is widespread, bipartisan agreement that the current state of civic education is lacking. In March 2021, Senator Chris Coons, a Democrat from Delaware, and Senator John Cornyn, a Republican from Texas, cosponsored a bill called the “Civics Secures Democracy Act.”¹⁵ That measure, if enacted, would appropriate roughly six billion dollars over the course of six years to foster civic education.¹⁶ Supreme Court Justices from across the ideological spectrum have also joined forces on this cause. Justice Neil Gorsuch and Justice Sonia Sotomayor, who often disagree in high-profile cases, have made joint appearances touting the need to deepen student comprehension of our basic civic structures.¹⁷ On such occasions, Justice Gorsuch has spoken powerfully about

¹² The reference here, of course, is to the classic song: “Let’s Call the Whole Thing Off.” Fred Astaire with Johnny Green and His Orchestra, “Let’s Call the Whole Thing Off,” March 3, 1937, track 1 on *Let’s Call the Whole Thing Off*, Brunswick Records, 1937.

¹³ Ronald Dworkin, *Is Democracy Possible Here? Principles for A New Political Debate* (Princeton, NJ: Princeton University Press, 2006), 1 (quoted in Rebell, *Flunking Democracy*, 2).

¹⁴ I should note, though, that I am highly skeptical that the term “consensus” accurately captures the complex dynamics that existed in American society during the 2000s, the 1950s, and every other decade. Conflict, rather than consensus, has always more accurately characterized American society, in my view. See Justin Driver, “The Consensus Constitution,” *Texas Law Review* 89, no. 4 (2011).

¹⁵ Senator Chris Coons and Senator John Cornyn, “The Civics Secures Democracy Act,” *Chris Coons*, March 11, 2021, <https://www.coons.senate.gov>.

¹⁶ *Ibid.* The need for an increased federal monetary commitment to civic education seems undeniable. See Danielle Allen and Paul Carrese, “Our Democracy Is Ailing. Civics Education Has to Be Part of the Cure,” *Washington Post*, March 2, 2021, <https://www.washingtonpost.com> (noting that the nation spends about \$50 per year educating each student in science, technology, engineering, and math, but only 5 cents per year educating each student in civic education).

¹⁷ John Fritze, “Three Supreme Court Justices Tackle U.S. Partisan Divisions in Public Remarks,” *USA TODAY*, April 14, 2021, <https://www.usatoday.com>.

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how the state of civic education poses a “national security” crisis, and noted that political and cultural polarization forms an important part of the crisis: “How can the democracy function if we can’t talk to one another, and if we can’t disagree, kindly, with respect for one another’s differences and points of view?”¹⁸ For her part, Justice Sotomayor has also dedicated significant time to promoting iCivics, an organization formerly chaired by Justice Sandra Day O’Connor, which seeks to capitalize upon youngsters’ fascination with video games to spark their interest in learning about U.S. government.¹⁹

Concerns in this field are not the product of an illogical panic but instead are well-founded, as the state of civic comprehension in the United States is—in a word—grim. The leading national method for assessing civic education consistently finds that fewer than 25 percent of American students attain proficiency in the subject.²⁰ Consider only one egregious indicator of students’ lack of knowledge, even about a signal event in American history: less than one-third of eighth graders could successfully identify why the Founders adopted the Declaration of Independence.²¹ Nor does the situation magically improve when minors reach the age of majority. In 2016, one survey determined that only about one in four Americans could name all three branches of government.²²

While basic civic understanding is shoddy in many areas, comprehension of the judiciary is shockingly dismal. The Annenberg Public Policy Center has found in recent years that: nearly one-third of American adults thought that Supreme Court opinions can be appealed; fewer than half of American adults understood that when the Supreme Court issues a decision by a 5-4 margin that the majority opinion holds the same formal status as does a unanimous opinion; 23 percent of American adults responded that when the Court issues a 5-4 decision that Congress ultimately resolves the dispute, and an additional 16 percent thought that the lower courts settle the matter.²³ Predictably, adults who took a civic education course in high school demonstrated a stronger grasp of our constitutional order.²⁴

Chief Justice Roberts’s year-end report identified several ways that the judiciary is connected to civic education. In addition to judicial opinions, Roberts highlighted—among others—how a New York program brings students into a federal courthouse to better understand the judicial system, and how an esteemed judge on the U.S. Court of Appeals for the District of

¹⁸ Ibid.

¹⁹ See “Justice Sonia Sotomayor Sits Down with Soledad O’Brien to Talk Civic Education,” *iCivics*, January 8, 2019, <https://www.icivics.org>.

²⁰ See, e.g., “NAEP Report Card: Civics,” *Nation’s Report Card*, accessed September 25, 2021, <https://www.nationsreportcard.gov> (noting that less than twenty-five percent of eighth graders demonstrated proficiency in their 2018 assessment).

²¹ Michael A. Rebell, *Flunking Democracy: Schools, Courts, and Civic Participation* (Chicago: The University of Chicago Press, 2018), 18.

²² See Sarah Shapiro and Catherine Brown, “The State of Civics Education,” *Center for American Progress*, February 21, 2018, <https://www.americanprogress.org>.

²³ Kathleen Hall Jamieson, “The Challenges Facing Civic Education,” *Daedalus* 142, n. 2 (Spring 2013): 74, https://doi.org/10.1162/DAED_a_00204.

²⁴ Ibid.

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Columbia Circuit dedicated time to tutoring students at a local, underprivileged elementary school.²⁵

In this Essay, I aim in effect to amplify Chief Justice Roberts’s call for connecting the judiciary to civic education, perhaps more loudly than he ever envisioned. I seek to promote what I label a “student-centered approach to civic education.”²⁶ Of course, virtually all advocates of civic education in elementary and secondary school settings would readily assert that their preferred models center the concerns of students. Exactly no one boasts of *teacher*-centered civic education, or—even more improbably—*principal*-centered civic education. But “student-centered civic education” differs from many approaches by featuring the historic struggles for students’ constitutional rights as the very touchstone of civic education.²⁷ The approach foregrounds the major Supreme Court decisions that have shaped the everyday lives of students across the nation. It is simultaneously retrospective and prospective; teaching students about the hard-fought constitutional struggles that young people waged yesteryear, and encouraging them to critically evaluate the contours of their rights in the context of today’s civic society. A student-centered approach to civic education thus not only frames students as active participants in shaping our constitutional order, but it also positions them well to become engaged, able stewards of our constitutional democracy. This Essay begins by describing the numerous salutary developments that the student-centered approach promises (including the less obvious second-order effects), then engages with objections to this approach, and closes by proposing how advocates might best pursue the urgent task of civic education reform.

A chief virtue of a student-centered approach to civic education is that it undertakes comprehending the relationship between the people and their government in a way that is tangibly, palpably connected to the daily lives of adolescents. Many, perhaps even most, high school students view relatively abstract constitutional concepts—like federalism, the separation of powers, executive authority, and the amendment process—as being utterly disconnected from the matters about which they care most. But highlighting constitutional conflicts involving students and the limitations that judicial opinions have placed on school authority hits young people where they spend vast portions of their waking hours. The schoolhouse occupies a

²⁵ Roberts, “2019 Year-End Report,” 3. Judge Robert Katzman initiated the New York program. See “Our Mission,” *Justice for All: Courts and the Community*, accessed September 29, 2021, <https://justiceforall.ca2.uscourts.gov>. Then Judge Merrick Garland tutored students at J.O. Wilson Elementary in Washington for decades. See Perry Stein, “Supreme Court Nominee Merrick Garland Has Tutored These D.C. Schoolkids for Years,” *Washington Post*, March 19, 2016, <https://www.washingtonpost.com>.

²⁶ This term has recently been used to refer to an approach where students engaging in civic education activities receive minimal instruction from their teachers. See, e.g., Julia Marin Hellwege, “Left to Their Own Devices: A Student-Centered Approach to Civic Engagement,” *Journal of Political Science Education* 15, no. 4 (2019). But I have in mind a quite distinct concept. My version is “student-centered” not because students are primarily guiding their own educations, but because the student experience is centered—literally—in the civic education curriculum itself.

²⁷ See Elizabeth Beaumont, *The Civic Constitution: Civic Visions and Struggles in the Path Toward Constitutional Democracy* (New York: Oxford University Press, 2014), xvi (“Taking the Constitution seriously requires taking citizens’ disputes over its essential commitments more seriously.”).

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concomitantly large share of students’ mental energy. Many of the nation’s fifty million public school students, like people generally, will find it easier to gain traction on a subject matter if they begin by clearly understanding how the subject matter is relevant to their lives.²⁸

The facts of leading cases involving students’ constitutional rights will fascinate and captivate students in a visceral fashion that no other civic education topic can match. Should schools be able to force students who participate in extracurricular activities to provide urine samples for drug testing even if educators have no individualized suspicion of wrongdoing on students’ parts?²⁹ Should schools be able to punish students for not following directions or for talking in class by striking them forcefully with a two-foot-long wooden paddle twenty times?³⁰ Should schools be able to strip-search students in an effort to locate ibuprofen tablets—an item educators have defined as contraband—even when there is no reason to believe that students have secreted the forbidden pain relievers in their undergarments?³¹ Should schools be permitted to ban unauthorized immigrants from obtaining elementary and secondary educations?³² Should schools be able to suspend a cheerleader from the junior-varsity squad for an entire year who posts a vulgarity on social media—off campus on a weekend afternoon—to vent her frustration about failing to make varsity?³³ These are but a few of the many scintillating questions presented by actual Supreme Court opinions involving constitutional rights in schools. These questions would engage even the most jaded students enrolled in a civic education course.

The student-centered approach to civic education also drives home the important lesson that young people have made invaluable contributions to our current constitutional order. Sometimes, young people mistakenly believe that civic affairs are the exclusive domain of adults. But when students today read about teenagers John Tinker and Mary Beth Tinker wearing black armbands to school in the 1960s over the objections of school authorities in Des Moines, Iowa, they would see that citizens’ constitutional rights do not simply materialize out of thin air or are always get willingly handed over to them by government authorities. Rather, the Tinkers—by daring to protest the Vietnam War on school grounds—sacrificed a tremendous amount and drew scorn from many Iowans to make students’ First Amendment rights a reality.³⁴ Thus, *Tinker v. Des Moines Independent Community School District* drives home the point that young people of prior generations have successfully stood up for constitutional rights and thus

²⁸ See, e.g., Jeffrey R. Albrecht and Stuart A. Karabenick, “Relevance for Learning and Motivation in Education,” *Journal of Experimental Education* 86, no. 1 (2018): 3, <https://doi.org/10.1080/00220973.2017.1380593> (“Over the past few decades, the idea that education should be made relevant to students has been studied and endorsed by motivation researchers in education and psychology.”); Margot Belet, “The Importance of Relevance to Student Lives: The Impact of Content and Media in Introduction to Sociology,” *Teaching Sociology* 46, no. 3 (2017): 208, <https://doi.org/10.1177/0092055X17730113> (finding that students’ “perceptions of . . . [a] course as relevant [is] associated with . . . course satisfaction and achievement”).

²⁹ See *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 826 (2002).

³⁰ See *Ingraham v. Wright*, 430 U.S. 651, 653-57 (1977).

³¹ See *Safford Unified School District v. Redding*, 557 U.S. 364, 368-69 (2009).

³² See *Plyler v. Doe*, 457 U.S. 202, 205 (1982).

³³ See *Mahanoy Area School District v. B.L.*, 141 S. Ct. 2038, 2043 (2021).

³⁴ For a brief overview of the Tinkers’ tribulations, see Justin Driver, *The Schoolhouse Gate: Public Education, the Supreme Court* (New York: Vintage Books, 2018), 85-86.

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played a pivotal role in creating modern civic society.³⁵ This realization instructs today’s students that they, too, have an indispensable role to play in bequeathing a constitutional tradition to subsequent generations.

Another virtue of student-centered civic education is that it instills young Americans with respect for longstanding constitutional values at a time when some of those values have come under attack. It is no secret, for example, that many young people today—particularly on the left—have grave skepticism about the First Amendment’s utility.³⁶ Free expression, left-leaning critics maintain, is used as either a shield to protect the powerful or a cudgel to bash the powerless. But if students learned at a formative age how major causes have successfully harnessed the power of free speech in schools—including not just *Tinker*’s protection of antiwar speech, but other judicial precedents such as one vindicating the ability of civil rights activists in Mississippi to promote racial equality—it would be difficult to maintain that the First Amendment *invariably* oppresses marginalized groups.³⁷

The nation’s college campuses have in recent years witnessed numerous, high-profile conflagrations where students have evinced precious little respect for free speech.³⁸ Commentators on the left and on the right have expressed great alarm that our institutions of higher education—where intellectual exchange on contentious topics is supposed to be prized—sometimes appear to hold free speech in such low regard.³⁹ Too few of those commentators have noted, alas, that college students may well disdain freedom of expression in no small part because they did not meaningfully encounter the concept in elementary or secondary school. Waiting to cultivate respect for free speech until a student reaches college is, of course, a little late in the day for such a momentous intervention. That process should have been initiated long before students even step foot on campus, something that a student-centered civic education would prioritize.

Student-centered civic education would not have pupils simply learn about judicial decisions involving their constitutional rights in a passive manner. To the contrary, the material lends itself to active debate among the students about the appropriate scope of constitutional rights in school. After students learn the basic contours of, say, free speech in schools, teachers should offer novel factual scenarios in mock cases that are designed to test the limits of permissible student speech by assigning half of the class to act as a lawyer for the student and the other half of the class to act as a lawyer for the school board. These mock cases would thus

³⁵ 393 U.S. 503, 505-14 (1969).

³⁶ Jonathan Zimmerman and Signe Wilkinson, *Free Speech: And Why You Should Give a Damn* (Buffalo, NY: New Idea Press, 2021), x (noting that younger Americans disproportionately agree that the First Amendment “goes too far” in protecting speech); David Cole, “Why We Must Still Defend Free Speech,” *New York Review*, September 28, 2017, <https://nybooks.com> (noting and critiquing the diminished youth support for First Amendment protections).

³⁷ *Tinker*, 393 U.S. at 505-14; *Burnside v. Byars*, 363 F.2d 744, 748-49 (1966).

³⁸ See, e.g., Editorial, “Smothering Speech at Middlebury,” *New York Times*, March 7, 2017, A26; Alina Tugend, “Challenging Free Speech,” *New York Times*, June 6, 2018, L4.

³⁹ See, e.g., Erwin Chemerinsky and Howard Gillman, *Free Speech on Campus* (New Haven, CT: Yale University Press, 2017); Sigal L. Ben-Porath, *Free Speech on Campus* (Philadelphia: University of Pennsylvania Press, 2017); George Will, “The Closed American Mind,” *Washington Post*, December 2, 2012, A27.

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encourage students to disagree with each other’s constitutional views respectfully, and thereby aid our ailing democratic experiment.⁴⁰ If students do not begin learning how to disagree with their peers in the relatively safe school context, disagreements in non-school settings will increasingly escalate into the ad hominem attacks that are already a disconcerting staple of our politics and of our broader culture.

Ideally, in these mock judicial settings, teachers would often assign students to defend a legal position that runs counter to the students’ own expressed viewpoints. (Contrary to popular belief, students do not always espouse the “pro-student” position on constitutional controversies in school.) When students advocate a legal position that they do not actually hold, it requires them to contemplate and voice the most compelling arguments on the other side. This exercise of walking in the shoes of one’s opponents encourages a measure of empathy for people with whom we might often disagree. This empathic understanding could play some role in helping to reduce political polarization. It is often difficult to demonize people on the other side of an issue when you have taken their views seriously, and even articulated them.

One theme that students ought to explore in a student-centered civic education course is how the Supreme Court itself has construed schools as shaping citizens. Some of the most significant opinions assessing students’ constitutional rights have expressly emphasized the citizen-formation aspect of the nation’s public schools.⁴¹ In *Brown v. Board of Education*, Chief Justice Warren famously contended in 1954: “[E]ducation is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship.”⁴² Eighteen years later, when assessing a Free Exercise Clause objection to a compulsory education law in 1972, the Supreme Court returned to this theme: “[E]ducation is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.”⁴³ One decade later, when the Supreme Court invalidated a Texas measure that sought to exclude unauthorized immigrants from public schools, Justice Brennan’s majority opinion noted that excluding young people from education “den[ies] them the ability to live within the structure of our civic institutions.”⁴⁴ Most recently, earlier this year, Justice Stephen

⁴⁰ See Amy Gutmann, *Democratic Education* (Princeton, NJ: Princeton University Press, 1987); Diana E. Hess and Paula McAvoy, *The Political Classroom: Evidence and Ethics in Democratic Education* (New York: Taylor & Francis, 2015); Jonathan Zimmerman and Emily Robertson, *The Case for Contention: Teaching Controversial Issues in American Schools* (Chicago: The Chicago University Press, 2017). The student-centered model of civic education would thus in effect be an exercise in “deliberative democracy,” which suggests that in a diverse democratic society it is essential for everyone to have reasoned discussions with people whose commitments differ from their own. See Gutmann, *Democratic Education*, 51: “Children must learn not just to behave in accordance with authority but to think critically about authority if they are to live up to the democratic ideal of sharing political sovereignty as citizens.”

⁴¹ Many distinguished legal scholars have incisively probed the relationship between the Supreme Court’s decisions and civic education. See, e.g., Betsy Levin, “Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School,” *Yale Law Journal* 95, no. 8 (1986); Helen J. Knowles, “The Supreme Court as Civic Educator,” *First Amendment Law Review* 6, no. 2 (2008); Anne C. Dailey, “Developing Citizens,” *Iowa Law Review* 91, no. 2 (2006).

⁴² 347 U.S. 483, 493 (1954).

⁴³ *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972); see also *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944) (“A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies.”).

⁴⁴ *Plyler v. Doe*, 457 U.S. 202, 223 (1982).

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Breyer’s opinion for the Court in *Mahanoy Area School District v. B.L.*, a case involving off-campus student speech, noted that public schools themselves have an interest in protecting students’ free expression because doing so preserves our democratic society. “America’s public schools are the nurseries of democracy,” Justice Breyer contended. “Our representative democracy only works if we protect the marketplace of ideas.”⁴⁵

The Supreme Court has also repeatedly suggested that it bears a special responsibility for safeguarding constitutional rights in the school context, lest students draw incorrect lessons about citizenship. Justice Robert Jackson stated this point for the Court most powerfully in 1943, when he led the Court’s invalidation of a state measure that required students to salute the American flag in *West Virginia State Board of Education v. Barnette*. “That [public schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual,” Justice Jackson wrote, “if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”⁴⁶ In 1960, the Supreme Court reiterated this idea that the public school is a preeminent site of constitutional interpretation: “The vigilant protection of our constitutional freedoms is nowhere more vital than in the community of Americans schools.”⁴⁷

In exploring the Supreme Court’s conceptualization of public schools as institutions that form citizens, it is important for students to appreciate that various Justices hold sharply divergent views of what citizenship entails, particularly for young people in school settings. Some Justices have embraced a robust conception of citizenship for students, suggesting that schools ought to permit and foster wide-ranging, spirited debates on the contentious questions of the day. This notion of citizenship suggests that the culture of American schools should resemble the larger clamorous nation of which they are a part. Writing for the Court in *Tinker*, Justice Abe Fortas espoused this robust notion of citizenship:

Any word spoken in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says that we must take this risk, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious society.⁴⁸

Other Supreme Court Justices, in contrast, have offered a thin, even anemic conception of citizenship for students. On this view, schools should not host free-wheeling debates, but should instead concentrate on imposing order and discipline on students. This notion of citizenship is what might be termed “Report Card Citizenship,” with a nod toward the subject that some elementary schools use to evaluate students based on their willingness to exhibit deference, follow directions, and play nicely with others. Justice Hugo Black, dissenting in *Tinker*, has

⁴⁵ *Mahanoy Area School District v. B.L.*, 141 S. Ct. 2038, 2046 (2021) (internal quotation marks omitted).

⁴⁶ *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 637 (1943).

⁴⁷ *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). For an elaboration of this theme, see Justin Driver, “The Public School as the Preeminent Site of Constitutional Law,” *Nebraska Law Review* 98, no. 4 (2020).

⁴⁸ *Tinker v. Des Moines Independent Community School*, 393 U.S. 503, 508-09 (1969) (internal citation omitted).

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advanced the leading articulation of Report Card Citizenship. “School discipline . . . is an integral and important part of training our children to be good citizens—to be better citizens,” he contended.⁴⁹

Although Justice Black dissented in *Tinker*, the thin conception of citizenship has seen its stock fluctuate dramatically at the Supreme Court during subsequent decades. The Court at times seemed to endorse Report Card Citizenship with enthusiasm during the 1980s. In assessing a school district’s ability to punish a high school student for a lewd speech at a school assembly, the Supreme Court emphasized the school’s duty to “inculcate the habits and manners of civility” and to “teach by example the shared values of a civilized social order.”⁵⁰ But the Supreme Court’s most recent decision involving student speech refused to give Report Card Citizenship a glowing mark. Justice Breyer’s opinion for the Court in *Mahanoy Area School District v. B.L.*, like Justice Fortas’s opinion in *Tinker*, made clear that schools cannot act as roving censors who punish students for dissident speech without immeasurably harming our democracy.⁵¹ Pupils enrolled in student-centered civic education courses should be encouraged to evaluate critically these sharply divergent conceptions of citizenship.

One subtle, second-order virtue of the student-centered approach to civic education is that the diffusion of knowledge regarding students’ constitutional rights would help to prevent schools from committing some of the more egregious violations of those rights in the first instance. A teacher who leads a classroom discussion on *Barnette*, for instance, will surely not attempt to suspend students for refusing to salute the American flag.⁵² Such conflicts are, alas, distressingly common in American schools even though *Barnette* decisively repudiated mandatory-flag salutes almost eight decades ago.⁵³

Teachers of a student-centered civic curriculum would, moreover, help to honor not only constitutional rights within their own classrooms, but they could also become invaluable resources for an entire school. It seems unrealistic in the extreme to believe that busy math and science teachers are going to become intimately familiar with the minutia of the Supreme Court’s

⁴⁹ Ibid., 524 (Black, J., dissenting). I have previously explored the competing conceptions of citizenship offered by various Supreme Court Justices. See Driver, *The Schoolhouse Gate*, 78-79; Justin Driver, “Two Cheers for a Free Speech Ruling,” *New York Times*, June 25, 2021, A23.

⁵⁰ *Bethel School District v. Fraser*, 478 U.S. 675, 681 (1986).

⁵¹ *Mahanoy Area School District v. B.L.*, 141 S. Ct. 2038, 2046 (2021) (“This free exchange [of ideas] facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People’s will. That protection [of the marketplace of ideas] must include the protection of unpopular ideas, for popular ideas have less need for protection.”).

⁵² 319 U.S. 624 (1943).

⁵³ See, e.g., Christine Hauser, “High Schools Threaten to Punish Students Who Kneel During Anthem,” *New York Times*, September 29, 2017, <https://www.nytimes.com>. In one particularly distressing confrontation, a sixth-grade student in Florida was arrested by police officers in 2019 following his refusal to participate in saluting the American flag. Christine Hauser and Matthew Haag, “Florida Student, 11, Arrested After Dispute over His Refusal to Say Pledge of Allegiance,” *New York Times*, February 19, 2019, <https://www.nytimes.com/2019/02/19/us/11-year-old-arrested.html>.

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doctrine governing schools. Yet when algebra and chemistry teachers confront scenarios potentially touching upon students’ constitutional rights, instructors with expertise in the area could provide guidance to their colleagues about what steps they may take without running afoul of the Constitution. In addition to helping colleagues, these same instructors could serve as valuable sounding boards for school administrators contemplating thorny constitutional questions, as it is often difficult to obtain advice from school board attorneys on an urgent question in the midst of a hectic school day. Such informal consultations mean that the existence of even one teacher trained in student-centered civic education could well help to increase respect for students’ constitutional rights within the community.

While diminishing flagrant constitutional violations would be laudable in its own right, this diminution would also help to tamp down a significant, underappreciated source of political polarization. It seems that the Culture Wars—to use a phrase from the 1990s—are increasingly being waged on the terrain of our nation’s public schools, and these disputes often involve infringements of students’ constitutional rights.⁵⁴ Our media outlets routinely highlight instances where school authorities have overstepped their constitutional authority. But our deeply-divided media—a product doubtless of our deeply-divided nation—do not seize upon and then showcase the same violations. Instead, left-leaning media companies elevate one set of school-based constitutional conflicts with a particular political valence, and right-leaning media companies elevate a different set of constitutional conflicts with a very different political valence. The consumers of these varied, highly-clickable reports are left to conclude that the nation’s public schools are systemically attacking the values that they hold dearest, thereby intensifying our nation’s political polarization.

Consider two recent high-profile constitutional controversies that arose when public schools erroneously censored students’ First Amendment rights—the first involving speech associated with liberals and the second involving speech associated with conservatives. In 2021, two Black elementary school students in Ardmore, Oklahoma, wore T-shirts reading: “Black Lives Matter.”⁵⁵ For this seemingly innocuous action, the students were ejected from their classrooms and forced to sit in an administrative office until the end of the day. One school official justified these disciplinary actions by stating that—in the wake of George Floyd’s killing—political statements would no longer be permitted at school. The school district superintendent suggested that he applied this broad policy to statements from across the political spectrum: “I don’t want my kids wearing MAGA hats or Trump shirts to school either because it just creates, in this emotionally charged environment, anxiety and issues that I don’t want our kids to have to deal with.”⁵⁶ After this controversy appeared in the *New York Times*, the school

⁵⁴ See James Davison Hunter, *Culture Wars: The Struggle to Define America* (New York: Basic Books, 1991); Jonathan Zimmerman, *Whose America? Culture Wars in the Public Schools* (Cambridge, MA: Harvard University Press, 2001); Driver, *The Schoolhouse Gate*, 9-13 (noting that the cultural conflicts that divide American society often appear in the nation’s public schools). For a recent article pursuing this theme in the context of rules regarding masks during the Covid era, see Michelle Cottle, “Chaos at the School Board Meeting,” *New York Times*, September 8, 2021, A22.

⁵⁵ Jesus Jiménez, “Two Oklahoma Boys Pulled from Class for ‘Black Lives Matter,’” *New York Times*, May 9, 2021, <https://www.nytimes.com>.

⁵⁶ *Ibid.*

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district expressly updated its policy to prohibit clothing “items [displaying] social or political content.”⁵⁷

The second scenario arose when a high school senior in Franklinton, Louisiana, decided to have his parking space at school painted over with a portrait of President Trump wearing a bandana and aviator sunglasses, both of which featured images of the American flag.⁵⁸ The portrait was part of an official school policy that permitted seniors to decorate their spaces in exchange for a modest fee. Although the policy prohibited designs from including either vulgar language or another student’s name, it did not prohibit political statements. Nevertheless, shortly after the portrait of Trump appeared, school officials painted over the image because they deemed it excessively political. A federal district court judge overrode the school’s decision, holding that it plainly violated *Tinker*’s foundational protection for student speech.⁵⁹ As one might predict, these events received no mention in the *New York Times*, but were trumpeted by Fox News.⁶⁰

Many other examples of this polarizing phenomenon could easily be adduced. Consider only two more, both arising from high school valedictorian speeches that were delivered at graduation ceremonies in 2021. A valedictorian in Voorhees Township, New Jersey, wished to discuss how his queer identity had shaped his high school experience and to deliver a message of pride regarding his sexual orientation.⁶¹ Another valedictorian in Westland, Michigan, wished to discuss how her Christian identity had provided meaning to her life, and to suggest that faith could be helpful in overcoming the adversity that life sometimes delivers.⁶² Both valedictorians encountered sustained efforts from school administrators to squelch their preferred messages, even though the First Amendment—properly understood—affords both students protection.⁶³ It will come as no surprise that the *New York Times* featured the queer valedictorian’s ordeal, and Fox News (quite extensively) featured the Christian valedictorian’s ordeal.⁶⁴ But neither outlet mentioned the other student’s regrettable encounters with high school censors.

⁵⁷ Michael D. Smith, “Ardmore School Dress Code Quietly Updated, Prohibits Social Content at Elementary Schools,” *Daily Ardmoreite*, May 27, 2021, <https://www.ardmoreite.com>.

⁵⁸ John Simerman, “Louisiana Teen Told No Trump Painting in School Parking Lot, But Federal Judge OKs It,” *The Times-Picayune / The New Orleans Advocate*, October 10, 2020, <https://www.nola.com>.

⁵⁹ *Thomas v. Varnado*, 511 F. Supp. 3d 761, 767-70 (E.D. La. 2020) (citing *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969)).

⁶⁰ Bob D’Angelo, “Federal Judge Rules Louisiana Teen Can Keep Trump Painting in School Parking Space,” *FOX23 News*, October 10, 2020, <https://www.fox23.com>.

⁶¹ Alyssa Lukpat, “When a Valedictorian Spoke of His Queer Identity, the Principal Cut Off His Speech,” *New York Times*, June 28, 2021, <https://www.nytimes.com>.

⁶² Sam Dorman, “Michigan Valedictorian’s Speech Censored, Criticized As ‘Very Christianized,’” *Fox News*, June 1, 2021, <https://www.foxnews.com>.

⁶³ See *Tinker*, 393 U.S. at 509 (“[I]n our [constitutional] system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”); see also *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 302 (2000) (“[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.”) (internal quotation marks and citations omitted).

⁶⁴ See Lukpat, “When a Valedictorian Spoke”; Dorman, “Michigan Valedictorian’s Speech Censored”; see also Sam Dorman, “Michigan High School Violates Federal Law by Opposing Religious Language in Grad Speech,” *Fox News*,

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These local stories of constitutional conflict reverberate across the nation for two primary reasons. First, they have extremely low barriers to entry and are therefore instantly legible to even the most casual news consumers. Whereas a story about tax policy or the latest armed conflict in the Middle East may require readers to possess years of knowledge to understand, virtually everyone in the United States attended school for some time and many of us sooner or later encountered a school official we deemed overzealous. These stories, moreover, involve young people, overreaching government authority, and the future of our nation—and those topics often prove irresistible. Second, and related, these stories tend to elicit strong normative assessments from readers. These stories of constitutional conflict in schools are hardly designed to instill a sense of complexity or nuance, but rather to generate a deep emotional reaction. Given that readers carefully curate their own, personalized media landscapes and that those landscapes reinforce their ideological inclinations, it should arrive as no surprise that the dominant emotions generated are anger and outrage.⁶⁵

Some readers may well believe that the uncommonly potent combination of qualities in these stories of constitutional conflict suggests that society should figure out a way to regulate or even eliminate their distribution. If these articles inflame people and further polarize our deeply fractious nation, this theory would run, then we should cut off this producer of civic discord at the source. While such a view would have been fringe until quite recently, declining reverence for First Amendment principles and widespread skepticism about social media render this impulse increasingly cognizable. For my own part, though, I vehemently reject any slide toward censorship that would entertain such proposals. Rather than concentrating on the distributional problem, we should instead concentrate on the manufacturing problem. We should, that is, dedicate ourselves to preventing public schools from systematically trampling students’ constitutional rights. If constitutional violations of students’ rights were not so flagrant and so prevalent, there would be no need for controlling their distribution. Adopting a student-centered approach to civic education would treat the underlying disease, rather than simply suppress the distressing symptoms.

Other readers may lodge an even more fundamental objection, one that questions student-based civic education altogether. On this view, students ought not learn about their own constitutional rights because they should not in fact be understood to possess such rights. The reason that such incredibly divisive newspaper articles exist, this objection runs, is because the federal courts have repeatedly erred by determining that schools can actually infringe the constitutional rights of the pupils whom they are charged with educating.⁶⁶ Educators, these

May 26, 2021, <https://www.foxnews.com>; Sam Dorman, “Michigan High School Reverses After Opposing Religious Language in Valedictorian Speech,” *Fox News*, May 28, 2021, <https://www.foxnews.com>.

⁶⁵ See Cass R. Sunstein, *Republic.com* (Princeton, NJ: Princeton University Press, 2001), 3-22 (describing the idea of the “Daily Me”); Margaret O’Mara, “Why the Social Media Rage Machine Won’t Stop,” *New York Times*, November 3, 2020, <https://www.nytimes.com>.

⁶⁶ For arguments expressing deep skepticism about the wisdom of protecting students’ constitutional rights, see Richard Arum, *Judging School Discipline: The Crisis of Moral Authority* (Cambridge MA: Harvard University Press,

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critics would maintain, should be viewed as acting *in loco parentis*, meaning that they stand in the shoes of parents when students are in the school environment. Accordingly, just as parents do not, say, violate the Fourth Amendment when they search their teenagers’ rooms for narcotics, neither would educators be viewed as even potentially violating the constitutional rights of students. Supreme Court Justices have, on occasion, expressed some enthusiasm for versions of this *in loco parentis* idea.⁶⁷

Extinguishing students’ constitutional rights would, in my view, be profoundly misguided. As a preliminary matter, it is important to recognize that the Constitution now protects students’ rights in a vast array of significant areas—including race, religion, immigration, speech, liberty, privacy, and criminal procedure.⁶⁸ Declaring public schools to be Constitution-free zones would thus require a radical assault on our American constitutional traditions. Some of our nation’s most cherished constitutional opinions arose from the public school context, and it will simply no longer suffice to assert blithely that judges are not teachers and that they therefore lack competence in this arena.

As importantly, though, a judicial retreat from schools would send students a dangerous message about the limitless reach of government power. The sites of the nation’s public schools are the first locations where most Americans have consistent exposure to any governmental entity. Those early, implicit lessons in civic affairs doubtless prove formative. Justice John Paul Stevens captured this idea astutely in a concurring opinion in 1986. “The schoolroom is the first opportunity most citizens have to experience the power of government,” Stevens wrote. “Through it passes every citizen and public official, from schoolteachers to policemen and prison guards. The values they learn there, they take with them in life.”⁶⁹ It would be surpassingly odd

2003); Anne Proffitt Dupre, *Speaking Up: The Unintended Costs of Free Speech in Public Schools* (Cambridge MA: Harvard University Press, 2010); and Anne Proffitt Dupre, “Should Students Have Constitutional Rights? Keeping Order in the Public Schools,” *George Washington Law Review* 65, no. 1 (November 1996).

⁶⁷ See, e.g., *Vernonia School District 47J v. Acton*, 515 U.S. 646, 654-55 (1995) (expressing enthusiasm for *in loco parentis* doctrine in a Fourth Amendment decision); *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 840 (2002) (Breyer, J., concurring) (same); *Mahanoy Area School District v. B.L.*, 141 S. Ct. 2038, 2046 (2021) (acknowledging the *in loco parentis* doctrine in the context of placing some limitations on the ability of schools to punish students for off-campus speech). For a warning about the dangers of viewing educators as standing *in loco parentis*, see Justin Driver, “Two Cheers for a Free Speech Ruling,” *New York Times*, June 25, 2021, A23.

⁶⁸ See, e.g., *Brown v. Board of Education*, 347 U.S. 483, 493-95 (1954) (prohibiting racial segregation in schools); *Lee v. Weisman*, 505 U.S. 507, 586-99 (1992) (prohibiting school-sponsored prayers at public school graduation ceremonies); *Plyler v. Doe* 457 U.S. 202, 216-30 (1982) (invalidating a Texas statute that sought to exclude unauthorized immigrants from schools); *Tinker*, 393 U.S. at 505-14 (protecting student speech); *Goss v. Lopez*, 419 U.S. 565, 572-76 (1975) (recognizing that students possess due-process protections regarding school suspensions); *Safford Unified School District v. Redding*, 557 U.S. 364, 374-77 (2009) (finding that educators violated a students’ constitutional rights by subjecting her to a strip search in an effort to find ibuprofen tablets); *J.D.B. v. North Carolina*, 564 U.S. 261, 271-81 (2011) (determining—in a case arising from a school setting—that if police officers are aware that a criminal suspect is a minor, that awareness is relevant for determining whether *Miranda* warnings must be issued).

⁶⁹ *T.L.O. v. New Jersey*, 469 U.S. 325, 385-86 (1986) (Stevens, J., concurring in part). Justice Stevens also stated: “Schools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry.” *Ibid.*, 373.

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if a nation that prides itself on liberty permitted its young people to spend a large portion of their waking hours in a place where they enjoyed no constitutional protections whatsoever. Ensuring that schools honor students’ constitutional rights thus constitutes an invaluable civic lesson unto itself. Justice William Brennan conveyed this point more than four decades ago: “Schools cannot expect their students to learn the lessons of good citizenship when the school authorities themselves disregard the fundamental principles underpinning our constitutional freedoms.”⁷⁰

Still other readers may object to student-centered civic education on the ground that it neglects what should be the core mission. If the ultimate goal is to prepare students to engage responsibly in civic society for the long haul, this argument runs, it is foolish for civic education to focus on school rather than on the various spheres that they will soon occupy as adults. Although this objection may initially seem plausible, perhaps even devastating, numerous difficulties undermine the critique. It overlooks the fact that there is often no sharp dividing line between the constitutional rights of minors, on the one hand, and the constitutional rights of adults, on the other. Instead, minors typically enjoy one set of constitutional rights in school, and then they enjoy what is sometimes misapprehended as the “adult-set” of rights outside of school.⁷¹ When students are in the public park after school, for example, they usually enjoy First Amendment rights that are coextensive with adults. Extending this point, it is important to realize that a palpable relationship links the constitutional rights of students and the constitutional rights that protect people—minors and adults alike—in non-school settings. In many areas of the law, students’ rights can be viewed as diluted, “junior varsity” versions of the constitutional rights that exist beyond the schoolhouse gate. For instance, although the Fourth Amendment prohibition on unreasonable searches and seizures typically requires “probable cause,” the school context requires only the less demanding “reasonable suspicion” standard.⁷² Learning about students’ constitutional rights thus can be an effective bridge to learning about constitutional rights in non-school settings.

More broadly, student-centered civic education’s effort to foreground opinions involving the constitutional rights of students does not mean that those opinions are the *only* content that would be covered in such a curriculum. To the contrary, the student-centered approach should ideally serve as a foundation from which to explore some of the more abstract concepts that form an important part of any comprehensive civic education. Contemplate a few examples that illuminate how cases involving students’ constitutional rights can lay the groundwork for examining adjacent concepts. Classroom discussion of *Barnette*’s prohibition on compulsory flag salutes in school tees up broader analysis of the government’s ability to instill patriotism and to prohibit speech that is regarded as antipatriotic. Those discussions logically lead to contemplating both state and federal legislative efforts to prohibit burning the American flag, and the two Supreme Court decisions that have invalidated such efforts.⁷³ Those decisions in turn

⁷⁰ Doe v. Renfrow, 451 U.S. 1022, 1027-28 (1981) (Brennan, J., dissenting from denial of certiorari).

⁷¹ I do not suggest, of course, that the legal rights of minors are *always* coextensive with legal rights of adults when they are in non-school settings. Minors cannot vote for elected officials nor can they be conscripted, among other significant differences.

⁷² T.L.O. v. New Jersey, 469 U.S. 325, 342-43 (1986) (applying the reasonable suspicion standard, and disavowing probable cause in school settings).

⁷³ Texas v. Johnson, 491 U.S. 397, 410-20 (1989); United States v. Eichman, 496 U.S. 310, 313-19 (1990).

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present opportunities to teach students about federalism, separation of powers, congressional authority, and executive authority. Similarly, a classroom discussion about *Hazelwood School District v. Kuhlmeier*—which held educators can typically regulate articles appearing in school newspapers without violating the First Amendment—invites a larger discussion about the media’s central role in maintaining democracy.⁷⁴ Finally, analyzing *San Antonio Independent School District v. Rodriguez*—which refused to invalidate dramatically unequal school financing schemes—provides students with a valuable opportunity for reflecting upon how well a nation that prides itself on providing opportunity to all lives up to that lofty ideal.⁷⁵

How should proponents of improving and redirecting civic education seek to achieve their goals? One possible answer—perhaps to be anticipated coming from a law professor—is through litigation. Pursuit of this potential avenue of reform is not merely a possibility, but a reality. Indeed, Professor Michael Rebell of Columbia University filed a high-profile federal lawsuit in Rhode Island a few years ago contending that the state’s approach to civic education was so wanting that it violated students’ constitutional rights. This lawsuit asserted that by failing to provide pupils with the basic civic knowledge that they need to participate effectively in American society—including serving on juries, casting votes for elected officials, and exercising their First Amendment rights—Rhode Island does not provide even a minimally adequate education.⁷⁶ While the Supreme Court in *San Antonio Independent School District v. Rodriguez* in 1973 did not recognize that the Constitution protects a fundamental right to education, the opinion did not completely foreclose the possibility that an education could be so woeful, so inadequate as to trigger a constitutional violation.⁷⁷ Rebell’s lawsuit marshaled some disturbing realities in Rhode Island in an effort to capitalize upon this question left open by *Rodriguez*. For instance, the lead plaintiff in Rebell’s lawsuit—Aleita Cook—never took a course that explored civic society or government structure during her four years in a Providence high school.⁷⁸

In *A.C. v. Raimondo*, District Court Judge William Smith issued an opinion in 2020 rejecting the claim that Rhode Island’s approach to civic education violated the Constitution.⁷⁹ Judge Smith, who President George W. Bush nominated to the bench, reasoned that the Supreme Court’s binding precedents prevented him from granting the relief that the plaintiffs sought. He did, however, go to elaborate lengths to decry the sorry state of civic education and to sound

⁷⁴ *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).

⁷⁵ *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 56-59 (1973).

⁷⁶ Class Action Complaint at 22, *A.C. v. Raimondo*, 494 F. Supp. 3d 170 (D. R.I. 2020) (No. 1:18-cv-645). For insightful newspaper coverage of this lawsuit, see Dana Goldstein, “Lawsuit Says Rhode Island Failed to Teach Students to Be Good Citizens,” *New York Times*, November 29, 2018, A18.

⁷⁷ 411 U.S. 1, 36-37 (1973). *Plyler v. Doe*, 457 U.S. 202, 218-23, 230 (1982), makes clear that completely denying an education to young persons can violate the Constitution. See also *Papasan v. Allain*, 478 U.S. 265, 285 (1986) (“As *Rodriguez* and *Plyler* indicate, this Court has not yet definitively settled the question [] whether a minimally adequate education is a fundamental right.”).

⁷⁸ See Goldstein, “Rhode Island Failed to Teach Students.”

⁷⁹ *A.C. v. Raimondo*, 494 F. Supp. 3d 170, 184 (D. R.I. 2020).

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alarms regarding the ominous threat it poses to American society. Observing that he was writing not long after President Trump floated the idea of postponing the upcoming presidential election, Judge Smith adopted a searing, even apocalyptic tone, one highly uncommon in judicial opinions:

This case . . . represent[s]. . . a cry for help from a generation of young people who are destined to inherit a country which we—the generation currently in charge—are not stewarding well. What these young people seem to recognize is that American democracy is in peril. Its survival and their ability to reap the benefit of living in a country with robust freedoms and rights. . . is something that citizens must cherish, protect, and constantly work for. We would do well to pay attention to their plea.⁸⁰

Judge Smith repeatedly construed the baleful state of civic education as posing nothing less than an existential danger to the nation: “This is what it all comes down to: we may choose to survive as a country by . . . educating our children on civics, the rule of law, and what it really means to be an Americans, and what America means. Or, we may ignore these things at our and their peril.”⁸¹ Judge Smith concluded his opinion by “commend[ing the plaintiffs] for bringing this case” because it “highlights a deep flaw in our national education priorities and policies,” and by expressing his “hope[that] others who have the power to address this need will respond appropriately.”⁸² Judge Smith’s opinion is currently being appealed in the U.S. Court of Appeals for the First Circuit.⁸³

I heartily applaud the creativity of Professor Rebell’s lawsuit, aiming as it does to forge a coalition of liberal and conservative jurists who are united in harboring deep concerns about the nation’s low quality of civic education. Trying to locate common terrain in this highly contested area is, as I have suggested, admirable.⁸⁴ I also endorse Professor Rebell’s animating belief that litigation and the resulting judicial opinions have, at times, dramatically improved American society—particularly in the school context. In *Flunking Democracy*, where Rebell outlines the legal theories pursued in *A.C. v. Raimondo*, he contends: “Judicial declarations of rights and responsibilities and court orders can inspire and motivate state policy makers and educators to prepare their students to confront and surmount serious challenges to democratic functioning that our students—and all Americans—face today.”⁸⁵ This view of judicial opinions’ potency, once prevalent, is now deeply unfashionable within the elite ranks of legal academia. But it is a view that I nonetheless endorse.⁸⁶ I would add to Rebell’s account, moreover, that even unsuccessful lawsuits can sometimes act to galvanize and mobilize support for a cause. Even when litigation loses in the courthouse, the underlying claim sometimes ultimately prevails in the statehouse.⁸⁷

⁸⁰ *Ibid.*, 175.

⁸¹ *Ibid.*, 181.

⁸² *Ibid.*, 197.

⁸³ *A.C. v. Raimondo*, 494 F. Supp. 3d 170 (D. R.I. 2020), *appeal filed sub nom. A.C. v. McKee*, No. 20-2082 (Nov. 30, 2020).

⁸⁴ I made this point in contemporaneous press coverage of *A.C. v. Raimondo*. See Alia Wong, “The Students Suing for a Constitutional Right to Education,” *Atlantic*, November 28, 2018, <https://www.theatlantic.com>.

⁸⁵ Rebell, *Flunking Democracy*, 33.

⁸⁶ See Driver, *The Schoolhouse Gate*, 22 (“[T]he Court is neither omnipotent nor impotent, but, simply, unambiguously potent.”).

⁸⁷ See generally Douglas NeJaime, “Winning Through Losing,” *Iowa Law Review* 96, no. 3 (2011).

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Indeed, Judge Smith’s bracing opinion in *A.C. v. Raimondo* is quite self-consciously designed to produce civic education reform—even if he believes it is a nonjudicial entity that should grant relief.

Despite being based at a law school, I have grave reservations about relying primarily upon litigation to reform civic education. Professor Rebell has stated that his largest ambition is that he “want[s] the federal courts, and ultimately the U.S. Supreme Court, to declare that there is a right to a basic quantity of education to prepare kids for capable citizenship.”⁸⁸ Given the conservative composition of today’s Supreme Court, though, I can see no plausible scenario where that institution would grant Rebell’s constitutional wish. The six Republican-appointed Justices on the current Court have demonstrated little to no appetite for interpreting the Constitution in a manner that would meaningfully reconstrue *Rodriguez*’s language involving a right to education. Unlike some of my fellow liberals, I do not believe that it is altogether impossible for left-leaning Justices to identify areas of overlap with the Court’s conservatives in the field of education law.⁸⁹ To the contrary, I have contended that liberals could find common cause with the libertarian-inflected vision of constitutional law that Republican-appointed Justices have occasionally endorsed to deliver significant victories involving student’s constitutional rights.⁹⁰ That claim bore at least some fruit earlier this year when the Supreme Court declared that students typically enjoy more robust free speech protections when they are off campus rather than on campus.⁹¹

Nevertheless, even I recognize that it is one thing for the current Court to recognize students’ free speech rights, and it is quite another to ask them to become involved in policing what constitutes the lowest permissible curricular offerings that a state must provide for civic education. The former can be viewed as falling into line with conservatives’ general approach to constitutional interpretation (a receptivity to First Amendment claims that liberals sometimes view as excessive);⁹² the latter would require them to expand notions of substantive due process (a *bête noire* in conservative constitutional thought for decades).⁹³

⁸⁸ Leslie Brody, “Students Press Unusual Argument in Court: A Constitutional Right to Civics,” *Wall Street Journal*, December 5, 2019, <https://www.wsj.com>.

⁸⁹ For a claim that *The Schoolhouse Gate* evinces undue optimism about the prospects for the current Supreme Court delivering education law opinions that liberals can celebrate, see Joseph Fishkin, “This Court Doesn’t Deserve This Book: A Reflection on Justin Driver’s *The Schoolhouse Gate*,” *Boston University Law Review Online* 100 (2020).

⁹⁰ See Driver, *The Schoolhouse Gate*, 23.

⁹¹ See *Mahanoy Area School District v. B.L.*, 141 S. Ct. 2038, 2046 (2021).

⁹² See, e.g., Adam Liptak, “Is a Cheerleader’s Vulgar Post Protected Speech?,” *New York Times*, December 29, 2020, A14 (noting that Chief Justice Roberts has called himself “probably the most aggressive defender of the First Amendment on the court now”). For a decision that many liberals construed as the Supreme Court becoming exceedingly solicitous of First Amendment claims, see *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448, 2486 (2018) (holding that public-sector unions cannot require nonmember employees to pay agency fees, even if they benefit from the union’s collective bargaining). See also *ibid.*, 2501 (Kagan, J., dissenting) (critiquing conservatives for “weaponizing the First Amendment”).

⁹³ See Jamal Greene, “The Memeing of Substantive Due Process,” *Constitutional Commentary* 31, no. 2 (Summer 2016) (identifying and critiquing how the phenomenon of substantive due process became demonized in legal circles).

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A more promising approach to achieving widespread reform along the lines that I have sketched here would be to form a presidential commission on civic education. I realize that many readers may well almost reflexively assert that the road to hell—or, dread word, irrelevance—is paved with presidential commissions.⁹⁴ Sometimes such criticisms are doubtless deserved. But it is also essential to appreciate that at least occasionally presidential commissions can serve an important signaling function. In the realm of education, for example, *A Nation at Risk* served as a significant focal point for reformers throughout much of the 1980s.⁹⁵

Many private, public, and philanthropic organizations have dedicated attention to examining civic education over the years. These organizations, though, pursue their various projects in something that too often resembles intellectual silos. While this centrifugal approach can possess some real value, we need—especially in these most polarized times—to find a way to come together, harnessing the centripetal energy. A presidential commission examining civic education could provide a helpful occasion for such a gathering, enabling communities to understand better which approaches work well and which do not. A commission that embraces student-centered civic education should include model lesson plans in an appendix. Such plans would distill relevant Supreme Court opinions into portions that are easily digestible for students, offer hypothetical scenarios involving students that are designed to test the limits of those Supreme Court opinions, and offer concrete advice to teachers on how they might get students to engage with those topics. It is a maxim among teachers that they should “beg, borrow, and steal” from lesson plans that work.⁹⁶ The commission’s appendix would ideally serve as one-stop shopping for teachers focusing on civic education. The commission would, of course, in no sense aim to mandate that public schools adopt a particular approach to civic education. Instead, the commission would, building on the abundant existing resources in this domain, devise a model that teachers and local school districts would be welcome to adopt and to adapt.⁹⁷ The hope is that many school districts and teachers, from very different parts of the country, would feel comfortable implementing the framework because it would focus upon students learning the current contours of students’ constitutional rights, and then encouraging them to actively, critically evaluate the content of those rights.

⁹⁴ For the inspiration of this verbal formulation, see Alexander Bickel, *The Supreme Court and the Idea of Progress* (New York: Harper & Row, 1970), 151 (“*Brown v. Board of Education*, with emphasis on the education part of the title, may be headed for—dread word—irrelevance.”).

⁹⁵ National Commission on Excellence in Education, *A Nation at Risk: The Imperative for Education Reform* (Washington, DC: National Commission on Excellence in Education, 1983). President Reagan’s Education Secretary, Terrel H. Bell, issued a major report that shook the nation with its bleak assessment of public schools’ performance and sparked years of policy discussions by offering numerous recommendations to improve public education. See Valerie Strauss, “‘A Nation at Risk’ Demanded Education Reform 35 Years Ago. Here’s How It’s Been Bungled Ever Since,” *Washington Post*, April 26, 2018, <https://www.washingtonpost.com>.

⁹⁶ See, e.g., “Harry Wong Addresses National Conference,” *Education World*, November 2, 2000, <https://www.educationworld.com>.

⁹⁷ One particularly valuable resource that deserves a special salute is Jamin B. Raskin, *We the Students: Supreme Court Cases for and About Students*, 3rd ed. (Washington DC: CQ Press, 2008). For a more theoretical approach aimed at teachers, see Hess and McAvoy, *The Political Classroom*. The presidential commission could also produce a list of recommended readings. If schools were to implement a student-centered approach to civic education, my book exploring students’ constitutional rights could prove helpful to some audiences. See generally Driver, *The Schoolhouse Gate*. Indeed, *The Schoolhouse Gate* might be used in lieu of a textbook in a class focusing upon students’ constitutional rights for some high school classes.

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Forming a commission on civic education would also seem to be a sound political idea for President Joseph Biden. In one of his first moves after claiming the Oval Office in January 2021, President Biden swiftly rescinded the 1776 Commission Report.⁹⁸ Professor Michael Kazin, an uncommonly sophisticated, insightful historian, argued in the *New York Times*: “Now that the 1776 Commission is deprived of federal authority, its influence will wane more quickly than that of the president who established it.”⁹⁹ But Kazin’s statement, alas, seems tantamount to wishful thinking about the supposedly vanishing influence of both President Trump and his 1776 Commission. Just as President Trump continues to cast a long shadow over the American political scene, the contents of the 1776 Commission’s Report can easily be accessed by anyone with a working internet connection. Closing our eyes will not somehow magically make the 1776 Report disappear. Instead, President Biden should assemble a civically-minded group from a range of ideological perspectives to offer an affirmative vision of civic education—one that should, in my view, highlight the struggle for students’ constitutional rights. If President Biden seeks to dislodge the 1776 Report from our intellectual landscape, he must supply his own conception of civic education, and he should explicitly frame it in Justice Gorsuch’s terms of promoting a vital national security interest.¹⁰⁰ We too often construe national security threats as arising only from foreign lands, but our disastrous state of civic education presents a paradigmatic instance of a domestic national security crisis.

Prominent Republicans have not shied away from discussing civic education. In May 2020, Steve Bannon, the former advisor to President Trump, offered a remarkable statement about future political struggles: “The path to save the nation is very simple—it’s going to go through the school boards.”¹⁰¹ In the aftermath of the 2020 election, it seems that some segments of the Republican Party have set out to implement what might be termed the Bannon Playbook. The most prominent tactic in this political strategy has, of course, has been to transform and distort Critical Race Theory into an intellectual boogiemán.¹⁰² Prominent figures in the Democratic Party have largely remained silent on these high-profile cultural questions. But it is incumbent upon Democrats, I believe, to provide their own notions of civic education. As the old adage runs, “If you don’t define yourself, someone else will do it for you.”

President Biden has consistently emphasized his desire to locate common ground with Republicans when possible—without, of course, sacrificing his core principles. Focusing on the content of students’ constitutional rights as articulated by the Supreme Court—a struggle that

⁹⁸ Bryan Pietsch, “The Biden Administration Quickly Revamped the White House Website. Here’s How,” *New York Times*, January 20, 2021, <https://www.nytimes.com>. It is true that in April 2021 the Department of Education published its “Proposed Priorities—American History and Civics Education” in the federal register. 86 Federal Register 20348 (April 19, 2021) (to be codified at 34 C.F.R. ch. II). But this measure flew under the radar and does not, in my estimation, constitute anything like a full-throated, affirmative response to the 1776 Commission.

⁹⁹ Michael Kazin, “The 1776 Follies,” *New York Times*, February 1, 2021, <https://www.nytimes.com>.

¹⁰⁰ See John Fritze, “Three Supreme Court Justices Tackle U.S. Partisan Divisions in Public Remarks,” *USA Today*, April 14, 2021, <https://www.usatoday.com>.

¹⁰¹ Jonathan Zimmerman, “Why the Culture Wars in Schools Are Worse Than Ever Before,” *Politico*, September 19, 2021, <https://www.politico.com>.

¹⁰² See Lauren Jackson, “What Is Critical Race Theory?,” *New York Times*, July 9, 2021 (noting conservative efforts to contend that schools teach students Critical Race Theory as a method of political mobilization).

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dates back to the first half of the twentieth century—would enable Biden’s commission to minimize some of the polarizing disputes that have proved insoluble during recent debates. Many Americans understand the profound need to improve substandard civic education as a way of bolstering our nation’s foundational commitments. In 2018, for instance, one national survey found that the most popular approach to fortifying American democracy was a policy aimed at “ensur[ing] that schools make civic education a bigger part of the curriculum.”¹⁰³ To underscore that the commission is truly dedicated to locating commonality on civic education for Americans of different political stripes, President Biden should make sure to tap high-profile people associated with the Republican Party to serve. Indeed, he could even consider selecting Chief Justice John Roberts to chair, or co-chair, the civic education commission.¹⁰⁴ In the event that the Chief Justice should resist efforts to conscript him, President Biden could nonetheless identify Roberts’s year-end report from 2019 as an important inspiration for the group and even title the commission after a passage that Roberts wrote. Near the very end of his 2019 year-end report, Chief Justice John Roberts stated: “Civic education, like all education, is a continuing enterprise and conversation.”¹⁰⁵ Biden’s Presidential Commission on the Civic Enterprise has a nice ring to it, suggesting as it does that civic education is a collaborative, difficult undertaking that demands considerable effort.¹⁰⁶

The ideas that I have sketched here are sure to find disagreement in certain quarters. Some readers may contend, as I suggested above, that “students’ constitutional rights” is simply a contradiction in terms. Other readers may object that President Biden ought not tread—however carefully—on ground that quintessentially belongs to states and localities, not the federal government. Still other readers may find the student-centered civic education approach to lavish far too much attention on judges, courts, and rights at the expense of material that they would deem more central. For my own part, I welcome such disagreements—and many others besides—because their existence would indicate that civic education is being actively debated in venues where such debates are all too rare. On this score, I cast my lot with Chief Justice Roberts. I have, to be sure, vehemently disagreed with plenty of Chief Justice Roberts’s opinions over the years.¹⁰⁷ But I wholeheartedly endorse his conclusion that we must continue the civic education conversation, as our nation’s very vitality depends upon it.

¹⁰³ Michael J. Abramowitz, Antony Blinken, and Holly Kuzmich, *Reversing a Crisis of Confidence* (Washington, DC: The Democracy Project, 2018), 9-10.

¹⁰⁴ Although this arrangement might be thought to raise separation-of-powers concerns, it is important to note that President Lyndon B. Johnson selected Chief Justice Earl Warren to chair the governmental group that investigated the death of President John F. Kennedy, colloquially known as the Warren Commission. See Associated Press, “Warren Panel Reports to Johnson Thursday,” *New York Times*, September 22, 1964, A26.

¹⁰⁵ Roberts, “2019 Year-End Report,” 4.

¹⁰⁶ Oxford English Dictionary defines “enterprise” as “[a]n undertaking, task, or project; (usually) *spec.* one which is bold, difficult, or important; a venture, an endeavour.” Oxford English Dictionary, 3rd ed. (Oxford: Oxford University Press, 2018), s.v. “Enterprise.”

¹⁰⁷ For only two major opinions written by Chief Justice Roberts—both arising from the education realm—with which I sharply disagree, consider *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 721-48 (2007) (plurality opinion), and *Morse v. Frederick*, 551 U.S. 393, 403-10 (2007). For my evaluations of those opinions, see Driver, *The Schoolhouse Gate*, 115-124, 293-308.

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Before closing, I should note that my interest in promoting the student-centered model of civic education is not purely intellectual and theoretical. Rather, it is inescapably informed by two significant sets of real-world experiences that occurred in my life separated by more than two decades. Upon graduating from college in 1997, long before I ever dreamed of becoming a law professor, I enrolled in a one-year teacher certification program at Duke University. As part of that program, I had the privilege of teaching a civic education class to ninth-graders at Jordan High School in Durham, North Carolina. I personally witnessed the students—many of whom had seemed patently uninterested in analyzing the differences among the three branches of government a few weeks earlier—come alive and engage deeply when we turned our attention to a unit on *Tinker*.¹⁰⁸ Perhaps the ninth-graders responded so enthusiastically because they somehow sensed much better than I did at that time that my professional path would inexorably lead me to a career in legal academia, with a special focus on students’ constitutional rights. On this account, I unknowingly did an effective job (or less ineffective than usual, anyway) of communicating the importance of judicial opinions involving education, and the students may have responded to my abundant energy. But I do not believe that is the case, for that view accords ninth-graders much stronger powers of perception and responsiveness to their instructors’ enthusiasms than I am conformable granting. Instead, I believe that the Jordan students engaged with *Tinker* deeply because they viewed themselves—at long last—as having some skin in the game. They viewed themselves, that is, as possessing genuine expertise about the regulation of students in schools. While it would perhaps be ideal if students immediately viewed themselves as having a personal stake in the separation of powers, it seems far more pedagogically profitable to meet students where they are at first, and then build outward from there.¹⁰⁹

The second set of real-world experiences began in 2019, after I joined the faculty at Yale Law School. I have the great honor of serving as the faculty supervisor for a long-standing program that places law school students in New Haven’s public schools and permits them to teach a student-centered civic education course. The program is, in my view, admirable for many reasons, not least because it helps in some small, but meaningful way to bridge the staggeringly wide chasm that all too often separates elite, cloistered Yale from gritty, under-resourced New Haven. My role in the program is admittedly quite modest. The redoubtable, committed Yale Law students who participate in the program do virtually all of the work, including devising their own curricula, inventing their own fact patterns, and preparing their students for a city-wide oral argument competition that occurs on Yale’s campus every Spring. I do occasionally sit in on a class, and I invariably find it an inspiring, rewarding experience. During my first year at Yale, I remember driving early one morning across town to a New Haven public school—one with a virtually all Black and Latino student population, a majority of whom are eligible for free lunch. After passing through the school’s metal detectors, I managed to find my way to the correct classroom, where I witnessed students diligently prepare for their upcoming oral argument. The New Haven public school students sounded very much like young lawyers, using shorthand for case names to claim that the Supreme Court’s precedents either required (or foreclosed) finding

¹⁰⁸ 393 U.S. 503 (1969).

¹⁰⁹ See Roberts, “2019 Year-End Report,” 3 (“[T]o reach people you have to meet them where they are.”).

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that a hypothetical principal violated a hypothetical student’s First Amendment rights. These public school students plainly viewed themselves as the subjects of law, not the objects of law, and the class left them feeling legally and civically empowered.¹¹⁰ As the students began filing out after the invigorating class, I overheard one young Black woman say quietly to a classmate, “I want to be a judge when I grow up.” It is my fervent hope that expanding the student-centered model will inspire young people around the country to endorse similar civically-minded ambitions.

¹¹⁰ This statement suggests that student-centered civic education could help to close what Professor Meira Levinson has insightfully termed the “civic empowerment gap.” See Meira Levinson, *No Citizen Left Behind* (Cambridge, MA: Harvard University Press, 2012), 56 (“Elimination of the civic empowerment gap, and education for civic empowerment more generally, necessitates a shift in focus from distant heroes and their accomplishments to more ordinary role models and their specific techniques of civic engagement, especially of collective action.”).