

**Testimony before the National Commission on Military, National, and Public Service
Creating an Expectation of Service Hearing: Civic Education and Service in Schools**

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Biography

I am a chaired professor of law at the University of South Carolina School of Law, where I teach education law and policy, constitutional law, civil rights, voting, and evidence. My scholarship focuses on education law and policy, particularly on how it impacts educational equality and fairness for disadvantaged students. I have authored two books on education law and over thirty scholarly articles, including in journals such as *Yale Law Journal*, *Stanford Law Review*, *New York University Law Review*, *Cornell Law Review*, and *Northwestern University Law Review*. The specific topics range from school funding, teacher policy, and segregation to the federal role in education and the history and content of the right to education.

My work has been cited and relied upon several times in the federal courts, including in briefs before the U.S. Supreme Court, and in hundreds of academic journals and media outlets. I have served as an expert witness in federal and state education litigation, including on issues involving school funding, the democratic foundations of the right to education, and the federal role in education. Prior to teaching, I litigated education cases at the Lawyers' Committee for Civil Rights Under Law. I began my career in teaching at Howard University School of Law, where I founded and directed the Education Rights Center.

Introduction

It is my honor to have the opportunity to submit testimony to the National Commission on Military, National, and Public Service. Its goal of finding solutions to inspire more people to serve our nation in the public sector is vital to sustaining our democracy. Throughout our nation's history, millions have eagerly stepped forward to serve the nation and its various communities. That same service is as crucial today as it has ever been. Yet, today it is less abundant. The problem is potentially clearest in in our largest public service sector—public education.

Over the past decade, our schools have experienced a crisis in terms of teacher retention and recruitment. Schools have been forced to increase class sizes, rely on uncertified personnel to teach, lower the threshold for entering the classroom, and beg teachers to remain on the job past their expected retirement date. Because teachers are the most important school resource affecting student achievement, encouraging students to serve their nation and communities by entering the teaching profession is one of the nation's most pressing policy needs.

It is my understanding that promoting civics education and service learning is among the policy recommendations that this Commission is considering as a response to the nation's public service

needs at the federal, state, and local level. I cannot speak to whether civics education and service learning are effective tools to inspire service, but I can assure you that the federal government has an appropriate role to play in encouraging civics education and service learning.

The more difficult question, however, is how best to navigate the complexities of the federal-state relationship in education, along with the varying fiscal capacities of the states and over 13,000 school districts. These factors dictate that Congress proceed with the utmost caution in deciding what conditions and requirements to place on the receipt of any federal funding designed to implement this Commission's recommendations in education. I do not claim to know the perfect structure for federal education policies, but recent experience has taught that there are bad structures. My testimony is, foremost, intended to help this Commission identify those bad options so that it may exercise its discretion among the remaining options with confidence.

With that introduction, my testimony will explore four major points: 1) the history of the federal role in education and its relationship to civics education; 2) the federal interest in promoting good citizenship, which requires critical literacy in addition to civics education; 3) the types of categorical conditions Congress might place on education funds, including the dangers of certain types of conditions; and 4) how to leverage federal funds in this area without out unfairly disadvantaging certain communities and states.

1. The Role of the Federal Government in Civics Education

Promoting civics education falls squarely within the federal role in education. Since its inception, the United States government has sought to ensure education that prepares individuals to participate in and serve as stewards of our democracy. Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME LAW REVIEW 1059 (2019). That interest was not to create workers, to create high school graduates, or any other similarly category, but to create well-informed citizens. *Id.* The founding fathers firmly believed that our democracy rested upon citizens' ability to govern themselves and that ability required them to understand how government works. *Id.*

These convictions are rooted in our two of our nation's foundational documents: the Northwest Ordinances and the U.S. Constitution. Alongside the Declaration of Independence, the Articles of Confederation, and the U.S. Constitution, the Northwest Ordinance (of 1785 and 1787) is printed at the beginning of every copy of the United States Code. The Northwest Ordinances divided all of the United States' remaining land—basically the land north and west of the original colonies—and set the terms by which those lands would become states. In those ordinances, Congress specified how the land would be divided into counties and towns and required that every town set aside one-ninth of its land and one-third of its natural resources for the financial support of public education. Even more specifically, the central lot of every town was to be reserved for the construction of a public school. Congress made its purpose clear: these schools were a necessity of “good government and the happiness of mankind.”

The United States Constitution's connection to education is less obvious, but not less powerful. The Constitution provides that “The United States shall guarantee to every State in this Union a Republican Form of Government.” U.S. CONSTITUTION art. IV, § 4. At the broadest level, a “Republican Form of Government” means a government in which the people govern themselves.

But that meaning was also predicated on citizens possessing the intelligence and civics knowledge necessary to govern themselves. Congress made this point clearest in the aftermath of the Civil War.

In setting the terms of southern states' readmission to the Union, Congress, among other things, required the confederate states to rewrite their constitutions to conform to a republican form of government. Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STANFORD LAW REVIEW 735 (2018). All the southern states seeking readmission did so and specifically included education clauses mandating that they would provide public education "for all." *Id.* In fact, as to those states that were slow to come into compliance, the Congressional legislation readmitting them explicitly conditioned their readmission on those states never doing anything to deprive citizens of the education rights that had just been vested in their state constitutions. *Id.*

Following the Civil War, no state ever again entered the Union without an education clause in its constitution. *Id.* The single one to try saw Congress reject its admission. *Id.* Also notable is the fact that so many state constitutions preface their education clause with language referencing the necessity of education in a republican form of government. *Id.*; *Fundamental Right to Education, supra.* Modern scholars and jurists often assume that the various state education clauses are accidents of history or local state prerogative, but a review of the evidence reveals that they are a direct result of Congressional action and the shared understanding of the demands of a republican form of government. *Fundamental Right to Education, supra.*

2. *Good Citizenship Entails Critical Literacy in Addition to Civics Knowledge*

The founders' and the nation's evolving sense of a republican form of government entailed more than just basic civics knowledge. It included critical literacy within the context of civics knowledge and the issues of the day. *Id.* Citizens needed a relatively high level of literacy and engagement to participate in the ongoing and active public dialogue that took place in print and held government accountable. *Id.* Voting was simply the culmination of that participation. Moreover, citizens often voted on matters far more important than electing their officials. They were regularly called to reform government itself, voting on new state constitutions and amendments on a reoccurring and frequent basis.

Self-government, particularly at the federal level, was almost entirely print based during the nation's first century. Newspaper and pamphlets were the dominant, and often exclusive, medium through which citizens understood their government. Print-based materials were the means through which citizens learned of, debated, and understood public policy. Margaret H. DeFleur, *James Bryce's 19th-Century Theory of Public Opinion in the Contemporary Age of New Communications Technologies*, 1 MASS COMMUNICATION & SOCIETY 63, 70 (1998). For a large portion of citizens, particularly those living in rural settings, reading the news was the only way to learn of and stay apprised of what representatives had done or were about to do in Washington, D.C. Richard Carwardine, *Abraham Lincoln and the Fourth Estate: The White House and the Press During the American Civil War*, 7 AMERICAN NINETEENTH CENTURY HISTORY 1, 3 (2006). Newspapers, as a consequence, became the de facto public forum. Insofar as one exercised the

First Amendment right to receive and dispense political information and debate, it was through the newspapers. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 697 (Henry Reeve trans., New York, George Adlard 1839) (1835).

The importance and prevalence of this debate is evidenced by the fact that between 1800 and 1860, the number of newspapers in print grew from 200 to 3000, and the total combined circulation of these papers doubled. FRANK LUTHER MOTT, *AMERICAN JOURNALISM: A HISTORY OF NEWSPAPERS IN THE UNITED STATES THROUGH 250 YEARS, 1690-1940*, at 216 (1941); DAN SCHILLER, *OBJECTIVITY AND THE NEWS: THE PUBLIC AND THE RISE OF COMMERCIAL JOURNALISM* 12 (1981). In fact, “Americans of the Civil War era read more and cheaper newspapers, and enjoyed a greater choice of daily and weekly titles, than the citizens of any other nation.” Carwardine, *supra*, at 3. The level of political information and discourse in the papers was a reflection of the United States’ status as the world’s first mass democracy. Newspapers were so important to the growth and operation of the United States’ democracy that Congress itself supplemented their transmission, subsidizing the delivery of newspapers to subscribers and allowing editors to ship their newspapers to one another free of charge so as to expand the dissemination of information. Richard Pérez-Peña, *A Reminder of Precedents in Subsidizing Newspapers*, N.Y. TIMES, (Jan. 27, 2010); THE PEOPLE’S CONTEST, *NEWSPAPERS AND JOURNALS DURING THE CIVIL WAR ERA*, <https://peoplescontest.psu.edu/newspapers-and-journals-during-civil-war-era>.

Finally, the pre- and post-War period was an incredible time of constitution-making at both the federal and state level. That all important task of self-government presupposed and required a high level of literacy and governmental and civics understanding. This fact is too easily overlooked, but obvious when one considers context. The *Federalist Papers*, for example, are telling on this score. Alexander Hamilton, James Madison, and John Jay wrote eighty-five essays arguing the merits of our Constitution. Their stated audience was “the people of the State of New York.” THE FEDERALIST NO. 1 (Alexander Hamilton). The content of those essays “presumed that critical reading and literacy was the proper standard of literacy for democratic participation.” Leon Botstein, *Damaged Literacy: Illiteracies and American Democracy*, 119 DÆDALUS 55, 60 (1990).

Citizens’ interaction with the federal Constitution, however, pales in comparison to the demands of state constitutions. State constitutional conventions, in many instances, called for the direct approval by citizens. This was arguably the highest act of citizenship and, by its nature, required that citizens make a substantive judgment about the form and function of government. Citizens would typically vote to call a constitutional convention, elect delegates to those conventions to propose a draft constitution, and then the people would vote on the final draft. *Fundamental Right to Education, supra*. And, of course, debates over the merits of these constitutions would be fought out in newspapers.

These state constitutional conventions, moreover, occurred on a frequent basis, particularly in the period surrounding the Fourteenth Amendment. Many southern states, for instance, called three to four constitutional conventions during the second half of the nineteenth century. WILLIAM F. SWINDLER, *SOURCES AND DOCUMENTS OF U.S. CONSTITUTIONS, VOLUME 10* (1982) (listing constitutional conventions in Virginia in 1864, 1870); SWINDLER, *VOLUME 2*, at 417 (Georgia

conventions in 1861, 1865, 1868, 1877); SWINDLER, VOLUME 8, at 447 (South Carolina conventions in 1865, 1868, 1895). Other state constitutions included provisions for automatically recurring conventions every decade or two. *See, e.g.*, N.H. CONSTITUTION of 1792, Sec. XCIX, Sec. C (vote on the necessity of a new convention every seven years); N.Y. CONSTITUTION of 1846, art. XII, § 2 (constitutional convention possible every 20 years). Western states typically took a different approach, allowing citizens to amend the constitution through referendum rather than a convention, which could occur on a bi-annual basis. In short, constitutional conventions and amendments were part of the regular life of a citizen during the second half of the 1800s and demanded quite a bit of knowledge and engagement from citizens.

This critical literacy and civics knowledge remain just as important today. Yet, today's citizens are seemingly less well equipped than those of earlier eras. As this Commission is surely aware, civics knowledge is at a dangerously low level. Far too many students do not possess basic civics knowledge, much less the ability to evaluate public debate and cast their vote intelligently. MICHAEL A. REBELL, *FLUNKING DEMOCRACY: SCHOOLS, COURTS, AND CIVICS PARTICIPATION* 18–19 (U. Chicago Press 2018). For instance, only half recognize that the press should be free of government control. MICHAEL DUBIN, *WE THE PEOPLE: THE CITIZEN AND THE CONSTITUTION* 13 (2009), http://www.civiced.org/pdfs/research/NATIONAL_FINALS_REPORT_2009.pdf. Upon graduation, most still cannot name the three branches of government or the purpose of the Declaration of Independence. REBELL, *supra*. These educational shortcomings negatively impact their ability to self-govern as adults. For instance, over the last few election cycles, so many adults have incorrectly read ballots and proposed laws that they shifted the actual outcome of elections and referenda. LAWRENCE NORDEN ET AL., BRENNAN CENTER FOR JUSTICE, *BETTER BALLOTS* 9 (2008); Amy N. Farley et al., *Democracy Under Fire: Voter Confusion and Influences in Colorado's Anti-Affirmative Action Initiative*, 83 HARV. EDUC. REV. 432 (2013). The cure to these modern ills, like it was at the time of the nation's founding and Civil War, involves the federal government.

3. Structuring a Federal Funding Program to Expand Civics Knowledge and Service Learning

Regardless of the substantive programs or practices that the Commission identifies to promote civic education and service learning, larger structural questions will arise. Those questions involve the precise legal framework, relationship, and conditions that will best incentivize public schools to adopt the programs and practices. The last fifty years offer a plethora of examples and cautionary tales as to the federal government's options. The foundational starting point is the history of the Elementary and Secondary Education Act of 1965 (ESEA). Congress has reauthorized and rewritten the Act on a reoccurring basis under popular titles such as the Improving America's Schools Act, the No Child Left Behind Act, and the Every Student Succeeds Act. The ESEA began as a supplemental aid program for low-income students in the neediest schools. Over time, it has become a general education reform law with countless strings and conditions offered in exchange for federal money.

Congress has also passed funding legislation targeted at improving educational opportunities for specific demographic groups, like students with disabilities (the Individuals with Disabilities in Education Act) and English Language Learners (the Equal Educational Opportunities Act). The Individuals with Disabilities in Education Act imposes a detailed set of procedural requirements on school districts, whereas the Equal Educational Opportunities Act imposes almost none, instead focusing on a larger singular concept that requires that schools assist students in overcoming language barriers.

Other targeted legislation does not include new funding, but simply bars discrimination in programs that already receive federal funding. For instance, Title IX of the Education Amendments of 1972, prohibits sex discrimination in education institutions receiving federal dollars of any sort. Without spending any new money, the prohibition has done things such as vastly expand athletic opportunities for females and provide a mechanism to prevent sexual harassment. Title VI of the Civil Rights Act of 1964 similarly prohibits race discrimination in all federally funded programs and was crucial in providing the leverage necessary to desegregate schools in the 1960s and 1970s.

Congress's experience with this and other education legislation reveals at least four major categorical options for incentivizing civic education and service learning. First, Congress could articulate the specific content, curriculum or program to be delivered in civics education and service learning and extend grants to states and districts to deliver that precise thing. To use an analogy, Congress would, in effect, act as the owner and architect who hires states as construction contractors to build the precise house—or in this case the program—Congress had envisioned.

The second option would be for Congress to identify the outcomes, rather than specific program, it desires and make achieving those outcomes a condition of receiving funds through a new federal spending provision. For instance, Congress might indicate that all recipients of the new funds ensure that 50% of their students complete 40 hours of volunteer or service work prior to graduation. Or Congress might indicate that 75% of a funding recipient's students demonstrate proficiency in basic civics knowledge by the eighth grade.¹

A third option would be to give states money to adopt new civics and service learning programs or expand and improve their existing ones without imposing any significant conditions on the money. The point would be to incentivize expansion and experimentation without prescribing particular strategies.

The fourth option would be to add civics and service education to existing spending legislation. For instance, Congress might make the provision of civics and service learning a new condition on the receipt of ESEA money. ESEA is due for a reauthorization soon, which will surely include several other new conditions. Civics and service learning would be just one of many others.²

¹ I do not advocate either of these conditions but simply offer them as instructive examples of the point.

² Congress could potentially affirmatively mandate civics education pursuant to the Republican Guarantee Clause or potentially the Fourteenth Amendment. Neither would require federal funding or conditions, but such an exercise of power has not yet been tested by the federal courts.

None of these options is inherently superior. But given the nature of the program this Commission is considering, I would warn against overly narrow and prescriptive conditions and requirements regarding the type of programs or outcomes a state or district should implement. Even if this Commission identified a “perfect” civics and service learning program, not all communities are in a position to implement that perfect program. For instance, if service were defined to only include internship or volunteer work at non-governmental organizations, many poor and rural communities would be unable to participate. Try though they may to facilitate these opportunities, many of these communities do not have adequate numbers of organizations in their communities with which to connect their students. Some will have no organizations at all. Others will have too few to accommodate large numbers of students, which is to say nothing of the disruption that accommodation may create for the organization or the quality of the opportunities it might provide.

Also counseling against an overly prescriptive approach is the federal government’s poor track record in setting education goals over the past two decades. Those goals have, in some instances, been impossible to meet—a point that would have been obvious had honest discussions occurred. Derek W. Black, *Civil Rights, Charter Schools, and Lessons to Be Learned*, 64 *FLORIDA LAW REVIEW* 1723, 1752–53 (2012). As a result, the program requirements simply set up school districts for failure rather than improvement. *Id.* Those goals have, in other instances, simply been substantively questionable. Derek W. Black, *Abandoning the Federal Role in Education: The Every Student Succeeds Act*, 105 *CALIFORNIA LAW REVIEW* 1309 (2017); Derek W. Black, *Federalizing Education by Waiver?*, 68 *VANDERBILT LAW REVIEW* 607 (2015). Setting measurable outcomes and monitoring the use of funds is, no doubt, important to ensure the proper stewardship of federal funds. Those goals, however, are distinct from overly ambitious conditions and requirements that may have rhetorical value but do little to improve student outcomes.

In the area of civics and service learning, there are three more specific reasons to be skeptical of overly prescriptive requirements and ambitious objective outcomes. The first is that civics knowledge and the provision of public services are intrinsically good and do not necessarily require precise measurement—at least from the perspective of our state and federal laws. Second, as to knowledge, students are beginning at such a low level and getting so little exposure that simply expanding offerings in schools and requiring them to track student progress is a reasonable goal. It could be enough, for instance, to ask that districts increase their current civics offerings by some percentage, which could result in 50, 60, or 70 hours of civics instruction over the course of high school rather than 35.³ Monitoring the provision and expansion of civics education in this way is an objective, meaningful goal that does not require further inquiries into issues of content or standardized testing.

Third, good citizenship, democratic values, and quality service are not easy to measure or test. Critical literacy—the skill students need to participate effectively in democracy—is not easy to test either, nor are the opportunities and skills necessary to improve critical literacy confined to what might be taught in a civics class (although a civics class might be the best place to work with and practice the skill). If the goal is to promote good citizenship and inspire service, we might adopt long-term measures of how one community that adopts the federal program fares on later

³ The hour offerings are purely hypothetical and not based on a review of what any particular school offers.

indicators of good citizenship (jury service, military service, and voting) in comparison to other communities. But gauging success based on how students perform on standardized tests of civics knowledge, for instance, has the capacity to transform civics education and service learning into the opposite of what this Commission seeks to achieve. Moreover, those test scores would more likely be a reflection of the varying socio-economic status of the communities in which they are administered than of their absorption of civic and service values.

4. *Determining the Appropriate Federal Investment and How Best to Leverage It*

Regardless of what conditions Congress might impose on the receipt of federal funds, Congress must also determine what percentage of the program's cost it will fund and what percentage it will expect states to fund. With smaller programs, Congress sometimes covers the lion's share of the cost. These are typically competitive grant programs in which only a relatively small number of states or districts receive funds. They also involve programs in which not all states or districts will be interested. Given the nature of the issue before this Commission and the existing data regarding need, I believe civics education warrants a larger, non-competitive program.

With large scale programs, however, Congress rarely, if ever, covers the entire cost. Congress typically funds something far short of even half the cost. For instance, low-income students require somewhere between 30% and 100% more funding than their peers to achieve at similar levels. Derek W. Black, *The Congressional Failure to Enforce Equal Protection Through the Elementary and Secondary Education Act*, 90 BOSTON UNIVERSITY LAW REVIEW 313 (2010). Depending on the district, the federal supplement for low-income students can range from something less than 10% to around 25%. *See, e.g., id.* Federal funding for students with disabilities typically covers a larger percentage, but still only a fraction. Funding for English Language Learners has often been in the nature of a block grant. Districts are only eligible if they enroll a certain percentage of English Language Learners and have, in the past, received flat grants regardless of their specific local costs.

These federal programs proceed under the assumption that federal dollars should be leveraged to incentivize states to invest more of their own funds in a particular program. By doing so, Congress seeks to ensure that federal dollars go further and states have an independent financial stake in a program's success. While the facial logic of this reasoning is clear, it proceeds on at least one faulty assumption, and that assumption tends to reinforce inequality.

The assumption is that state or local education agencies' matching funds are a strong indicator of interest, commitment, or need for federal funds. While they may represent those factors to some extent, they are more likely to represent fiscal capacity. Education agencies with most fiscal capacity are in the best position to tap into matching federal funds. Those with the least capacity are in the opposite position. As a result, federal programs that require substantial financial commitments from states or local districts tend to help the rich get richer and do far less than they could or should to help needy states and districts. *Id.* This phenomenon has been well-documented with ESEA funds, in particular. *Id.*

Today, states and districts have wildly different fiscal capacity. *See* BRUCE D. BAKER ET AL., EDUCATION LAW CENTER, IS SCHOOL FUNDING FAIR? A NATIONAL REPORT CARD (7th ed. 2018).

That difference is grossly evidenced by extreme funding gaps both between and within states. On average, states and districts spend about \$1,000 less per pupil in districts that serve predominantly low-income students, and \$1,800 less per pupil in districts that serve predominantly students of color. IVY MORGAN & ARY AMERIKANER, EDUCATION TRUST, *FUNDING GAPS: AN ANALYSIS OF SCHOOL FUNDING EQUITY ACROSS THE U.S. AND WITHIN EACH STATE* (2018). Thus, a federal program that is facially open to all districts but requires substantial matching funds from local districts will likely be less accessible to poor and minority communities.

For these reasons, I would strongly recommend against a program that requires local districts or states to cover large percentages of the program themselves. Foregoing this option would, to some extent, limit the leveraging capacity of whatever dollar amount Congress might spend, but other leveraging tools exist to counterbalance that problem while still avoiding the inequality problem. For instance, Congress could provide a state a \$30 million grant, but place two important conditions on the grant. First, the state could be required to spend those funds entirely on districts that fall in the bottom quartile of spending in the state. Second, the state could be required to expand civics programs in some number or percentage of its remaining school districts (and without the use of the new federal dollars).⁴ Combined, conditions like these would ensure that needy districts get federal funds to implement civics and serving, but that those some funds create leverage for states to expand similar services in other districts. To be clear, however, the amount of additional expansion Congress can ask for in non-poor districts would be tempered by the amount it offers for the poor districts. If Congress asks for too much, few states will take Congress's offer, but this problem is simply a matter of getting the precise balance of ask and offer right.

Conclusion

History reveals that Congress has an important role to play in civics education and preparing citizens to serve and participate in democracy. The fact that it has formed this Commission also reveals that Congress may be ready to fulfill that role once again. Congressional action can come none too soon. Yet, the details of how Congress carries out that role are as important as its substantive goals. The foregoing is my best attempt to suggest how this Commission and Congress might avoid the most obvious pitfalls and pursue options that provide the best chance of equitable and expansive civics and service learning. Should my research and opinions be of any other value to this Commission or Congress, I remain at your service.

⁴ This might also require a supplement not supplant provision and a maintenance of effort provision (common to ESEA programs) to ensure that states do not redirect certain existing funds from the poorer districts to cover the cost of program expansion in the wealthier districts. *See generally* Derek W. Black, *The Congressional Failure to Enforce Equal Protection Through the Elementary and Secondary Education Act*, 90 BOSTON UNIVERSITY LAW REVIEW 313 (2010).