NOTES

GUARANTEED: THE FEDERAL EDUCATION DUTY

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The Supreme Court has long emphasized state and local supremacy over public schooling. This theory of education federalism has been at the heart of the Court's decisions pulling back on school desegregation and refusing to find a federal fundamental right to education. Today, America's schools are as segregated as they were in the 1970s and often fail to prepare Americans for democratic participation. Despite the national impact of school failures, the federal government is seen to have only a minimal role in public education.

This Note argues that the Constitution's guarantee of a republican form of government creates a federal duty to provide for public education. From the Founding through Reconstruction, America's education system has expanded to account for its broadening electorate, and education has been understood as a core foundation of republican government. Moreover, Congress has historically taken an active role in shaping state education systems. Recognizing this relationship suggests broader powers for both courts and Congress to intervene in public education to ensure an educated electorate.

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INTRODUCTION

American education is in crisis.[1] 21% of Americans struggle to compare information, paraphrase, or make low-level inferences.[2] Roughly

1. See Robin Lake & Travis Pillow, The Alarming State of the American Student in 2022, Brookings: Brown Ctr. Chalkboard (Nov. 1, 2022), https://www.brookings.edu/articles/the-alarming-state-of-the-american-student-in-2022/ [https://perma.cc/7N69-H3A3] (calling the COVID-19 pandemic a "wrecking ball for U.S. public education"); David Steiner, Opinion, America's Education System Is a Mess, and It's Students Who Are Paying the Price, The 74 (July 20, 2023), https://www.the74million.org/article/americas-education-system-is-a-mess-and-its-students-who-are-paying-the-price/ [https://perma.cc/EAH5-6YM8] (describing "two decades of disappointing [academic achievement] results" as fueling a turn away from content mastery).

2. Adult Literacy in the United States, Nat'l Ctr. for Educ. Stats. (July 2019), https://nces.ed.gov/pubs2019/2019179/index.asp [https://perma.cc/X2DR-RJB6].

eight million American adults are functionally illiterate in English;[3] 54% are partially illiterate.[4] In 2022, only 47% of American adults could name all three branches of government.[5] 25% could not name any.[6] In a twist of dark irony, only a third of Americans can pass the U.S. Citizenship Test.[7] These outcomes are driven by schools as unequal as they are inadequate: School segregation has returned to levels not seen since the 1960s.[8] Put simply, schools fail to prepare students for participation in America's republican form of government, with disastrous consequences at the state and national levels.[9]

Despite these risks, national change in education is stymied by America's federal system. The Supreme Court's commitment to state and local supremacy in education has consistently limited the federal government's capacity to ensure educational equality and adequacy.[10] This Note argues that the Guarantee Clause demands a broader federal role in education policymaking, reorienting education toward public schooling's central purpose since America's Founding: self-governance.

While other scholars have noted the connection between education and the Guarantee Clause,[11] this Note makes several novel contributions. It articulates the educated-electorate principle, relying on the close relationship between enfranchisement and education to argue that education inheres in the republican form of government. This principle provides a

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3. Id. An additional 8.2 million adults couldn't be interviewed because of a language barrier or cognitive or physical disability. Id.

4. Jonathan Rothwell, Gallup, Assessing the Economic Gains of Eradicating Illiteracy Nationally and Regionally in the United States 3, 6 (2020), https://www.barbarabush.org/wp-content/uploads/2020/09/BBFoundation_GainsFromEradicatingIlliteracy_9_8.pdf [https://perma.cc/FNQ7-H5EL].

5. Americans' Civics Knowledge Drops on First Amendment and Branches of Government, Annenberg Pub. Pol'y Ctr. (Sept. 13, 2022), https://www.annenbergpublicpolicycenter.org/americans-civics-knowledge-drops-on-first-amendment-and-branches-of-government/ [https://perma.cc/8BCE-U5RP].

6. Id.

7. See Press Release, Inst. for Citizens & Scholars, National Survey Finds Just 1 in 3 Americans Would Pass Citizenship Test (Oct. 3, 2018), https://citizensandscholars.org/resource/national-survey-finds-just-1-in-3-americans-would-pass-citizenship-test/ [https://perma.cc/N2AZ-QPLG].

8. See Gary Orfield & Danielle Jarvie, UCLA C.R. Project, Black Segregation Matters: School Resegregation and Black Educational Opportunity 11 (2020), https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/black-segregation-matters-school-resegregation-and-black-educational-opportunity/BLACK-SEGREGATION-MATTERS-final-121820.pdf [https://perma.cc/6K8G-6XRB] ("School segregation is now more severe than in the late 1960s.").

9. See Campaign for the Civic Mission of Schs., Guardian of Democracy: The Civic Mission of Schools 4–7 (2011), https://media.carnegie.org/filer_public/ab/dd/abdda62e-6e84-47a4-a043-348d2f2085ae/ccny_grantee_2011_guardian.pdf [https://perma.cc/E25R-YXEL] (noting that declining civics education decreases trust in democratic institutions).

10. See infra Part I.

11. See infra notes 82–85 and accompanying text.

conceptual framework for linking education to the American tradition of republicanism as preserved by the Guarantee Clause. Relying on the principle, this Note provides the first comprehensive argument that the Guarantee Clause creates a federal duty to ensure that state electorates receive a sufficient education to participate in republican government.

This Note proceeds in three parts. Part I examines the legal regime that has inhibited the creation of robust and equitable public school systems capable of preparing students to participate in a republican form of government. Part II relies on text and history to argue that the educated-electorate principle inheres in the republican form of government, making the Guarantee Clause a hook for federal intervention. Finally, Part III describes the Guarantee Clause power and articulates how the courts and Congress could meet their constitutional obligation to provide for an educated electorate.

I. EDUCATION FEDERALISM AND THE FRACTURING OF AMERICAN EDUCATION

America's public schools are underfunded, inadequate, and divided.[12] Schools fail to equip students with the basic skills required in a democracy, including literacy, critical thinking, and civics knowledge.[13] Poor outcomes are exacerbated by deep inequality: Family income remains a significant determinant of academic outcomes,[14] and gaps in opportunity and achievement persist nationwide for Black, Hispanic, and low-income students.[15]

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12. See, e.g., Bruce D. Baker, Matthew Di Carlo & Mark Weber, The Adequacy and Fairness of State School Finance Systems 2 (6th ed. 2024) (finding that approximately 60% of the nation's students are in "chronically underfunded" school districts, concentrated disproportionately in a small number of states (internal quotation marks omitted)), https://www.schoolfinancedata.org/wp-content/uploads/2024/02/SFID2024_annualreport.pdf [https://perma.cc/2GD4-VR7Z].

13. See supra notes 3–6. For an extended discussion on the poor state of civic education, see generally Michael A. Rebell, Flunking Democracy: Schools, Courts, and Civic Participation 17–28 (2018).

14. See Anthony P. Carnevale, Megan L. Fasules, Michael C. Quinn & Kathryn Peltier Campbell, Georgetown Univ. Ctr. on Educ. & the Workforce, Born to Win, Schooled to Lose: Why Equally Talented Students Don't Get Equal Chances to Be All They Can Be 5 (2019), https://cew.georgetown.edu/wp-content/uploads/FR-Born_to_win-schooled_to_lose.pdf [https://perma.cc/Z7F4-QC2P] ("Even when they are equally prepared, children from low-[socioeconomic status (SES)] families are less likely than their high-SES peers to enroll in postsecondary programs, complete college degrees, or have high SES as young adults.").

15. See, e.g., Nat'l Ctr. for Educ. Stats., The Condition of Education: Reading Performance 8 (2023), https://nces.ed.gov/programs/coe/pdf/2023/cnb_508.pdf [https://perma.cc/9XNP-UTAJ] (finding a 28-point reading achievement gap between white and Black fourth graders and a 22-point gap between white and Hispanic fourth graders); Racial Disparities in Education and the Role of Government, U.S. Gov't Accountability Off.: WatchBlog (June 29, 2020), https://www.gao.gov/blog/racial-disparities-education-and-role-government [https://perma.cc/VV5H-ULSE] (noting that students in high-poverty areas have less access to college-prep courses).

Inadequacy and inequity in education weaken other democratic institutions.[16] Students' civics knowledge predicts their expected political participation.[17] It is no surprise then that voter turnout is perennially low in the United States compared to economically similar countries.[18] For those who do vote, the inability to differentiate between credible sources makes elections vulnerable to misinformation campaigns.[19] More frighteningly, a substantial portion of Americans believe democracy is a bad system of government and political violence is justified.[20] These trends are partially explained by a lack of civics education, widespread illiteracy, and persistent segregation and racial isolation.[21]

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16. Vanessa Williamson, Understanding Democratic Decline in the United States, Brookings (Oct. 17, 2023), https://www.brookings.edu/articles/understanding-democratic-decline-in-the-united-states/ [https://perma.cc/73MV-T5N8] (identifying a declining education system as a symptom of a broader decline in American democracy).

17. See Campaign for the Civic Mission of Schs., supra note 9, at 12 ("Americans who are not properly educated about their roles as citizens are less likely to be civically engaged by nearly any metric.").

18. See Drew DeSilver, Turnout in U.S. Has Soared in Recent Elections but by Some Measures Still Trails that of Many Other Countries, Pew Rsch. Ctr. (Nov. 1, 2022), https://www.pewresearch.org/short-reads/2022/11/01/turnout-in-u-s-has-soared-in-recent-elections-but-by-some-measures-still-trails-that-of-many-other-countries/ [https://perma.cc/2FTK-BWE2]. Voter turnout is significantly worse for young voters, resting at 23% in 2022. See The Youth Vote in 2022, Ctr. for Info. & Rsch. on Civic Learning & Engagement, https://circle.tufts.edu/2022-election-center [https://perma.cc/9WBK-R36G] (last visited Feb. 6, 2025).

19. See Nathaniel Sirlin, Ziv Epstein, Antonio A. Arechar & David G. Rand, Digital Literacy Is Associated With More Discerning Accuracy Judgments but Not Sharing Intentions, Harv. Kennedy Sch. Misinformation Rev., Nov. 2021, at 1, 1–2 (finding that digital literacy is an important predictor of the ability to assess misinformation online); see also Lorrie Frasure, Janelle Wong, Edward D. Vargas & Matt Barreto, Collaborative Multiracial Post-Election Survey (CMPS) 2020: Topline Results by Race/Ethnicity 18 (2021), https://cmps.ss.ucla.edu/2020-survey/ (on file with the *Columbia Law Review*) (noting that 57% of white Americans believe there was voter fraud in the 2020 election, despite a lack of evidence).

20. See Roberto Stefan Foa & Yascha Mounk, The Danger of Deconsolidation: The Democratic Disconnect, J. Democracy, July 2016, at 5, 7–8 (noting that 24% of millennials polled in 2011 believed democracy was a "'bad' or 'very bad' way of running the country"). The same poll showed 13% of millennials believe that free and fair elections are unimportant and that it would be good or very good for the army to rule. Id. at 10–12; see also Rachel Kleinfeld, The Rise of Political Violence in the United States, J. Democracy, Oct. 2021, at 160, 168–69 (describing the significant increase in sentiments that point to psychological readiness for violence among Republicans in 2020).

21. See, e.g., Jomills Henry Braddock II & Amaryllis Del Carmen Gonzales, Social Isolation and Social Cohesion: The Effects of K–12 Neighborhood and School Segregation on Intergroup Orientations, 112 Tchrs. Coll. Rec. 1631, 1650–51 (2010) (finding that school segregation leads to racial isolation and impacts overall social cohesion); David E. Campbell, Voice in the Classroom: How an Open Classroom Climate Fosters Political Engagement Among Adolescents, 30 Pol. Behav. 437, 447–49 (2008) (noting that civics training is related to students' appreciation of political conflict in democratic discourse).

Across American history, democratic training has been a central goal of education.[22] Yet, it is difficult to imagine a thriving participatory democracy in which the citizenry is neither literate nor supportive of democratic values. This Part will first identify education federalism as an extraconstitutional value that limits judicial and congressional intervention in education and entrenches segregation, inequity, and inadequacy.

A. *The Myth of Absolute State and Local Supremacy*

Education federalism is the principle that state and local governments ought to have primacy in education decisionmaking, while the federal government takes on a limited role.[23] As Professor Kimberly Jenkins Robinson argues, education federalism entails two axioms: First, that local control is a fundamental value of American education.[24] Second, that "the existing balance of power between the federal and state governments" ought not be disrupted.[25] In practice, the first principle is bolstered by the second: States devolve significant authority to local government, particularly over funding.[26] Thus, state supremacy in education is functionally equivalent to local control in education, despite state constitutions squarely placing the duty to provide education on state governments.[27] Under this "dualist" system, state and local control over schools is exalted while intercessions by the federal government are considered overreach.[28]

This principle has had profound and unusual influence over the development of American public education since the 1950s.[29] Profound

22. See infra section III.B.

23. See Kimberly Jenkins Robinson, The High Cost of Education Federalism, 48 Wake Forest L. Rev. 287, 287–88 (2013) [hereinafter Robinson, High Cost of Education Federalism].

24. Id. at 294.

25. Id.

26. See Derek W. Black, Localism, Pretext, and the Color of School Dollars, 107 Minn. L. Rev. 1415, 1440 (2023) [hereinafter Black, Color of School Dollars] (noting that education federalism has made "local funding . . . a predicate aspect of school funding, even in a state system of school funding"); Kimberly Jenkins Robinson, Disrupting Education Federalism, 92 Wash. U. L. Rev. 959, 979 (2015) [hereinafter Robinson, Disrupting Education Federalism] (noting the "pervasive state insistence that local governments raise education funds").

27. See Richard Briffault, The Role of Local Control in School Finance Reform, 24 Conn. L. Rev. 773, 781–86 (1992) (describing how state delegation of authority to localities in education law has become a "constitutional or quasi-constitutional imperative").

28. See Robinson, High Cost of Education Federalism, supra note 23, at 287, 303–04, 329–30 (describing the dualist federalism that has informed judicial and congressional action in education law since the 1950s).

29. See infra sections I.B–.C.

because state and local supremacy have played a key role in halting desegregation and establishing that there is no federal right to education.[30] Unusual because this supremacy is extraconstitutional—nowhere in the Constitution is there a command for state and local control over education.[31] Further, education federalism is an aberration in the prevailing system of cooperative federal–state relations operant in the United States.[32] Judicially imposed limitations on federal power fail to recognize the system of cooperativism ascendant in education since the early '60s.[33] Despite these abnormalities, the Court has given education federalism the status of a quasi-constitutional value and used it to steeply curb efforts to make public schools adequate and equitable.[34]

B. *The Court Abdicates Its Role in Education*

The Supreme Court has long exhorted the importance of education in our republican democracy.[35] But when education federalism and equal educational opportunity have come into conflict, state and local control

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30. See infra notes 39–51 and accompanying text; see also San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) (declining to find education is a fundamental right).

31. Some might point to the Tenth Amendment as reserving authority over education to the states. See U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). There are a few problems here. First, if this Note's major premise is correct, then the Guarantee Clause delegates to the United States the power to intervene in education policy to ensure a republican form of government, meaning that it need not be reserved to the states under the Tenth Amendment's plain meaning. Second, even if the Tenth Amendment reserves authority over education to the states, it is silent as to the role of local governments.

32. See Robinson, High Cost of Education Federalism, supra note 23, at 292 (noting the nation's shift to cooperative federalism since the New Deal). For a definition and a more detailed discussion of cooperative federalism, see, e.g., Kristi L. Bowman, The Failure of Education Federalism, 51 U. Mich. J.L. Reform 1, 5–7 (2017) (articulating the need for cooperative federalism in education); Erwin Chemerinsky, Jolene Forman, Allen Hopper & Sam Kamin, Cooperative Federalism and Marijuana Regulation, 62 UCLA L. Rev. 74, 116 (2015) ("Cooperative federalism has been described as 'a partnership between the States and the Federal Government, animated by a shared objective.'" (quoting Arkansas v. Oklahoma, 503 U.S. 91, 101 (1992))).

33. See Robinson, High Cost of Education Federalism, supra note 23, at 311.

34. See Briffault, supra note 27, at 774–75 ("Many courts and commentators have treated local control as the cornerstone of the American system of public education, and as a value of constitutional magnitude.").

35. See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) ("[S]ome degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence."); Meyer v. Nebraska, 262 U.S. 390, 400 (1923) ("The American people have always regarded education and acquisition of knowledge as matters of supreme importance . . . ."). None of the Court's education musings have been more quoted than those found in Brown v. Board of Education, 347 U.S. 483, 493 (1954) ("Today, education is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship.").

have nearly always prevailed. Despite the Court's noble declaration in *Brown v. Board of Education* that separate but equal is inherently unequal,[36] school integration unraveled by the mid-1970s—to preserve education federalism.[37] Beginning with *Milliken v. Bradley*—the first decision to reverse a school desegregation order after *Brown*[38]—the Court began to weigh state and local control over equal educational opportunity.[39]

Milliken effectively halted the desegregation movement. The Court barred interdistrict remedies for intradistrict equal protection violations as too disruptive to education federalism; after all, "No single tradition in public education is more deeply rooted than local control over the operation of schools . . . ."[40] Later cases would rely on the federalism norms established in *Milliken* to dismantle the doctrinal infrastructure of effective desegregation.[41] To preserve the "vital national tradition" of "local autonomy of school districts,"[42] the Court granted deference to recently desegregated school districts while signaling to lower courts that they should withdraw judicial remedies even before complete compliance.[43] To be sure, the Court provided other doctrinal justifications for its decision, centering the decision primarily on the need for intradistrict evidence of discrimination.[44] Still, education federalism operates in *Milliken* as a sort

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36. See *Brown*, 347 U.S. at 495.

37. See Robinson, High Cost of Education Federalism, supra note 23, at 287, 293–306 (arguing that education federalism drove the Court's decisions that resulted in the resegregation of schools); see also Erwin Chemerinsky, The Deconstitutionalization of Education, 36 Loy. U. Chi. L.J. 111, 112–19 (2004) (describing the string of Supreme Court decisions that deconstitutionalized racial segregation in schools).

38. See Charles R. Lawrence III, Segregation "Misunderstood": The *Milliken* Decision Revisited, 12 U. S.F. L. Rev. 15, 15 (1977).

39. See Milliken v. Bradley, 418 U.S. 717, 741–42 (1974); Robinson, High Cost of Education Federalism, supra note 23, at 295–306. The Court's emphasis on local control has persisted since the early days of the desegregation movement, but these cases did not see local control as a justification for limiting desegregation. See, e.g., Wright v. Council of Emporia, 407 U.S. 451, 462–69 (1972) (upholding a desegregation order while acknowledging that "[d]irect control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society").

40. *Milliken*, 418 U.S. at 741.

41. See supra note 37 and accompanying text.

42. Freeman v. Pitts, 503 U.S. 467, 490 (1992) (internal quotation marks omitted) (quoting Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 410 (1977)).

43. See id. at 489–92 ("[F]ederal courts have the authority to relinquish supervision and control of school districts in incremental stages, before full compliance has been achieved . . . ."); see also Bd. of Educ. v. Dowell, 498 U.S. 237, 247 (1991) (holding that courts should consider a school district's good faith compliance in determining when a desegregation decree should be dissolved).

44. See *Milliken*, 418 U.S. at 744–45 ("Before the boundaries of separate and autonomous school districts may be set . . . it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district.").

of subdoctrinal principle—some might say subterfuge—that prioritized state and local supremacy over the need to curb racial segregation.[45]

The Court's fealty to state and local control similarly curtailed judicial remedies in federal funding equity cases. In *San Antonio Independent School District v. Rodriguez*, the Court held that education is not a fundamental right protected by the Fourteenth Amendment.[46] The Court supported its conclusion with an appeal to states' rights: "The Texas system . . . should be scrutinized under judicial principles sensitive to the nature of the State's efforts and to the rights reserved to the States under the Constitution."[47] With a wistful nod to its own anachronism,[48] the Court recognized "[t]he merit[s] of local control"—including "the freedom to devote more money to the education of one's children"—democratic participation, and experimentation.[49] The Court concluded that "[i]t has simply never been within the constitutional prerogative of this Court to nullify statewide measures for financing public services merely because the burdens or benefits thereof fall unevenly depending upon the relative wealth of the political subdivisions in which citizens live."[50]

Together, the desegregation cases and *Rodriguez* have led to judicial impotence.[51] *Milliken* and its progeny made acquiring and enforcing desegregation orders prohibitive in many districts, effectively sacrificing meaningful integration at the altar of local control.[52] *Rodriguez* halted

45. See id. at 742–43 (pointing to the structure of Michigan's education system and outlining a litany of questions that disrupting education federalism would raise).

46. See 411 U.S. 1, 35 (1973) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected."); Derek W. Black, The Fundamental Right to Education, 94 Notre Dame L. Rev. 1059, 1074 (2019) (describing the Court's holding).

47. *Rodriguez*, 411 U.S. at 39.

48. See id. at 49 ("In an era that has witnessed a consistent trend toward centralization of the functions of government, local sharing of responsibility for public education has survived.").

49. Id. at 49–50.

50. Id. at 54.

51. See Kimberly Jenkins Robinson, Introduction: The Essential Questions Regarding a Federal Right to Education, *in* A Federal Right to Education 1, 10–12 (Kimberly Jenkins Robinson ed., 2019) [hereinafter Robinson, The Essential Questions] (describing *Rodriguez*'s implications for the rational basis test).

52. See Robinson, Disrupting Education Federalism, supra note 26, at 976 ("[K]ey Supreme Court decisions . . . relied on the structure of federalism and the American tradition of local control of education as one of the reasons for severely curtailing the authority of courts to ensure effective school desegregation."); Robinson, High Cost of Education Federalism, supra note 23, at 304 ("[The Court's] insistence on a dualist understanding of education failed to protect the right to attend a nondiscriminatory school system, just as it has failed to protect individual rights in other areas.").

education equity and adequacy cases in the federal courts.[53] Without fundamental right status, plaintiffs must argue equal protection cases involving schools under a rational basis test, allowing schools to defend racially disparate impact and economically disparate treatment with any "rational" justification.[54] As a result, students facing even the most deplorable school conditions have been unable to receive judicial relief.[55] Today, few academics or activists believe the federal courts are a viable pathway for ensuring schools provide equity or adequacy.[56]

C. *The Court Limits Congress, and Congress Limits Itself*

Even as the Supreme Court has retreated from protecting educational opportunity, it has placed new doctrinal limitations on congressional authority under the Spending and Commerce Clauses. Where the Court has not made explicit prohibitions on congressional action, the perception that the federal government must have a limited role in education has stalled efforts to pass legislation targeting educational inequity. Thus, education federalism hampers the key levers that Congress might use to address inequality and inadequacy.

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53. See Kimberly Jenkins Robinson, Designing the Legal Architecture to Protect Education as a Civil Right, 96 Ind. L.J. 51, 75 (2020) [hereinafter Robinson, Designing the Legal Architecture] ("*Rodriguez* closed the federal courthouse door to litigation challenging inequities in school funding, at least temporarily."); see also Black, Color of School Dollars, supra note 26, at 1430–33 (discussing *Rodriguez*'s role in shaping the Court's federalism jurisprudence).

54. See Robinson, The Essential Questions, supra note 51, at 1 ("[*Rodriguez*] left remedies for disparities in educational opportunities to the primary province of states and localities."). Numerous state supreme courts have relied on local control to uphold property tax–based systems, further entrenching disparities in school resourcing. See Briffault, supra note 27, at 775 (noting that "nearly a dozen state supreme courts have" followed *Rodriguez* and used "its paean to 'the merit of local control'" to uphold property tax–based school finance systems and "ward off claims that the state has an obligation to revamp the existing school finance system" (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 49 (1973))).

55. In 2020, there was a brief flicker of hope that a fundamental right to education might be federally recognized. See Gary B. v. Whitmer, 957 F.3d 616, 658 (6th Cir.) (finding that "some minimal education—enough to provide access to literacy—is a prerequisite to a citizen's participation in our political process"), vacated, 958 F.3d 1216 (6th Cir. 2020) (en banc). The plaintiffs in *Gary B.* described a school system in absolute disarray, with classroom sizes exceeding fifty students per class. Id. at 625–28. Students sat in classrooms that reached temperatures in excess of ninety degrees and drank contaminated water. Id. Despite these conditions, the Sixth Circuit vacated its decision sua sponte and ordered a rehearing en banc. *Gary B.*, 958 F.3d at 1216. For a synopsis of other cases in the lower courts centering on a fundamental right to education, see Robinson, Designing the Legal Architecture, supra note 53, at 75–77.

56. See, e.g., Chemerinsky, supra note 37, at 112 ("[T]he Supreme Court's overall approach has been to withdraw the courts from involvement in American schools."); Matthew Patrick Shaw, The Public Right to Education, 89 U. Chi. L. Rev. 1179, 1180 (2022) ("The decades-long fight to recognize a fundamental right to education within the U.S. Constitution appears lost.").

1. *The Spending Power.* — Federal legislation plays three major roles in education: funding, civil rights enforcement, and accountability.[57] While this involvement is significant,[58] the latter two roles are all contingent on the former—congressional influence over education is almost exclusively rooted in inducements for cash. This is because the Spending Clause allows Congress to reach issues traditionally reserved for state authority, like education.[59] For example, Title VI, the civil rights legislation that drives most education antidiscrimination litigation, is the product of federal inducement.[60] As a result, Title VI only applies to recipients of federal funding, and the primary remedy for violations is to pull money from schools.[61] Essentially, federal education policy is a system of economic coercion: If states want better budgets, they'll follow the federal government's lead.

But even Congress's spending authority cannot escape education federalism. The Court's broader education federalism decisions have a chilling effect on congressional action. For example, scholars have argued that education federalism prevented Congress from adopting national academic standards in the No Child Left Behind Act (NCLB).[62] Without national standards, states adopted lower standards to escape accountability, inadvertently triggering a nationwide race to the bottom.[63] In the end,

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57. See Jason P. Nance, The Justifications for a Stronger Federal Response to Address Educational Inequalities, *in* A Federal Right to Education, supra note 51, at 35, 46–55 (surveying federal funding and accountability legislation); Robinson, High Cost of Education Federalism, supra note 23, at 304 (noting numerous federal antidiscrimination laws in education).

58. This section aims not to diminish the growing role that the federal government has played in education but to demonstrate how local control has contributed to the failure of the federal government's efforts. In fact, Kimberly Robinson points out that the emphasis on local control in the Court's jurisprudence has failed to account for the growing federal role since the 1960s. See Robinson, High Cost of Education Federalism, supra note 23, at 303–04.

59. See Jared P. Cole, Cong. Rsch. Serv., R45665, Civil Rights at School: Agency Enforcement of Title VI of the Civil Rights Act of 1964, at 3 (2019) (discussing the argument that the conditional spending authority allows Congress to "condition the receipt of appropriated funds on the terms of its choosing, even in areas traditionally left to the regulation of the states").

60. Id. at 1 ("Title VI is concerned specifically with the use of 'public funds,' designed to ensure that federal dollars not be 'spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination.'" (quoting 110 Cong. Rec. 6543 (1964) (statement of Sen. Humphrey quoting President Kennedy))).

61. See 42 U.S.C. § 2000d-1 (2018) ("Compliance with any requirement adopted pursuant to this section may be effected . . . by the termination of or refusal to grant or to continue assistance . . . ."). For a discussion of federal antidiscrimination law's limitations in education, see Robinson, Designing the Legal Architecture, supra note 53, at 69.

62. See Robinson, High Cost of Education Federalism, supra note 23, at 322–31 ("[E]ven the most far-reaching federal effort to promote equity and excellence in education [NCLB] could not escape the policymaking constraints of education federalism.").

63. See Michael Heise, From No Child Left Behind to Every Student Succeeds: Back to a Future for Education Federalism, 117 Colum. L. Rev. 1859, 1868–69 (2017) (noting that

education federalism prevailed when NCLB was replaced by the Every Student Succeeds Act (ESSA), legislation intentionally designed to shift power back to the states.[64] Thus, the perception that the federal government must have a limited role in education inhibited Congress's most robust education legislation, even as states continue to provide inconsistent access to quality education.[65]

2. *The Commerce Clause Power.* — The Commerce Clause has historically provided a robust alternative to Congress's spending power,[66] yet the Supreme Court has made preemptive moves to ensure congressional action under the Clause does not interfere with state and local authority. In *United States v. Lopez*, the Court struck down federal legislation criminalizing gun possession near public schools.[67] The majority's opinion downplayed the effect of gun violence near schools on interstate commerce while emphasizing state education control.[68]

Generally, the Commerce Clause allows Congress to regulate individual, local behavior because of the substantial effects such activity has in aggregate on interstate commerce.[69] But in *Lopez*, the Court reasoned that the Commerce Clause could not countenance an extended "substantial effects" test when it came to schools because that would allow Congress to directly regulate education:

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several aspects of NCLB, including its flexibility in state assessments, were intentionally designed to avoid federalism concerns).

64. Id. at 1872–73 (describing the ways that ESSA provides greater flexibility to states compared to NCLB); see also Derek W. Black, Abandoning the Federal Role in Education: The Every Student Succeeds Act, 105 Calif. L. Rev. 1309, 1340 (2017) [hereinafter Black, Abandoning the Federal Role] ("The ESSA's new structure amounts to an enormous devolution of power to states and a complete rebalancing of the federal role in education.").

65. See Black, Abandoning the Federal Role, supra note 64, at 1342–45 (discussing states' resistance to racial equality, failure to provide equal opportunity, and inability to address funding disparities); Robinson, Disrupting Education Federalism, supra note 26, at 978 ("Even when Congress was adopting NCLB . . . the nation's longstanding approach to education federalism insisted that states decide the standards for students and teachers.").

66. Christina E. Coleman, Note, The Future of the Federalism Revolution: *Gonzales v. Raich* and the Legacy of the Rehnquist Court, 37 Loy. U. Chi. L.J. 803, 809–13 (2006) (describing Congress's expansive powers under the Commerce Clause prior to the Rehnquist Court).

67. 514 U.S. 549, 551 (1995).

68. Id. at 565–67 (rejecting the dissent's argument that Congress could have rationally concluded that gun violence has a substantial effect on interstate commerce as lacking a limiting principle).

69. Wickard v. Filburn, 317 U.S. 111, 127–28 (1942) (upholding legislation prohibiting personal consumption of wheat because even an individual farmer's consumption, "taken together with that of many other similarly situated, is far from trivial" (citing United States v. Darby, 312 U.S. 100, 123 (1941); Nat'l Lab. Rels. Bd. v. Fainblatt, 306 U.S. 601, 606 (1939))); see also Katzenbach v. McClung, 379 U.S. 294, 304 (1964) ("[W]e must conclude that [Congress] had a rational basis for finding that racial discrimination in restaurants had a direct and adverse effect on the free flow of interstate commerce.").

> [I]f Congress can, pursuant to its Commerce Clause power, regulate activities that adversely affect the learning environment, then . . . Congress could mandate a federal curriculum for local elementary and secondary schools because what is taught in local schools has a significant "effect on classroom learning," and that, in turn, has a substantial effect on interstate commerce.[70]

Thus, the connection between school safety and interstate commerce was too attenuated to justify legislating under the Commerce Clause. For the *Lopez* Court, a federal curriculum would be constitutional anathema,[71] never mind that gun violence in schools almost certainly impacts interstate commerce in aggregate as much or more than farmers' personal wheat consumption.[72]

D. *The Need for a New Education Federalism*

Despite its absence in the Constitution, education federalism has become a robust constitutional norm that limits federal authority.[73] America's schoolchildren have reaped the seeds of judicial and congressional abdication. Schools today are as segregated as they were in the '60s;[74] remain grossly underfunded, often directing inadequate resources among low-income, minoritized communities;[75] and consistently produce racially disparate, generally inadequate outcomes.[76]

A growing body of scholarship has criticized state and local control, both for its roots in segregation and its effects on student outcomes today.[77]

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70. *Lopez*, 514 U.S. at 565 (citation omitted).

71. See id.

72. Compare id. at 567 ("To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."), with *Wickard*, 317 U.S. at 128–29 ("This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.").

73. See Briffault, supra note 27, at 774–75 ("Many courts and commentators have treated local control as the cornerstone of the American system of public education, and as a value of constitutional magnitude.").

74. See supra note 8; see also Robinson, The High Cost of Education Federalism, supra note 23, at 304 (arguing that a handful of Supreme Court decisions, "along with several other factors . . . have led to resegregation of many of the nation's schools").

75. EdBuild, $23 Billion 2 (2019), https://staging.edbuild.org/content/23-billion/full-report.pdf [https://perma.cc/6YP2-PHPZ] (demonstrating that predominantly minority schools receive $23 billion less than predominantly white schools nationwide, despite serving the same number of children).

76. See supra notes 14–15 and accompanying text.

77. See, e.g., Kristi L. Bowman, The Failure of Education Federalism, 51 U. Mich. J.L. Reform 1, 15–23 (2017) (describing how federal intervention is needed to address the uneven standards of education quality set by each state).

Similarly, many have noted potential benefits of greater federal involvement in education.[78] This Note does not aim to resolve the debate over the relative virtues of state and local primacy in education, nor does it seek to propose an argument for the "best" balance of authority between local, state, and federal governments. Rather, this Note seeks to counter the prevailing judicial and congressional perception that the Constitution demands a limited role for the federal government in education. Because education federalism has been constitutionalized, disrupting this status quo requires a constitutional foundation. This Note argues that a constitutional basis for a new federalism already exists: the Constitution's guarantee of a republican form of government.[79]

II. THE GUARANTEE OF REPUBLICAN EDUCATION

Article IV, Section 4 of the U.S. Constitution begins with a command: "The United States shall guarantee to every State in this Union a Republican Form of Government . . . ."[80] The plain text of the Guarantee Clause defines the state–federal relationship by placing an affirmative duty on the federal government to safeguard republicanism.[81] Professor Arthur Bonfield recognized in the '60s that this duty might command greater federal intervention in education.[82] But Bonfield argued that education had *become* an aspect of republican government under a dynamic interpretation of the Clause.[83] More recently, Professor Derek Black noted that the Clause could be a plausible hook for a federal right to education but focused instead on evidence from the history of the ratification of the Fourteenth Amendment.[84] Similarly, Professor Kip Hustace developed a

78. See, e.g., Nance, supra note 57, at 38–46 (emphasizing that "there are other compelling rationales for the federal government to address our nation's stark educational inequalities, including economic, criminal justice, health, democratic, and fairness rationales"); Shaw, supra note 56, at 1239–40 (arguing for a public right to education that expands federal courts' role in upholding education rights).

79. See U.S. Const. art. IV, § 4.

80. Id.

81. See Deborah Jones Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century, 88 Colum. L. Rev. 1, 35 (1988) ("Thus, both advocates and foes of the new Constitution recognized the guarantee clause as an attempt to mark the boundary between federal power and state sovereignty.").

82. See Arthur E. Bonfield, The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude, 46 Minn. L. Rev 513, 564 (1962) (noting that the Clause grants Congress broad authority to secure rights that sufficiently touch the public interest, including education).

83. See id. at 560 ("[U]niversal free public education, not a requisite to such government 150 years ago, must unavoidably be deemed so today.").

84. See Derek W. Black, The Constitutional Compromise to Guarantee Education, 70 Stan. L. Rev. 735, 837 (2018) [hereinafter Black, Constitutional Compromise] (noting that a federal right to education could be rooted in the Guarantee Clause).

novel interpretation of the Guarantee Clause that would protect education as an element of "antidomination" republicanism.[85]

This Note seeks to expand on these claims by providing the conceptual link connecting education and the original meaning of "Republican Form of Government": the educated-electorate principle. Further, this Note builds on Bonfield's, Black's, and Hustace's works to make the first comprehensive argument that the Clause places a duty on the courts and Congress to intervene against antirepublican education.

This Part will make the case that *Milliken* and *Rodriguez* misunderstood the Constitution's historic approval of federal intervention in education. This Part will demonstrate that a republican form of government implicitly guarantees an educated electorate as a necessary corollary to popular sovereignty and representative government. This proposition—that the republican form of government protected by the Guarantee Clause requires education systems commensurate with the needs of a self-governing electorate—will be referred to throughout the remainder of this Note as the educated-electorate principle. Demonstrating the enduring nexus between education and the republican form of government, this Part rebuts the Court's currently cabined view of federal authority in education and provides the hook for enforcement under the Guarantee Clause.

A. *The Republican Form of Government: Popular Sovereignty and Representation*

The authority granted by the Guarantee Clause to intervene in state education governance turns on whether education falls within the remit of the admittedly ambiguous words "Republican Form of Government."[86] In 1787, most Americans defined a republican government by what it was not: monarchy, aristocracy, or democracy.[87] Scholars today agree that the

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85. See Kip M. Hustace, Education, Antidomination, and the Republican Guarantee, 30 Wm. & Mary Bill Rts. J. 91, 142 (2021) (arguing that the Clause is "a guarantee of nondomination and thus of a fundamental right to education").

86. See Adam H. Kurland, The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials, 62 S. Cal. L. Rev. 367, 424 (1989) (noting that, when it comes to the Guarantee Clause, "[i]t is impossible to discern, in any meaningful way, the precise 'original intent' or 'original meaning' of the framers"). As James Madison pointed out, Holland, Venice, Poland, and—perhaps ironically—England had each been described as republics around the time of the Founding, demonstrating "the extreme inaccuracy with which the term [was] used in political disquisitions." The Federalist No. 39, at 276 (James Madison) (Floating Press 2011).

87. See William M. Wiecek, The Guarantee Clause of the U.S. Constitution 17 (1972) ("The negative senses of 'republican,' that is, nonmonarchical and nonaristocratic, commanded the assent of most Americans in 1787."); Akhil Reed Amar, The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem, 65 U. Colo. L. Rev. 749, 762–66 (1994) [hereinafter Amar, The Central Meaning] (discussing historical evidence that the Founders contrasted republicanism with aristocracy and monarchy). The public would have understood it this way as well. Samuel Johnson's

heart of republican government was, at minimum, popular sovereignty and representation.[88]

In Federalist 39, James Madison articulated this principle for the public, defining a republic as "a government which derives all its powers directly or indirectly from the great body of the people."[89] From the perspective of the Founders, monarchy and aristocracy could never be sufficiently committed to the public.[90] Majority rule alone would be the source of government's power; anything less "would be degraded from the republican character."[91]

Even as the Framers sought to guarantee that popular sovereignty would be the engine of the new republic, however, they feared unbridled liberty and democracy would ultimately lead to tyranny.[92] The cure would be a "government in which the scheme of representation takes place."[93]

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dictionary of 1773 defined republican (the adjective) as "[p]lacing the government in the people" and republican (the noun) as "[o]ne who thinks a commonwealth without monarchy the best government." Samuel Johnson, A Dictionary of the English Language (4th ed. 1773), https://johnsonsdictionaryonline.com/views/search.php?term=republican (on file with the *Columbia Law Review*). Widely read pamphlets spoke of republicanism along the same lines. See Plain Truth: Reply to an Officer of the Late Continental Army, Indep. Gazetteer (Phila.), Nov. 10, 1787, https://archive.csac.history.wisc.edu/pa_5.pdf [https://perma.cc/BZ2V-CDCW] ("'The United States shall guarantee to every state, a republican form of government.' That is, they shall guarantee it against monarchical or aristocratical encroachments." (quoting U.S. Const. art. IV, § 4)).

88. See Jacob M. Heller, Note, Death by a Thousand Cuts: The Guarantee Clause Regulation of State Constitutions, 62 Stan. L. Rev. 1711, 1718 (2010) (noting that majoritarianism, representative government, and separation of powers have achieved near consensus as the fundamentals of a republican form of government).

89. The Federalist No. 39, supra note 86 at 276 (James Madison). Madison centers popular sovereignty in republicanism throughout *The Federalist Papers*. See Amar, The Central Meaning, supra note 87, at 763–66 ("And Madison's observations in *The Federalist* consistently linked Republican Government with popular self-rule, the people's right to alter or abolish, and the role of popular majority rule in moments of constitutional founding and change.").

90. See The Federalist No. 39, supra note 86, at 276 (James Madison) ("It is essential to . . . a [republican] government that it be derived from the great body of the society . . . otherwise a handful of tyrannical nobles . . . might . . . claim for their government the honorable title of republic." (emphasis omitted)).

91. Id.

92. See Wiecek, supra note 87, at 18 (reflecting that, at the time of the Constitutional Convention, Americans viewed democracy as equally undesirable as a monarchy, with republican government "thought to be an alternative to these extremes"). In the early republic, democracy entailed "direct, complete, and continuing control of the legislative and executive branches of government by the people as a whole." Id.; see also Gordon S. Wood, The Creation of the American Republic: 1776–1787, at 19 (2d ed. 1998) ("[I]t was believed[] the disorder of absolute liberty would inevitably lead to the tyranny of the dictator.").

93. The Federalist No. 10, supra note 86, at 71 (James Madison); see also Catherine A. Rogers & David L. Faigman, "And to the Republic for Which It Stands": Guaranteeing a Republican Form of Government, 23 Hastings Const. L.Q. 1057, 1060 (1996) ("Madison proposed the republican form as a check on the passions of a potentially factious majority.

Representation would ensure popular influence while moderating the "tendency [of popular governments] to break and control the violence of faction."[94] A representative system would not curb popular participation but refine it.[95] Seeking votes would lead to transparency, encourage public participation in the business of government, and ensure that elected officials were the best equipped to make decisions about government.[96] Ultimately, the Constitution and the representative government it created would guard the public "against *all servants* but those 'whom choice and common good ordain.'"[97]

With the memory of Shays's Rebellion and the impotence of the federal government under the Articles of Confederation in mind, the drafters of the Guarantee Clause sought to preserve popular sovereignty and representation from monarchy and aristocracy.[98] The Clause would quell fears that degradations of the republican form in one state would make the rest

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Representative decisionmaking offered a mechanism by which public views could be refined and enlarged." (footnote omitted)).

94. The Federalist No. 10, supra note 86, at 65 (James Madison). For Madison, republicanism would "refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations." Id. at 71; see also Thomas Paine, Rights of Man, *in* 6 The Life and Works of Thomas Paine 1, 272 (William M. Van der Weyde ed., Patriots' ed. 1925) ("By ingrafting representation upon democracy, we arrive at a system of government capable of embracing and confederating all the various interests and every extent of territory and population . . . .").

95. See Paine, supra note 94, at 278–79 ("But the case is, that the representative system diffuses such a body of knowledge throughout a nation, on the subject of government, as to explode ignorance . . . .").

96. The Federalist No. 21, supra note 86, at 147 (Alexander Hamilton) ("The natural cure for an ill-administration, in a popular or representative constitution, is a change of men."). A crucial aspect of the representative system was to ensure knowledgeable citizens drove good government. See Paine, supra note 94, at 273–74 ("[The representative system] concentrates the knowledge necessary to the interest of the parts . . . . It admits not of a separation between knowledge and power, and is superior, as government always ought to be, to all the accidents of individual man, and is therefore superior to . . . monarchy.").

97. An American Citizen, On the Federal Government No. 3, Indep. Gazetteer (Phila.), Sept. 29, 1787, at 3, https://archive.csac.history.wisc.edu/pa_1.pdf [https://perma.cc/CV2V-2KPM].

98. See Wiecek, supra note 87, at 58–59 (discussing the influence of Shays's Rebellion on the Clause). This concern was driven by theory as much as experience. Montesquieu, whose writings informed the Clause's drafting, feared small democracies would be swallowed up by their neighboring states. See The Federalist No. 43, supra note 86, at 319 (James Madison) (quoting Montesquieu and noting that neighboring states might be threatened "by the caprice of particular states, by the ambition of enterprising leaders, or by the intrigues and influences of foreign powers"); see also Akhil Reed Amar, America's Constitution: A Biography 278–80 (2005) (analyzing the origins of the Guarantee Clause, including how Montesquieu's discussion of Greece inspired the drafters). Montesquieu himself noted the connection between republicanism and education. See 1 M. de Secondat, Baron de Montesquieu, The Spirit of Laws 36 (Thomas Nugent trans., new ed. 1909) (1748) ("It is in a republican government that the whole power of education is required.").

of the Union vulnerable by establishing the federal government as the guarantor of state republicanism.[99] Thus, the Guarantee Clause was designed to ensure popular sovereignty and representation would remain a feature of state government.

B. *Republican Foundations of the Educated-Electorate Principle*

The Framers understood that the republican experiment was fragile, a balancing act between ensuring the government served the people and preventing the people from destabilizing the government.[100] The Framers recognized, too, that education, popular sovereignty, and representation are necessary bedfellows.[101] In the new republic, "the people" would be sovereign; educating American leaders would mean expanding the education system to meet the electorate. As suffrage broadened over the course of the nation's history, so too would the system of education.[102]

America's commitment to education as a core institution of government predates the Constitution.[103] Who the education system serves and how it is administered have always been linked to the prevailing form of government.[104] Prior to the revolution, education was primarily directed toward the ruling class on both sides of the Atlantic.[105] Only landowning white "gentlemen" would have a place in public affairs, thus "common men" needed no education.[106] As the colonies became republican states, the educated-electorate principle took hold, driving the expansion of education alongside the electorate.[107] This Part first demonstrates the longstanding nexus between education and republicanism that began with

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99. See The Federalist No. 43, supra note 86, at 318–22 (James Madison) (describing the function of the Guarantee Clause in preserving the republican form).

100. See supra notes 92–97 and accompanying text.

101. See infra notes 108–139 and accompanying text.

102. See infra notes 105–106, 163–164.

103. See Richard D. Brown, The Strength of a People: The Idea of an Informed Citizenry in America, 1650–1870, at 36–40 (1996) (noting early proposals in the mid-eighteenth century for education systems geared toward gentlemen).

104. See Lawrence A. Cremin, American Education: The National Experience, 1783–1876, at 2 (1980) (discussing the Founders' adherence to Montesquieu's belief that education should be tied to the republican form of government). Thus, even before the Founding, education began to transition from the British system of educating only the nobility to preparing members of the electorate for the duties of republican governance. See Brown, supra note 103, at 36–37 (noting that colonial education proposals in the 1700s provided for greater social mobility into the class of elite citizens).

105. Brown, supra note 103, at 37 ("Originally Franklin and his associates were guided by the British ideology of the preparation of gentlemen citizens.").

106. See id. at 32–33 ("[I]t was just as inappropriate for a common man to be informed or to speak on public matters as for a fishmonger to dress in silks.").

107. See Cremin, supra note 104, at 11 ("[The American Revolution] set in motion significant innovations in educational theory and practice that were widely thought of as essential to the survival and prosperity of the Republic.").

the Founding and persisted through Reconstruction, then concludes that an educated electorate is required by the Republican Guarantee.

1. *In the States*. — Throughout the Founding Era, state leaders and the public directly linked education to republicanism, popular sovereignty, and representation. More than three decades before the Founders' concerns over interstate violence would lead to the Guarantee Clause, William Livingston presented the vital stakes of educating the youth in terms of popular sovereignty.[108] The "people" could only defend their rights if they were knowledgeable of them; they could only ward off the "insidious Designs of domestic Politicians" if they could identify them.[109] To guarantee the safety of the Commonwealth of Pennsylvania, the establishment of a college and series of public grammar schools, funded by taxes, should be "under the Care of the Public."[110]

Around the same time, a young John Adams, seeking to provoke public ire toward the Stamp Act, articulated a similar connection between education and republicanism.[111] The tyrants of every age had sought to "wrest from the Populace . . . the Knowledge of their Rights and Wrongs," while American republicanism in New England, born of "a love of *universal Liberty*," had safeguarded popular power by making "the education of all ranks of people . . . the care and expence of the public."[112] As early as the mid-eighteenth century, Americans were publicly defining education as an essential bulwark of liberty and popular government against monarchical rule.

As the Revolution gained steam, American republicanism began to crystalize and, with it, the necessity of republican education.[113] Before long, the impassioned words of the pamphleteers became the sober acts of government. In 1776, the Massachusetts legislature proclaimed:

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108. See The Advantages of Education, Indep. Reflector, Nov. 8, 1753, at 200, www.proquest.com/magazines/advantages-education-with-necessity-instituting/docview/88519688/se-2 ("Knowledge among a People makes them free, enterprising and dauntless; but Ignorance enslaves, emasculates and depresses them.").

109. Id.

110. Id.

111. Whether his polemic was successful is a matter of interesting historical speculation. See A Dissertation on the Canon and the Feudal Law (May–Oct. 1765), Editorial Note, *in* 1 Papers of John Adams 103, 103–04 (Robert J. Taylor ed., 1977) ("Although Adams was later to claim that the 'Dissertation' was the spark which ignited New England's opposition to the Stamp Act, in fact it did no such thing, resistance to this measure having developed in this region prior to and independent of the appearance of Adams' work." (citation omitted)).

112. See id. at 103, 108–09, 113–14, 120.

113. Carl F. Kaestle, Pillars of the Republic: Common Schools and American Society, 1780–1860, at 4–5 (1983) ("To foster the intelligence required of republican citizens, some of America's most eloquent political leaders looked to education—not just through the informal colonial modes of instruction but through schools organized and financed by the states."). At the same time, American notions of the informed citizen began to take shape. See Brown, supra note 103, at 52–53.

> But as a Government so popular can be Supported only by universal Knowledge and Virtue, in the Body of the People, it is the Duty of all Ranks, to promote the Means of Education, for the rising Generation as well as true Religion, Purity of Manners, and Integrity of Life among all orders and Degrees.[114]

The legislature explicitly linked the need for public education with the popular, representative form of government that Massachusetts had adopted.[115]

At the same time, in response to independence, several of the nascent states began to adopt new constitutions. By the time the Constitution was ratified, five of the original thirteen colonies had expressly included education language in their constitutions.[116] The Massachusetts Constitution made explicit what each of these documents implied: wisdom, knowledge, virtue, and learning must be diffused among the people to preserve their rights and the structure of a free government.[117] In their home states, many of the Framers advocated for new legislation to erect systems of public education. Thomas Jefferson called for an expansive system of public education in Virginia,[118] while Benjamin Rush did the same in

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114. A Proclamation by the General Court (Jan. 19, 1776), *in* 3 Papers of John Adams 383, 385 (Robert J. Taylor ed., 1979).

115. See id. The proclamation describes its form of government, capturing the key features of republicanism. See id. ("The present Generation, therefore, may be congratulated on the Acquisition of a Form of Government, more immediately in all its Branches under the Influence and Controul of the People, and therefore more free and happy than was enjoyed by their Ancestors." (footnote omitted)).

116. See Ga. Const. art. LIV (1777); Mass. Const. pt. II, ch. V, § 2 (1780); N.H. Const. pt. I, art. 6 (1784); N.C. Const. art. XLI (1776); Pa. Const. § 44 (1776). When Vermont and Delaware were recognized as states, they also had adopted similar provisions. See De. Const. art. VIII, § 12 (1792); Vt. Const. ch. II, § XL (1777).

117. Mass. Const. pt. II, ch. V, § 2 (1780). In full, the provision stated:

> Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislators and magistrates, in all future periods of this Commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them . . . .

Id. This clause would later become the basis for similar constitutional provisions adopted by many of the new states that joined the union in the early 1800s. See, e.g., Ark. Const. art. VII (1836); Ind. Const. art. IX (1816); Tenn. Const. art. XI, § 10 (1834).

118. See A Bill for the More General Diffusion of Knowledge (June 18, 1779), Founders Online, https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0079 [https://perma.cc/T6MF-MPYM] (last visited June 8, 2025) ("[I]t is believed that the most effectual means of preventing [tyranny] would be, to illuminate . . . the minds of the people at large, and . . . give them knowledge of those facts, which . . . may . . . enable[] [citizens] to know ambition under all its shapes, and prompt to exert their natural powers to defeat its purposes . . . .").

Pennsylvania.[119] For Jefferson and Rush, republicanism demanded that the citizens in whom sovereignty resided must be equipped to lead and elect leaders.[120] Rush put it plainly:

> THE business of education has acquired a new complexion by the independence of our country. The form of government we have assumed, has created a new class of duties to every American. It becomes us, therefore . . . in laying the foundations for nurseries of wise and good men, to adapt our modes of teaching to the peculiar form of our government.[121]

This is the heart of the educated-electorate principle. Good government required education even in the British monarchy, but the twin pillars of republicanism—popular sovereignty and representation—would require educated voters and educated representatives. The mechanics of education would be settled through practice, but the principle remained that the governing class—"the People" in a Republic—would need to be prepared for their role.

2. *At the Federal Level.* — Founding Era leaders took active steps at the federal level to ensure that education and republicanism would be intertwined in the new republic. In fact, delegates initially proposed that the new Constitution explicitly grant Congress authority over education. James Madison and Charles Pinckney both proposed that Congress should have the power to create a university and "seminaries for the promotion of literature and the arts & sciences."[122] The provision was ultimately excluded from the Constitution after Gouverneur Morris proclaimed that the Clause would not be necessary because the Constitution already gave Congress that power.[123]

Outside of the heady debates of the Constitutional Convention, the Founders took proactive steps to secure education in the new republic. In 1785 and 1787, Congress passed the Northwest Ordinances to prescribe the division and governance of the Western Territories; today, they provide

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119. See Benjamin Rush, A Plan for the Establishment of Public Schools and the Diffusion of Knowledge in Pennsylvania 13–36 (Phila., Thomas Dobson 1786), http://name.umdl.umich.edu/N15652.0001.001 [https://perma.cc/2FKN-6S6M] (emphasizing that widespread education was critical in Pennsylvania because its "citizens [were] composed of the natives of so many different kingdoms in Europe" and that a cohesive educational framework would cultivate a "more homogeneous" populace and support a steady and consistent government).

120. See id. at 13. It must be noted that the education the Founders called for was as unequal as the society for which it was designed. See Cremin, supra note 104, at 6–7 (describing how these proposals were limited to free white children and emphasized preparing girls for roles serving their future husbands).

121. Rush, supra note 119, at 13.

122. John E. Haubenreich, Education and the Constitution, 87 Peabody J. Educ. 436, 446 (2012) (internal quotation marks omitted) (quoting 2 The Records of the Federal Convention of 1787, at 324–33 (Max Farrand ed., 1911)).

123. Id. at 446–48.

a critical view into the power and expectations the Founders had for republican government.[124] More particularly, the Ordinances show that the educated-electorate principle inheres in the Guarantee Clause.

The Northwest Ordinance of 1785 "placed public education at the literal center of the nation's plan for geographic expansion and statehood in the territories."[125] As a result of the Ordinance's prescriptive land use policies, public schools would be placed on the sixteenth lot, right at the center of each town.[126]

Two years later, the Northwest Ordinance of 1787 cemented the connection between education and republican government. The Ordinance of 1787 contains language that would later form the foundation of the Guarantee Clause.[127] In order to "extend[] the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions are erected" and "establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory," the Ordinance created a "compact between the Original States" and the territories that guaranteed several articles.[128] The third article of compact guaranteed by the Ordinance reads: "Religion, Morality, and knowledge being necessary to good government and the happiness of mankind, Schools and the means of education shall forever be encouraged."[129]

Some may dismiss this as simple hortatory language, but this forgets that the Ordinance of 1785 had already cemented the practical provision of education by ensuring there would be land and resources to support it. The 1787 Ordinance reaffirmed that commitment and explicitly tied it to the republican forms of government that the Ordinance aimed to establish in the territories. Congress aimed to seed republican governments across

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124. An Ordinance for Ascertaining the Mode of Disposing of Lands in the Western Territory, 29 J. Cont. Cong. 375 (May 20, 1785) (Northwest Ordinance of 1785); An Ordinance for the Government of the Territory of the United States North West of the River Ohio, 32 J. Cont. Cong. 334 (July 13, 1787) (Northwest Ordinance of 1787). Some scholars have noted that the ordinances should be seen as a source of constitutional values. See, e.g., Derek W. Black, Schoolhouse Burning: Public Education and the Assault on American Democracy 64–65 (2020) [hereinafter Black, Schoolhouse Burning] (noting that the Northwest Ordinance of 1787 is included in the Front Matter of the U.S. Code "because of its direct connection to our constitutional structure").

125. See Black, Schoolhouse Burning, supra note 124, at 62.

126. An Ordinance for Ascertaining the Mode of Disposing of Lands in the Western Territory, 29 J. Cont. Cong. 375, 376, 378 (May 20, 1785) (commanding that "the lot N 16[] of every township" be strategically reserved "for the maintenance of public schools[] within the said township"); see also Black, Schoolhouse Burning, supra note 124, at 62 (describing the importance of the Northwest Ordinance's education provisions).

127. See Wiecek, supra note 87, at 15 (noting that the Northwest Ordinance of 1787 is a "textual forerunner" of the Guarantee Clause).

128. An Ordinance for the Government of the Territory of the United States North West of the River Ohio, 32 J. Cont. Cong. 334, 339–40 (July 13, 1787).

129. Id. at 339–40.

the territories, and, in fact, the Ordinances have shaped the organic law of numerous states across the Union.[130] Over time, the Ordinances would provide federal support for public schools in over thirty new states.[131] Relying on a nascent version of the Guarantee Clause, Congress built these new republics with public schools at their very heart.[132]

Like today, the administration of a republican education system was rife with disagreements: on religion, on funding, on curriculum, on state and local responsibility.[133] But there was agreement on at least one thing: that a minimally adequate education system was essential to preserving a republican form of government.[134] Many from the Founding Era believed popular sovereignty, representation, and education were all complimentary traits of republicanism, and they said so in state constitutions,[135] in state and federal legislation,[136] in private letters,[137] and in public manifestos.[138] For the "entire generation of revolutionary leaders," republican

130. See Matthew J. Hegreness, An Organic Law Theory of the Fourteenth Amendment: The Northwest Ordinance as the Source of Rights, Privileges, and Immunities, 120 Yale L. Rev. 1820, 1858 (2011) ("The . . . Ordinance formed the basis for the organic law throughout the new states . . . .").

131. Alexandra Usher, Ctr. on Educ. Pol'y, Public Schools and the Original Federal Land Grant Program 9 (2011), https://files.eric.ed.gov/fulltext/ED518388.pdf [https://perma.cc/W2R5-UK7U].

132. See Black, Schoolhouse Burning, supra note 124, at 72 ("Before the US Constitution would mandate a 'republican form of government' in the states . . . the Northwest Ordinances mandated republican government and provided for education's role in it.").

133. See Cremin, supra note 104, at 126–28.

134. Id. at 103 ("No theme was so universally articulated during the early decades of the Republic as the need of a self-governing people for universal education.").

135. See, e.g., Mass. Const. pt. II, ch. V, § 2 (1780) ("Wisdom[] and knowledge . . . diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; . . . it shall be the duty of legislators and magistrates, in all future periods of this Commonwealth, to cherish the interests of literature and the sciences . . . especially . . . public schools . . . ."); N.H. Const. pt. I, art. VI (1784) ("As morality and piety . . . will give the best and greatest security to government . . . the people of this state have a right to empower . . . the several towns, parishes bodies-corporate, or religious societies . . . [with] the exclusive right of electing their own public teachers . . . .").

136. See supra notes 118–129 and accompanying text.

137. See, e.g., Brown, supra note 103, at 72–74 (discussing the private letters of Founding Era leaders trying to obtain a republican education for their own children); see also Black, Schoolhouse Burning, supra note 124, at 61–62 (discussing Jefferson's private letters to George Washington and others emphasizing education's role in preventing nobility).

138. See, e.g., Noah Webster, A Collection of Essays and Fugitiv Writings on Moral, Historical, Political and Literary Subjects 24 (Bos., I. Thomas & E.T. Andrews 1790) ("Two regulations are essential to the continuance of republican governments . . . [including] [s]uch a system of education as gives every citizen an opportunity of acquiring knowledge and fitting himself for places of trust. These are fundamental articles; the *sine qua non* of the existence of the American republics.").

government hinged on education, and republican governments bore the burden of ensuring its provision.[139]

Popular sovereignty would guard against monarchy and aristocracy, and education would prepare the electorate to spot demagogues and operate the democratic machinery.[140] Representation would moderate the passions of the public, and education would grant the electorate the wisdom to make sound decisions.[141] As Madison stated in Federalist 39, "It is essential to [republican] government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it."[142] Education would ensure that the "great body of the society" was ready for governance, acting as a prophylactic against the "handful of tyrannical nobles" which Madison believed would "aspire to the rank of republicans."[143]

The educated-electorate principle set the United States apart. As Noah Webster proclaimed: "In no country, is education so general—in no country, have the body of the people such a knowledge of the rights of men and the principles of government."[144] The "body of the people" in the early Republic was designed to include only landowning, white males, a class of people who were generally educated.[145] At the time, the republican form of government secured by the Constitution may only have required a system of fee-based schooling and private colleges—after all, only a narrow class of citizens was meant to govern.[146] But even at the

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139. See Brown, supra note 103, at 81.

140. See Noah Webster, A Citizen of America: An Examination Into the Leading Principles of America (Oct. 17, 1787), Teaching Am. Hist., https://teachingamericanhistory.org/document/a-citizen-of-america-an-examination-into-the-leading-principles-of-america/ [https://perma.cc/B26F-Z99S] (last visited Feb. 8, 2025) [hereinafter Webster, Citizen of America] ("This knowledge, joined with a keen sense of liberty and a watchful jealousy, will guard our constitutions, and awaken the people to an instantaneous resistance of encroachments."); George Washington, President, Eighth Annual Message to Congress (Dec. 7, 1796), www.let.rug.nl/usa/presidents/george-washington/annual-message-1796-12-07.php [https://perma.cc/Z5ZZ-N948] ("In a republic what species of knowledge can be equally important and what duty more pressing on its legislature than to patronize a plan for communicating it to those who are to be the future guardians of the liberties of the country?").

141. See Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), https://founders.archives.gov/documents/Jefferson/01-12-02-0454 [https://perma.cc/YGU3-954S] ("Above all things I hope the education of the common people will be attended to; convinced that on their good sense we may rely with the most security for the preservation of a due degree of liberty.").

142. The Federalist No. 39, supra note 86, at 276 (James Madison) (emphasis omitted).

143. Id.

144. See Webster, Citizen of America, supra note 140.

145. See Kaestle, supra note 113, at 3 (noting that the majority of white males were literate at the Founding). This number would have been higher for propertied white men.

146. See Brown, supra note 103, at 83–84 ("The idea that propertyless men, white or black, might be candidates for equal political rights appeared truly radical in the 1770s . . . .").

Founding, the educated-electorate principle would drive a new egalitarianism. As George Washington put it, "In proportion as the structure of a government gives force to public opinion, it is essential that public opinion should be enlightened . . . ."[147] Acting on this principle, states began to expand public support for education as they removed property requirements from the right to vote.[148]

At each turn, the Founders demonstrated a commitment to education as the nascent United States began to build its democratic institutions.[149] Public education's most avid supporters envisioned a state and federal role in schooling to equip American citizens with the skills necessary to lead the Republic.[150] Even those who were not so committed to *public* education recognized the necessity of an educated electorate to the survival of a republican form of government.

C. *The Second Founding and the New Constitution*

The educated-electorate principle remained a driving force of American republicanism through the antebellum and Reconstruction periods, prompting the expansion of educational opportunity in tandem with growing suffrage. This section will demonstrate that the Reconstruction Congress took affirmative steps using the Guarantee Clause to vindicate the educated-electorate principle. This historic use of the Clause at a moment of tectonic shift for the constitutional order puts a gloss on the Clause's interpretation today.

1. *The Antebellum Period and the Educated Electorate.* — To understand the influence of the educated-electorate principle in the Reconstruction Era, one must first understand the groundswell of support for republican education that occurred in the antebellum period. If the Founding Era sparked the belief that "education was crucial to the vitality of the Republic," the antebellum period ignited a conflagration that would

147. George Washington, President, Farewell Address (Sept. 19, 1796), https://www.loc.gov/resource/mgw2.024/?sp=237&st=pdf&pdfPage=130 [https://perma.cc/S245-DLUX].

148. See Mark Boonshoft, From Property to Education: Public Schooling, Race, and the Transformation of Suffrage in the Early National North, 41 J. Early Republic 435, 441 (2021). In the Old Northwest, this trend was driven, in part, by the Northwest Ordinances. Id.

149. See Brown, supra note 103, at 133 ("The Revolution . . . elevated schools to a priority status that was expressly articulated in the constitutions of many states and in a host of statutes.").

150. George Washington even dedicated part of his estate to the creation of a national university. See George Washington's Last Will and Testament, July 9, 1799, Mount Vernon, https://www.mountvernon.org/education/primary-source-collections/primary-source-collections/article/george-washingtons-last-will-and-testament-july-9-1799 [https://perma.cc/5UXM-6PJZ] (last visited Apr. 6, 2025).

spread across the country.[151] Famed orators spoke of the connection between education and republicanism in florid terms, and private societies organized to diffuse books and literacy among the public.[152] States across the Union made further moves to systematize public education, couching their efforts in terms of republicanism.[153]

In the early 1800s, the connection between education and popular sovereignty crystalized further. This connection had become so fundamental to republican theory in America that, in 1814, Noah Webster, a key expositor of the Constitution in the Founding Era, noted:

> It is a maxim among political writers, that public virtue, and a general diffusion of knowledge among the people, are essential to the support of a free republican government. As the citizens, under such a constitution, are the fountain of power, the purity of their views and principles, and an acquaintance with the men whom they select for rulers, seem indispensable to a wise choice, without which they have no security for the exercise of justice and wisdom, in the several departments of government.[154]

Far from implicit, education advocates gave full-throated articulations of the connection between education and republicanism.[155] Horace Mann called education under republican political institutions "the highest earthly duty of the risen."[156] He would go on to articulate the core of the educated-electorate principle: "If republican institutions . . . give [the people] implements of unexampled power wherewith to work out their will; then these same institutions ought also to confer upon that people unexampled wisdom and rectitude."[157] Without education, the popular sovereignty of the new republic would consume itself, and the nation would "perish by the very instruments prepared for our happiness."[158] For

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151. See Cremin, supra note 104, at 147 (noting that this belief in the connection between republicanism and education drove the systematization of education during this period).

152. See Brown, supra note 103, at 119–26 ("[T]he triumph of the idea of an informed citizenry, which orators such as Daniel Webster, Joseph Story, and Edward Everett proclaimed in the 1820s . . . place[d] the creation of an informed citizenry at the head of the nation's cultural agenda.").

153. See id. at 143 (describing the tumultuous process of establishing state legislation to support education in North Carolina, which ultimately was justified in republican terms); Cremin, supra note 104, at 150–63 (discussing efforts to systemize education during this period in Massachusetts, Michigan, New York, and Virginia).

154. Noah Webster, An Oration Pronounced Before the Knox and Warren Branches of the Washington Benevolent Society at Amherst on the Celebration of the Anniversary of the Declaration of Independence 3 (Northampton, William Butler 1814).

155. Cremin, supra note 104, at 142 ("At a time when schooling was rapidly expanding in the United States, Mann not only accelerated the movement but gave it its essential meaning, both in educational terms and in broader political terms.").

156. Horace Mann, Lectures on Education 123 (Bos., Ide & Dutton 1855).

157. Id. at 124.

158. Id. at 125.

Mann, education was a fundamental aspect of republican government because it bolstered popular sovereignty and preserved the republican form. Education fulfilled both the substance of republicanism countenanced by the Guarantee Clause and facilitated the Clause's fundamental purpose.[159]

Mann's view of education's inherent role in republicanism ought to be given particular weight for two reasons. First, throughout the first half of the nineteenth century, Mann was the voice of public education; his writings were distributed across the United States and the world and would have been familiar to many Americans.[160] Second, his work likely influenced fellow Massachusetts Congressman Charles Sumner, a key expositor of the Guarantee Clause and member of the Reconstruction Congress.[161]

As a result of the efforts of advocates like Mann, even before Reconstruction, education became a systematized aspect of state republics. By the mid-1800s, nearly every state constitution contained education provisions.[162] Education's systematization was driven, in part, by the adoption of more egalitarian voting laws. By 1820, landowning requirements and religious tests began to fall away from state constitutions and legislation.[163] The educated-electorate principle began to work, and "[b]y the 1830s, the

159. See supra section II.A; infra section III.A.

160. See Cremin, supra note 104, at 142 (describing Mann as "universally acknowledged as the commanding figure of the public school movement," especially since his writings were "incessantly consulted by schoolmen, boards of education, politicians, and philanthropists").

161. While there is no formal documentation that Sumner's use of the Guarantee Clause was informed by Mann, his views on education likely were. Both men were members of the Free-Soil Party, had heard each other speak many times, and Sumner spoke positively of Mann's contributions to education. See Letter From Hon. Charles Sumner to S.G. Howe, N.Y. Times (Mar. 15, 1860), https://www.nytimes.com/1860/03/15/archives/the-state-of-horace-mann-letter-from-hon-charles-sumner-mr-seward-s.html (on file with the *Columbia Law Review*) (writing to express his support for a public statue to commemorate Mann's extraordinary contributions to education reform); see also Charles Sumner, U.S. Senator, The Party of Freedom: Its Necessity and Practicability (Sept. 15, 1852), *in* 4 Charles Sumner: His Complete Works 3, 3–6 (Statesman ed. 1900), https://www.gutenberg.org/files/45954/45954-h/45954-h.htm [https://perma.cc/5KR5-2RLU] (announcing his support for the newly formed Free-Soil Party of Massachusetts).

162. Haubenreich, supra note 122, at 444. These clauses varied from hortatory to compulsory, and states struggled to develop tax policies and public will sufficient to maintain a system of education. See id. at 445 ("[C]onstitutional provisions do not necessarily mean free public systems of education. In fact, most of the states with constitutional provisions did little or nothing to establish educational systems until well into the 19th century.").

163. See Brown, supra note 103, at 154. Recent studies have shown that the expansion of education had a significant impact on political participation. See Tine Paulsen, Kenneth Scheve & David Stasavage, Foundations of a New Democracy: Schooling, Inequality, and Voting in the Early Republic, 117 Am. Pol. Sci. Rev. 518, 533 (2023) (finding that an additional $100 in school funds was associated with a .62% increase in voter turnout in a series of New York elections in the 1840s).

idea of a separate and inferior system of education for the poor and common people was entirely outmoded."[164] Common schools proliferated across the Northeast as public education became a central aspect of republicanism, and over 90% of school enrollment was in public schools.[165] Thus, on the eve of the Civil War, such was the public's commitment to the educated-electorate principle that Mann noted "the necessity of general intelligence under a republican form of government . . . is so trite . . . as to have lost much of its force by its familiarity."[166]

2. *Reconstructing an Educated Electorate.* — After the Civil War, the educated-electorate principle played a motivating role for the Reconstruction Congress, and the Guarantee Clause was fundamental to effectuating the principle across the Reconstructed states. By 1867, the rebelling states had yet to rejoin the Union, and the Reconstruction Congress relied, in part, on the Guarantee Clause to create the terms upon which these states might rejoin.

Congress's first effort to reconstruct the seceding states took the form of the Wade–Davis Bill, which would have relied on Guarantee Clause authority to create military governments tasked with supervising the creation of new republican governments in those states.[167] Even then, Radical Republicans recognized that the Clause could be used by the federal government to promote universal, free public education.[168] The bill passed both houses, indicating its appeal even to Congress's moderates;[169] however, President Abraham Lincoln's pocket veto of the bill ensured that Reconstruction and readmission would not begin in earnest until 1867.

After the demise of the Wade–Davis Bill, Congress would use the Reconstruction Acts of 1867 and 1868, passed in part under the authority of the Clause, to ensure that rebel states were under the "peace and good order" of the Union until they had become "loyal and republican."[170] The Reconstruction Acts laid out the process for readmission into the Union, including adopting the Fourteenth Amendment, expanding suffrage, and convening new state conventions to establish republican constitutions.[171] Importantly, voting for the delegates to these conventions would be open

164. See Brown, supra note 103, at 141.

165. See Cremin, supra note 104, at 179.

166. See Brown, supra note 103, at 128 (alterations in original) (quoting Horace Mann, Report for 1848, *in* 3 Life and Works of Horace Mann 640, 687 (Mary Mann ed., Bos., Horace B. Fuller 1868)).

167. See Wiecek, supra note 87, at 185–88 (explaining that Henry Davis introduced the Wade–Davis bill with an appeal to the Guarantee Clause).

168. See id. at 185–87 (noting that George Boutwell believed the Wade–Davis bill, authorized by the Guarantee Clause, could be used to demand universal education).

169. See id. at 186.

170. Reconstruction Acts of 1867, ch. 153, 14 Stat. 428 (1867).

171. Id.

to all male citizens "of whatever race, color, or previous condition."[172] Thus, the Reconstruction Acts represented a sudden and enormous expansion of suffrage.

Recognizing this expansion, the Reconstruction Congress acted swiftly to ensure broader access to education. Sumner introduced an amendment to the Acts that would have included universal public schools as a condition for readmission.[173] Bluntly stating that "[i]n a republic Education is indispensable," Sumner urged Congress to act with an appeal to the educated-electorate principle: "You have prescribed universal suffrage. Prescribe now universal education . . . . Votes by the hundred thousand will exercise the elective franchise for the first time, without delay or preparation. They should be educated promptly. Without education your beneficent legislation may be a failure."[174]

The amendment failed with a vote of 20-20 for reasons largely unrelated to the principle that republicanism requires education.[175] Far from refuting the nexus between republicanism and education, this vote demonstrates that the importance of education to republicanism was so essential that Congress was willing to confront the much more divisive proposition of integrated education.[176] In fact, one nay-voting congressman suggested the Guarantee Clause could be used to reject state constitutions that failed to protect education *after* the states were readmitted;[177] another believed equal education was already secured by the Fourteenth Amendment.[178]

Even without the amendment, the educated-electorate principle would ultimately prevail. Relying on the spending authority, Congress expanded access to education for Black and poor white Americans through the Freedmen's Bureau, with more than two-thirds of the Bureau's budget going to education issues.[179] Similarly, Congress, for the

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172. Id. at 429 (making readmission contingent on the creation of a state constitution in conformity with the U.S. Constitution by delegates "elected by the male citizens of said State, twenty-one years old and upward, of whatever race, color, or previous condition").

173. Cong. Globe, 40th Cong., 1st Sess., 165–69 (1867) (statement of Sen. Sumner).

174. Id. at 166–67.

175. See Black, Constitutional Compromise, supra note 84, at 779–80 (noting that the Act failed because of objections to placing *any* conditions on states' readmission and the prospect of integrating schools).

176. See Black, Schoolhouse Burning, supra note 124, at 109.

177. As Senator Thomas A. Hendricks put it:

> [A] State constitution depends . . . on the will and pleasure of the people . . . . Whether Congress may afterward hold that constitution to be republican in form is altogether another question; and the power of Congress to judge of that particular question confers no power upon Congress to prescribe in advance a form of government to a State.

Cong. Globe, 40th Cong., 1st Sess. 168 (1867) (statement of Sen. Hendricks).

178. See id. at 167 (statement of Sen. Frelinghuysen) ("The fourteenth amendment has that provision . . . [t]here is . . . no necessity for that part of the Senator's amendment.").

179. Black, Constitutional Compromise, supra note 84, at 782.

first time, created a federal Department of Education, explicitly citing the importance of "the universal intelligence of the people" to the "permanent safety" of "republican institutions" in the authorizing legislation's preamble.[180]

Further, as Professor Black concludes, the Reconstruction Congress made inclusion of constitutional education provisions an implicit criterion of readmission.[181] Sumner and other members of the Congress made clear that senators could easily refuse readmission if the states lacked education provisions because they failed to conform with the republican form of government, even if the Reconstruction Acts did not specifically provide for it.[182] The seceded states took this seriously, and by 1868 each of the readmitted states adopted provisions extending the right to vote and providing for public education.[183] Fearing a loss of republican momentum in the states, Congress later made the education condition explicit, readmitting Mississippi, Texas, and Virginia with a command to not "deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the constitution of said State."[184]

Thus, using its Guarantee Clause authority, the Reconstruction Congress confirmed that education is a fundamental aspect of American republicanism. Members of the Congress articulated the need for education with the pragmatism of the educated-electorate principle; they argued for education as a preservative of hard-won republicanism.[185]

3. *The Lessons of Reconstruction.* — Reconstruction serves as a primary example of the major point of this Note: that the Guarantee Clause provides the federal government authority to ensure that states uphold the

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180. See Cong. Globe, 39th Cong., 1st Sess. 60 (1865) (statement of Rep. Donnelly) (discussing the connections made between the republican form of government and education in the creation of the federal Department of Education); see also Black, Schoolhouse Burning, supra note 124, at 101–03 (discussing the creation of the first Department of Education).

181. See Black, Constitutional Compromise, supra note 84, at 783.

182. See id. at 781–82 (detailing how Congress communicated its message—both implicitly and explicitly—that it withheld the right to not readmit a state if it "did not conform to a republican form of government," including by "providing education through state constitutions").

183. See Black, Schoolhouse Burning, supra note 124, at 110.

184. See Act of Mar. 30, 1870, ch. 39, 16 Stat. 80, 81 (Texas); Act of Feb. 23, 1870, ch. 19, 16 Stat. 67, 68 (Mississippi); Act of Jan. 26, 1870, ch. 10, 16 Stat. 62, 63 (Virginia); see also Black, Schoolhouse Burning, supra note 124, at 110–11 (describing the circumstances that led Congress to make the education condition explicit).

185. See, e.g., Cong. Globe, 40th Cong., 1st Sess. 168 (1867) (statement of Sen. Morton) ("Republican government may go on for awhile with half the voters unable to read or write, but it cannot long continue. Intelligence is the very foundation of republican government."); see also Black, Schoolhouse Burning, supra note 124, at 106–08 (discussing the views of Senators Sumner, Morton, and Cole that, without education, republicanism would ultimately fail).

educated-electorate principle, providing educational opportunity commensurate to the state's electorate. The perspective of the Reconstruction Congress should be given particular weight. Its use of the Clause in the reestablishment of republican governments after the Civil War represents the first major definition of both "Republican Form of Government" and the authority granted to Congress under the Clause. This history provides strong evidence (1) that, whether it was so at the Founding, the Reconstruction Congress incorporated education into the republican form of government countenanced by the Clause, and (2) that the Guarantee Clause provides broad legislative authority to secure education, allowing such extreme action as refusing states reentry into the Union. The Guarantee Clause provided the foundation for the federal government's most significant interventions in public education in American history, and the Clause could again be used to protect education rights today.

III. USING THE GUARANTEE CLAUSE TO UPHOLD THE FEDERAL EDUCATION DUTY

With the connection between education, republicanism, and the Guarantee Clause established, this Part outlines the contours of the Guarantee Clause duty. First, this Part establishes when, how, and by whom the Clause's authority may be exercised. This Part then identifies how this duty compels a radically different approach to education federalism than that prevailing among both courts and Congress.

A. *The Guarantee Clause's Power*

Text, history, and legal theory support a robust Guarantee Clause power. Recognizing that the Clause has fallen into desuetude in recent years, this section examines caselaw and the relevant literature to provide a rough sketch of the Clause's power. Ultimately, this section argues that the Clause provides Congress an outsized role in interpreting "Republican Form of Government," determining when the Clause authorizes federal action, and effectuating the Clause's command to preserve republican government.

1. *Who Wields the Sword?* — The Guarantee Clause is a Constitutional aberration—nowhere else in the Founding document is the "United States" directly charged with an authority or obligation.[186] Most modern commentators agree that the subject of the Clause, the United States, was originally meant to grant the executive, legislative, and judicial branches each a role in upholding the Guarantee.[187]

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186. See Ryan C. Williams, The "Guarantee" Clause, 132 Harv. L. Rev. 602, 632 (2018).

187. See Wiecek, supra note 87, at 76 (noting that the Constitution's text, ratification history, and structure support the view that "that federal courts, as well as Congress and the

After *Luther v. Borden*, however, claims under the Clause have been seen as nonjusticiable by the courts.[188] *Pacific States Telephone & Telegraph Co. v. Oregon* cemented the Clause's desuetude in the federal courts by glossing *Luther* to hold that enforcement of the Clause is "exclusively committed to the legislative department."[189] Today, virtually no federal cases reach the merits of Guarantee Clause claims.[190]

As the Court noted in *Texas v. White*, the Clause's authority to interfere with the machinery of state governments lies with the federal government's most democratic branch.[191] The Constitution generally provides Congress authority over intrastate relations, and the remainder of Article IV, Section 4 specifically countenances an outsized role for Congress.[192] Further, Congress has made the most extensive use of the Clause's authority, relying on it throughout Reconstruction to pass direct legislation and reconstitute seceding state governments.[193] The republican "sword" is thus largely for Congress to wield.

While Congress has primary authority under the Clause, the Court could plausibly look to the Clause for guidance in adjudicating claims brought under the Reconstruction Amendments. Justice John Marshall Harlan relied on the Clause in his now-canonical dissent in *Plessy v.*

President, in the future might implement [the Clause]"); Erwin Chemerinsky, Cases Under the Guarantee Clause Should Be Justiciable, 65 U. Colo. L. Rev. 849, 871 (1994) [hereinafter Chemerinsky, Guarantee Clause] ("The clause . . . unambiguously says 'the United States' and includes all of the branches of the federal government." (quoting U.S. Const. art. IV, § 2)); Merritt, supra note 81, at 75–76 (noting that text and constitutional structure support the view that the Clause includes every branch).

188. See Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849) (holding that Congress determines which of two competing governments should be recognized in Rhode Island); see also Heller, supra note 88, at 1728 (describing how the *Luther* holding produced "the general rule that Guarantee Clause claims are *always* nonjusticiable, an interpretation the Court has since recognized was probably unwarranted").

189. See 223 U.S. 118, 146 (1912).

190. See, e.g., Chemerinsky, Guarantee Clause, supra note 187, at 862 (describing the Clause as "buried"). Some state and lower courts have used the Clause as a shield to limit federal overreach. See Heller, supra note 88, at 1731–32. Even so, courts are unlikely to seriously enforce the Clause. See, e.g., Thomas C. Berg, Comment, The Guarantee of Republican Government: Proposals for Judicial Review, 54 U. Chi. L. Rev. 208, 209 (1987) (explaining that, even when justiciability problems do not arise, "in most cases [courts] have upheld the challenged state action").

191. 74 U.S. (7 Wall.) 700, 730 (1868) ("[T]he power to carry into effect the clause of guaranty is primarily a legislative power, and resides in Congress."); see also Francesca L. Procaccini, Reconstructing State Republics, 89 Fordham L. Rev. 2157, 2176 (2021) (arguing that Guarantee Clause power is most properly exercised by the legislative branch).

192. See U.S. Const. art. IV, § 4; Procaccini, supra note 191, at 2176.

193. See Procaccini, supra note 191, at 2171–75, 2196–97, 2202–04 (describing the Reconstruction Congress's use of the Guarantee Clause to pass the Reconstruction Acts and place conditions on statehood). For a detailed account of congressional use of the Clause during Reconstruction, see generally Wiecek, supra note 87, at 166–210 (recounting the guarantee clause's conceptual importance during the Reconstruction era).

Ferguson.[194] Outlining the Court's precedent to date under the Thirteenth, Fourteenth, and Fifteenth Amendments, Justice Harlan excoriated the majority's affirmation of the state's right to segregate.[195] He then appealed to the Guarantee Clause to condemn segregation: "Such a system is *inconsistent with the guaranty given by the constitution to each state of a republican form of government*, and may be stricken down by congressional action, or by the courts in the discharge of their solemn duty to maintain the supreme law of the land . . . ."[196] Given the current Court's frequent reliance on the *Plessy* dissent, this use of the Clause may prove a source for judicial resurrection of the Clause even in cases where claims are not brought in direct reliance on the Clause.[197]

2. *When Can It Be Used?* — The affirmative duty of the Guarantee Clause would clearly be triggered if a state's republican form were replaced by aristocracy or monarchy. There is greater ambiguity, however, in whether the Clause may be used as a prophylactic.[198] The majority of courts have rendered the Clause a nullity by adopting a binary analysis that asks whether a state's republican form has ceased to exist.[199] However, as Jacob M. Heller notes, there is nothing in the text or history of the Clause that supports this view.[200]

Indeed, the text supports the view that the Clause addresses gradual degradations of the republican form. For one, Article IV, Section 4 provides separate protections against foreign and domestic violence.[201] As Professor Francesca Procaccini notes, this suggests that the Clause applies to peaceful devolutions of state republics.[202] Similarly, the Clause uses affirmative rather than negative language; where the rest of Section 4 protects *against* domestic violence and insurrection, the Guarantee Clause affirmatively supports the republican form of government.[203] Federalist

194. See 163 U.S. 537, 552–64 (1896) (Harlan, J., dissenting).

195. See id. at 557–59, 562 ("The arbitrary separation of citizens, on the basis of race . . . is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution.").

196. Id. at 563–64 (emphasis added).

197. See Douglas S. Reed, Harlan's Dissent: Citizenship, Education, and the Color-Conscious Constitution, Russell Sage Found. J. Soc. Scis., Feb. 2021, at 148, 160 (noting the Court's frequent reliance on Justice Harlan's dissent to argue for a "colorblind" constitution).

198. Compare Procaccini, supra note 191, at 2175 ("[T]he clause bestows a prophylactic legislative power designed to usher in new legal paradigms of political rights."), with Heller, supra note 88, at 1726–27 (describing a "death in one blow" interpretation, which renders the clause a dead letter "unless a state crowns a king or is overtaken by a dictator" (internal quotation marks omitted)).

199. Heller, supra note 88, at 1727.

200. See id. at 1726.

201. See U.S. Const. art. IV, § 4.

202. See Procaccini, supra note 191, at 2175.

203. Id.

No. 43 corroborates this view, suggesting that the Clause defends against "aristocratic or monarchical *innovations*" rather than providing a binary trigger for the Clause that only attaches when the government becomes antirepublican.[204] Even if courts have tended to adopt a binary approach—and this approach is not ubiquitous—these decisions limit *judicial* authority in claims brought under the Clause.[205] Courts would be free to adopt a prophylactic approach when relying on the Clause as a source of constitutional norms.

Similarly, these decisions do not limit Congress to a binary approach. The Court's decision in *Luther* confirms Congress's superior positioning to "determine whether [a State] is republican or not."[206] Thus, Congress ought to have latitude to determine when republican degradation has become sufficiently dangerous to justify a republican response. In any case, Congress is institutionally better situated to make prophylactic use of the Clause. Congress would face greater accountability when its actions conflict with contemporary republican norms. Further, the power the Clause provides Congress is amplified by the Necessary and Proper Clause, enabling Congress to pass prophylactic laws rationally related to preventing the complete collapse of republican government.[207]

3. *How Can It Be Used?* — The text of the Guarantee Clause provides the federal government extensive authority to guarantee republican governments.[208] Scholars have variously described the Clause as providing a

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204. The Federalist No. 43, supra note 86, at 319 (James Madison) (emphasis added).

205. See Heller, supra note 88, at 1730–1732 (discussing state and federal courts' adoption of a "death by a thousand cuts" reading of the Clause (internal quotation marks omitted)).

206. Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849); see also Texas v. White, 74 U.S. (7 How.) 700, 730 (1868) ("[T]he power to carry into effect the clause of guaranty is primarily a legislative power, and resides in Congress.").

207. See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 356 (1819) ("To make a law constitutional, nothing more is necessary than that it should be fairly adapted to carry into effect some specific power given to Congress."). It is possible that the Court's novel interpretation of "proper" in *National Federation of Independent Business v. Sebelius* could limit the magnifying effect of the Necessary and Proper Clause. See Celestine Richards McConville, The (Not So Dire) Future of the Necessary and Proper Power After *National Federation of Independent Business v. Sebelius*, 24 Wm. & Mary Bill Rts. J. 369, 374 (2015) (noting that the Court held "Congress may not regulate indirectly through the necessary and proper power that which it may not regulate directly through an enumerated power"). The Guarantee Clause directly authorizes Congress to intervene in state governments, so the federalism concerns presented in *Sebelius* would be arguably less controlling.

208. See Procaccini, supra note 191, at 2198–99 ("Under the Guarantee Clause, it is for Congress to legislate against unrepublican practices, the executive to enforce that legislation, and the judiciary to adjudicate any resulting disputes."). This reflects the view of some Reconstruction-era congressmen. See, e.g., Cong. Globe, 38th Cong., 1st Sess. 1740 (1864) (statement of Rep. Smithers) ("Subjected by the Constitution to the necessity of the guaranty of republican government to the States, there must necessarily accrue to the United States the right not only to declare . . . the contingency on which its action is invoked but to determine the choice of the means necessary . . . .").

sword for the federal government to protect state republics, a shield for state republics to ward off federal transgressions, and a shield for the Union to safeguard its own republican form.[209] For Madison—co-drafter of the Clause—the "intimate . . . nature" of the Union provided each state an interest "in the political institutions of each other; and the greater right to insist that the forms of government under which the compact was entered into should be substantially maintained."[210] But this right would mean little without a mechanism for seeking a remedy.[211] The Guarantee Clause would obligate the "superintending government" to ensure that states "shall not exchange republican for antirepublican Constitutions."[212]

History has afforded a strong gloss on the power granted to each branch of the federal government. For the courts, nonjusticiability and the binary approach discussed above make judicial enforcement of the Clause nonexistent.[213] Courts are thus limited to relying on the Clause as Justice Harlan did in *Plessy*—as a source of constitutional norms that inform the application of other doctrine.[214] The Guarantee's placement of a duty on the courts bolsters this application: Court's must adjudicate decisions in a way that fulfills their obligation to preserve the republican form of government.[215]

Congress, on the other hand, has historically relied on the Clause for the authority to take two forms of action: (1) the passage of direct legislation and (2) the dissolution and reconstruction of unrepublican states.[216] While the second authority may be reserved for the direst circumstances, Congress's power to directly legislate under the Clause is necessarily broad.[217] As one key Reconstruction-era expositor of the Clause, Henry

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209. See, e.g., Anthony Johnstone, The Federalist Safeguards of Politics, 39 Harv. J.L. & Pub. Pol'y 415, 420–27 (2016) (synthesizing the academic literature's many competing visions of the Clause's authority); see also Bonfield, supra note 82, at 513–16 (arguing that the Clause provides a federal duty to intervene to uphold contemporary political rights); Merritt, supra note 81, at 22–36 (arguing that the Clause protects state autonomy from federal interference).

210. The Federalist No. 43, supra note 86 at 319 (James Madison) (emphasis omitted).

211. Id. ("[A] right implies a remedy; and where else could the remedy be deposited, than where it is deposited by the Constitution?").

212. Id. at 319–20. Madison went on to designate this "a restriction which, it is presumed, will hardly be considered as a grievance." Id. at 320.

213. But see supra note 190 (noting persuasive arguments by Professors Erwin Chemerinsky and Thomas Berg).

214. See supra notes 187–189 and accompanying text.

215. See supra notes 79–81 and accompanying text.

216. See Procaccini, supra note 191, at 2196 (noting that the Clause allows Congress to directly legislate, incentivize state action using its other powers, and, in dire circumstances, reconstruct state governments).

217. Texas v. White, 74 U.S. (7 Wall.) 700, 729 (1868) ("In the exercise of the power conferred by the guaranty clause, as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed.").

Davis, put it, the Clause grants "Congress . . . a plenary, supreme, unlimited political jurisdiction, paramount over courts, subject only to the judgment of the people of the United States, embracing within its scope every legislative measure necessary and proper to make it effectual."[218] This power is unique in at least two ways. First, it could allow Congress to draft legislation that targets particular states which have devolved from republicanism.[219] Second, it circumvents traditional federalism limitations on congressional action, allowing Congress to legislate in domains traditionally left to the state police power—like education—so long as those domains inhere in the republican form of government.[220]

Caselaw supports the notion that Congress has broad discretion to determine how to wield its legislative authority under the Clause. As noted previously, *Luther* and *Pacific States* both understood enforcement decisions related to the Clause to be up to Congress.[221] In *Texas v. White*, the Court was tasked with determining whether the newly reconstructed Texas government could reclaim bonds sold by the state's segregationist government.[222] In determining that the reconstructed government had proper claim over the bonds, the Court made a broad statement of Congress's authority under the Clause: "In the exercise of the power conferred by the guaranty clause, as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed."[223] These decisions indicate a practice of judicial deference toward congressional action to preserve republican governments. Thus, the Guarantee Clause provides Congress a uniquely broad authority to intervene in state governmental process via direct legislation despite traditional federalism norms.

4. *The Natural Limitations of Guarantee Clause Federalism.* — The Guarantee Clause also provides natural limiting principles for federal authority under the Clause.

Most obviously, the Clause enables only federal intervention in policy domains substantively related to republicanism.[224] The federal government's education powers under the Clause are thus substantively limited

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218. Cong. Globe, 38th Cong., 1st Sess. app. at 82 (1864) (statement of Rep. Davis).

219. See Procaccini, supra note 191, at 2200 (emphasizing that "the clause permits tailored legislation against specific states").

220. Id. ("[The Guarantee Clause] explicitly displaces background principles of federalism by speaking directly to the proper constitutional balance between federal power and state sovereignty under the clause . . . .").

221. See supra section III.A.1.

222. See *White*, 74 U.S. (7 Wall.) at 717–18.

223. Id. at 729.

224. See U.S. Const. art. IV, § 4. There is academic debate over whether the Clause should be given a static or dynamic interpretation. The dynamic approach provides greater federal power, and other scholars have made persuasive arguments for this interpretation. See, e.g., Johnstone, supra note 209, at 421–33 (describing various scholars' views of "republican pluralism," which corresponds to a static reading of the Clause, and "republican perfectionism," which corresponds to a dynamic reading).

to only those aspects of education deemed essential to republican government in line with the educated-electorate principle. Those parts of education which are essential to uphold the scheme of popular sovereignty and representation would be subject to Guarantee Clause authority, while other aspects would remain the sole prerogative of state and local control.[225]

Professor Deborah Jones Merritt has further argued the Clause protects states *from* federal intercessions into state decisionmaking that would deny them republican government.[226] Extending Merritt's logic, federal activity under the Clause should be proportional to the republican erosion occurring in the states because anything more would erode the popular will of the state's electorate.[227] Thus, the Clause protects state governments from antirepublican or disproportionate interference by the federal government just as it protects the federal government (and other states) from antirepublican developments at the state level.

B. *Upholding the Federal Education Duty*

Up to this point, this Note has focused on establishing two primary claims: First, that the republican form of government protected by the Guarantee Clause incorporates the educated-electorate principle, and that this principle requires an education system sufficient to provide for an educated electorate. Second, that the Clause places an affirmative obligation on the federal government to ensure that states provide a republican form of government and grants the government significant power to carry out that duty. This section will articulate how the judiciary and Congress might meet their Guarantee Clause obligations.

1. *The Judicial Duty.* — Given the Court's view that Guarantee Claims are nonjusticiable, it is unlikely that plaintiffs can bring education claims

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225. While defining republican education is beyond the scope of this Note, state and federal precedent may provide insight. Although the Sixth Circuit's decision in *Gary B.* has since been vacated, the decision provides a robust defense of the centrality of literacy to democratic government. See Gary B. v. Whitmer, 957 F.3d 616, 659 (6th Cir.) ("[T]he right only guarantees the education needed to provide access to skills that are essential for . . . participation in our political system. . . . [T]his amounts to an education sufficient to provide access to a foundational level of literacy—the degree of comprehension needed for participation in our democracy."), vacated, 958 F.3d 1216 (6th Cir. 2020) (en banc).

226. Merritt, supra note 81, at 36 (arguing that the Clause "prohibits the federal government from interfering with state sovereignty in a manner that would destroy republican government in the states").

227. Others have rooted this analysis in the Necessary and Proper Clause or the verb "guarantee." See, e.g., Procaccini, supra note 191, at 2211–12 (arguing that the Necessary and Proper Clause places limitations on the Guarantee Clause); Williams, supra note 186, at 634 (interpreting the Guarantee Clause as in line with principles of international law, including proportionality).

directly under the Clause.[228] That said, education federalism is an extra-constitutional norm that has informed the Court's application of the distinct doctrine;[229] the Guarantee Clause recontextualizes that norm. The history of the Clause demonstrates a keen federal interest in upholding the educated-electorate principle. Beyond simply challenging the prevailing narrative related to federal involvement in education, the Clause places a duty on the federal judiciary to uphold education as a central pillar of republican government. Thus, an appeal to the Clause rebuts both the historical argument that education is traditionally a matter of local control that excludes federal involvement and, as a doctrinal matter, provides a Constitutional hook for upholding federal authority when it conflicts with state and local control. Revisiting *Milliken* and *Rodriguez* demonstrates how the Clause might be used to support education claims brought on equal protection and substantive due process theories.

a. Milliken*'s Misunderstanding of Education Federalism.* — In *Milliken*, the Court denied an equal protection claim that sought a cross-district remedy for intradistrict segregation. Undertaking such a remedy would require the district court to "become first, a *de facto* 'legislative authority' to resolve these complex questions, and then the 'school superintendent' for the entire area," exceeding the court's authority.[230] The district court could thus only order a remedy "determined by the nature and extent of the constitutional violation."[231] Interdistrict remedies, therefore, could not be ordered to address admitted segregation within a district.[232]

The opinion makes no mention of the Guarantee Clause or Justice Harlan's assertion that segregation is itself contradictory to the republican form of government.[233] But the Clause provides strong support for the view that courts are empowered to provide interdistrict remedies. As an initial matter, the Court's concern that such remedies would be too disruptive to the state educational scheme are of no consequence for the Guarantee Clause. The Clause places an affirmative duty for the courts to preserve

228. See supra section III.A.

229. See supra section I.B.

230. Milliken v. Bradley, 418 U.S. 717, 742–44 (1974) ("The Michigan educational structure . . . provides for a large measure of local control, and a review of the scope and character of these local powers indicates . . . the interdistrict remedy approved by the two courts could disrupt and alter the structure of public education in Michigan." (footnote omitted)).

231. Id. at 744 (citing Swann v. Charlotte–Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971)).

232. Id. at 745 ("To approve the remedy ordered by the court would impose on the outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy based on a standard not hinted at in *Brown I* and *II* or any holding of this Court.").

233. See id. at 717–53.

the republican form; if racial segregation derogates the republican form as Justice Harlan thought,[234] then courts are *required* to intervene.

Further, the Clause reframes the equal protection violation central to *Milliken* as a statewide issue. The violation at issue was centrally segregated schools within a single a district, but such a violation impugns the republican form of government statewide by diminishing the electorate's ability to effectively exercise its popular sovereignty. As in *Plessy*, the violation is principally an equal protection violation, but the Guarantee Clause is implicated where such violations contravene the republican form of government.[235] An interdistrict remedy would therefore be commensurate to an intradistrict harm because that harm has statewide effects countenanced by the Guarantee Clause.[236] In this manner, the Guarantee Clause could bolster equal protection clause claims where the republican form is threatened.

b. Rodriguez*'s Flawed Fundamental Rights Analysis*. — In *Rodriguez*, the Court rejected substantive due process claims asserting that education is a fundamental right explicit or implicit in the Constitution.[237] After nodding to the importance of education in American society, Chief Justice William Rehnquist asserted that importance is not the lodestar of the fundamental rights analysis.[238] The Court further rejected "nexus" arguments, that is, that education must be protected as a prerequisite to the exercise of other rights, like free speech and voting: "[W]e have never presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice."[239] Finally, the Court noted that disparities in educational funding and therefore educational opportunity did not merit strict scrutiny because the state funding scheme "scrutinized under judicial principles sensitive to the nature of the State's efforts and to the rights reserved to the States under the Constitution."[240]

But this fundamental rights analysis ignores the Court's obligations under the Guarantee Clause. Informed electoral choice cannot be a mere "desirable goal" where the Guarantee Clause commands that the federal

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234. A full-throated argument that racial segregation violates the Guarantee Clause is beyond the scope of this Note. For present purposes, it is sufficient to note that this view has been espoused in a canonical dissent and therefore has some plausibility. See supra notes 194–197 and accompanying text.

235. See Plessy v. Ferguson, 163 U.S. 537, 557–60, 564 (1896) (Harlan, J., dissenting) (relying principally on the Reconstruction Amendments and the principle of "equality before the law" to conclude that a racial caste system is contrary to a republican form of government).

236. See *Milliken*, 418 U.S. at 744–45.

237. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 30 (1973).

238. See id. ("But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause.").

239. Id. at 36.

240. Id.

government affirmatively preserve popular sovereignty as a central aspect of republican government.[241] The history of the Clause demonstrates that an educated electorate is at the very core of the republican form of government. In other words, education *is* implicitly protected as a constitutional right, not because it is "a protected prerequisite to the meaningful exercise" of speech or the franchise but because it is a central pillar of the republican form guaranteed by the Constitution.[242]

Further, the Court's appeal to "rights reserved to the States" is inapt when due consideration is given to the Guarantee Clause.[243] The Clause places an affirmative duty on the Court to intervene where the republican form is threatened.[244] It would be inimical to the history and purpose of the Clause to say that the Court is bound by a respect for state rights. The Clause places the federal government in a supervisory role over the states—a probing look at state action that threatens the republican form is precisely what the clause demands. Anything less leaves the states free to regulate themselves, preventing the Court from meeting the duty placed on it to protect the republican form.

The *Rodriguez* Court rejected the nexus theory that education is a fundamental right. The Guarantee Clause provides an alternative. Because education inheres in the republican form of government protected by the clause, a nexus theory is unnecessary to find that the Constitution implicitly provides for education rights. Instead, the Clause itself provides a sufficient textual hook to incorporate education as a fundamental right protected by substantive due process.

In *Milliken* and *Rodriguez*, attention to the Guarantee Clause could have reframed the Court's obligations to uphold the federal obligation to maintain republican governments. Plaintiffs today seeking to overcome the precedent set by these cases can and should rely on the Clause to bolster equal protection and substantive due process claims. Federal courts can and must carry out their Guarantee Clause duty by ensuring that state and local control are not held as values higher than achieving an education system suitable to a republican form of government.

2. *The Congressional Duty.* — While the Guarantee Clause provides courts a source of constitutional values, the Clause authorizes Congress to directly intervene in state education policy. Under the Clause, Congress is obligated to ensure states are providing adequate education to uphold popular sovereignty, prevent despotism and aristocracy, and ensure stability. This reading of the Guarantee Clause authorizes Congress to reach past

241. See supra section II.A.

242. *Rodriguez*, 411 U.S. at 36 (dismissing the plaintiff's arguments that the nexus between education and voting rights implies a fundamental right to education).

243. See id.

244. See supra section III.A.

historic limitations of their legislative authority to prophylactically intercede in state education systems. The Court has indicated that Congress has broad discretion in deploying this authority.[245] Congress could exercise this authority either through direct legislation or by creating new causes of action to vindicate educational rights.

a. *Directly Legislating to Preserve the Republican Form.* — Prophylactic use of the Clause would substantially alter the existing dynamic of education federalism; however, the Guarantee Clause places an affirmative duty on the legislature to subvert this dynamic where necessary to prevent degradations of the republican form.[246] Such a duty requires the development of a framework for establishing when Congress is compelled to act, including a more robust analysis of the educational features central to republicanism. This Note saves for future work the task of fully articulating such a framework. Instead, this Note provides a rough sketch of the types of actions Congress could plausibly take and the considerations Congress would need to make before acting pursuant to the Clause.

Congress's legislative duty under the Clause is triggered when education has become sufficiently antirepublican as to endanger the electorate's exercise of popular sovereignty. Identifying this breaking point would largely be up to congressional discretion, and Congress would have broad discretion in choosing the means necessary to ameliorate declines in the republican form.[247] Still, congressional action would likely need to be proportional to the educational harm that threatened the republican form of government.[248]

The most straightforward trigger of the Congress's Guarantee Clause duty would be if a state took steps to significantly defund or replace its system of public schools. In that situation, Congress could legislate to protect the structure of education as provided for in the state's Constitution. Similarly, if a state were to devolve power to local agencies which consistently failed to provide republican education, the Clause would allow Congress to intervene. In each of these cases, the limiting principles described above would ensure that Congress itself would not adopt antirepublican legislation nor act disproportionately to the antirepublican threat.

Used prophylactically, the Guarantee Clause could also support congressional interventions in the day-to-day operation of public school systems. Thus, if, to take a contemporary example, a state provided antirepublican civics or censorial history education, Congress could theoretically protect education as an individual entitlement by legislating to provide

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245. See supra Part II.

246. U.S. Const. art. IV, § 4 ("The United States *shall* guarantee . . . ." (emphasis added)).

247. See supra section III.A.3.

248. See supra section III.A.4.

civics education.[249] The most robust prophylactic use of the Clause would be to address education inadequacy and inequity *before* a specific triggering event occurred in the state. In this scenario, Congress might pass national adequacy standards or require certain state per pupil funding minimums. Such action could be justified under the Clause on the theory that such interventions ensure effective popular sovereignty and representation, affirmatively guaranteeing the republican form of government. Such actions would still likely be limited by the required nexus between the intervention and republicanism; the more attenuated the intervention's connection to republicanism, the more suspect Congress's power under the Clause.[250]

Finally, because Congress lacks the resources and the institutional knowledge to effectively monitor when states have triggered the federal duty, Congress could delegate authority to the executive to monitor and enforce the Guarantee Clause. For example, Congress could pass legislation defining key threats to the republican form of government, such as segregation, illiteracy, lack of civics education, and authorize the Department of Education to promulgate regulations determining the thresholds at which agency enforcement is triggered.

The Guarantee Clause provides Congress the right and duty to disrupt education federalism in order to preserve state republics. The resulting paradigm shift is doctrinally sound, providing limiting principles and an effective theory of structural education rights. Acting prophylactically or defensively, the Clause empowers Congress to ensure that state governments vindicate the educated-electorate principle which inheres in republican government.

CONCLUSION

America's schools have become deeply unrepublican—segregation is entrenched, and students do not receive the basic skills they need to exercise popular sovereignty. The Guarantee Clause provides the federal government broad authority to protect state republican forms of government. Throughout our history, the principle that the education system should expand proportionally alongside the electorate has been a fundamental aspect of American republicanism. Thus, the Guarantee Clause provides a constitutional hook for the Courts and Congress to disrupt existing education federalism norms and secure adequacy, equity, and republicanism in America's schools.

249. See supra section III.A.3.

250. See supra section III.A.4.