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## States' Duty Under The Federal Elections Clause And A Federal Right To Education

*Evan H. Caminker\**

*Fifty years ago, in San Antonio Independent School District v. Rodriguez, the Supreme Court failed to address one of the preeminent civil rights issues of our generation—substandard and inequitable public education—by holding that the federal Constitution does not protect a general right to education. The Court didn't completely close the door on a narrower argument that the Constitution guarantees “an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.” Both litigants and scholars have been trying ever since to push that door open, pressing various legal theories propounding that education be recognized as a protected “prerequisite” to established rights of voting, political participation, or citizenship. No such theory has gained more than momentary traction in the courts, unsurprisingly, given the oft-proclaimed axiom that our Constitution secures only negative rights.*

*This Essay introduces a novel framework for considering this important constitutional question. The Elections Clause of Article I, which has largely been ignored, presents a promising foundational duty from which a “prerequisite” state obligation to provide public education might spring. The Elections Clause commands state governments to design and hold elections to select members of Congress. In this sense, states are already constitutionally obligated to establish the very edifice of representative democracy. Especially since the Court reminded in Rodriguez that the Constitution does not directly protect a right to vote, I believe this state electoral duty—which clearly does contemplate voting—offers a firmer foundation to which a state education duty might anchor than those other sources identified in Rodriguez or since. Moreover, the Elections Clause and related electoral duties*

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*debunk naysaying that the Constitution recognizes no affirmative rights or duties requiring state officials to act positively. And finally, focusing on state duties rather than affirmative rights invites creative thinking about judicial enforcement approaches, including some that might better fit federal courts' remedial comfort zone. Other theoretical, doctrinal, and pragmatic challenges remain to be addressed, but my hope is that highlighting states' affirmative electoral duty offers a fertile fresh start in this critically important constitutional discourse.*

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## INTRODUCTION

Anniversary commemorations typically celebrate landmark precedents that heralded major doctrinal changes or significantly improved society. The fifty-year-old subject of this Symposium, sadly, did neither. *San Antonio Independent School District v. Rodriguez* is better known for undercutting momentum for judicial intervention into one of the preeminent civil rights issues of our generation—children’s access to quality public education.<sup>1</sup> *Brown v. Board of Education* described public education as the “very foundation of good citizenship” and central “to our democratic society.”<sup>2</sup> The Supreme Court has often repeated this sentiment, recognizing “the public schools as a most vital civic institution for the preservation of a democratic system of government” and that “some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system.”<sup>3</sup>

In *Rodriguez*, parents of children attending Texas schools argued that significant funding disparities among school districts violated the Fourteenth Amendment’s Equal Protection Clause.<sup>4</sup> The parents asserted that the school financing system should be strictly scrutinized because it both discriminated among students based on their wealth and impinged upon their fundamental right to obtain an education.

The Court, in a five-Justice majority opinion authored by Justice Powell, rejected both rationales and upheld Texas’s system under rational basis review. With respect to the fundamental rights claim,<sup>5</sup> the Court side-stepped education’s “relative societal significance” or “importan[ce]” and asked “whether there is a right to education explicitly or implicitly guaranteed by the Constitution.”<sup>6</sup> The Court answered no, expressing concerns about both the right’s foundation and its attendant remedial difficulties.<sup>7</sup>

While appearing to slam the federal courthouse door, the Court actually left it slightly ajar. Noting that the plaintiffs challenged only their

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

2. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

3. *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (cleaned up).

4. See *Rodriguez*, 411 U.S. at 44–53 (referencing U.S. CONST. amend. XIV, § 1).

5. The Court rejected the wealth discrimination rationale after disclaiming “that wealth discrimination alone provides an adequate basis for invoking strict scrutiny.” *Id.* at 29. Upon examination, the Court concluded “that the Texas system does not operate to the peculiar disadvantage of any suspect class.” *Id.* at 28.

6. *Id.* at 33.

7. See *infra* notes 28–30 and accompanying text (explaining Court’s skepticism).

schools' unequal funding and not poor quality,<sup>8</sup> the Court deflected whether it would apply heightened scrutiny if a state “occasioned an absolute denial of educational opportunities to any of its children,” meaning “an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.”<sup>9</sup>

Ever since *Rodriguez*, many legal scholars have tried pushing the door back open, advocating for a federal constitutional right to education in some form. Some scholars directly challenged the Court’s analysis, while others offered alternative paths. Many of these scholarly efforts share a central analytical move, which I call a “prerequisite right” or “nexus-based” rationale.<sup>10</sup> This move recognizes rights that “even though not expressly guaranteed . . . [are] indispensable to the enjoyment of rights explicitly defined.”<sup>11</sup> Put differently, the approach identifies an already-established “base” or “foundational” constitutional right and asserts that a new “nexus-based” right should be recognized because protecting the latter is a “prerequisite” to fully or meaningfully protecting the base right.

Under this approach, access to public education—or at least a minimally adequate one—deserves federal constitutional protection because it is “essential to the . . . intelligent utilization of the right to vote” or to broader norms and processes of participatory democracy.<sup>12</sup> Scholars identify various constitutional provisions purportedly grounding these base rights for which education is arguably a prerequisite. But while “promising,” no such approach “has yet garnered practical traction.”<sup>13</sup>

In *Gary B. v. Whitmer*, children attending inner-city Detroit schools described as “schools in name only” sued Michigan State officials in 2016 and momentarily persuaded the Sixth Circuit Court of Appeals that they were being denied a substantive due process-based right to a “basic

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8. See *Rodriguez*, 411 U.S. at 23–24. Although the plaintiffs argued they “receiv[ed] a poorer quality education” as compared to students in wealthier school districts, they did not argue that the poor quality per se violated the Constitution. *Id.* at 23.

9. *Id.* at 37.

10. See generally Evan Caminker, *The Doctrine of Prerequisite Rights* 4 (1986) (unpublished manuscript) (on file with author).

11. *Richmond Newspapers, Inc., v. Virginia*, 448 U.S. 555, 580 (1980). For a fuller description, see *infra* notes 24–27 and accompanying text.

12. *Rodriguez*, 411 U.S. at 35.

13. See Matthew Patrick Shaw, *The Public Right to Education*, 89 U. CHI. L. REV. 1179, 1182 (2022) (describing “robust literature” challenging *Rodriguez*’s “stranglehold”).

minimum education” that “can plausibly impart literacy.”<sup>14</sup> That unprecedented victory was short-lived; within a month, the full court granted rehearing en banc (which automatically vacated the panel decision) and then quickly dismissed the appeal as moot after the plaintiffs secured a favorable settlement.<sup>15</sup> Rehearing en banc was likely spurred by a passionate panel dissent proclaiming that (1) the federal Constitution secures no affirmative rights, and certainly not this one; (2) federal courts are incompetent to define and protect such rights; and (3) separation of powers and federalism concerns militate against recognizing any such rights.<sup>16</sup> As exemplified by *Gary B.*, renewed federal litigation has borne little fruit.<sup>17</sup>

For this reason, advocates of an affirmative federal right to education still seek a persuasive-to-courts argument that the Constitution protects such a right and that federal courts are institutionally competent to enforce it.

Seeking lemonade from *Rodriguez*'s lemon, I offer a fresh perspective. The Elections Clause of Article I, which has largely been ignored, presents a promising foundational duty from which a “prerequisite” state obligation to provide public education might spring.<sup>18</sup> The Elections Clause drafts state governments to define the electorate and hold elections for members of Congress. In this sense, states are already constitutionally obligated to establish the very edifice of representative democracy. Especially after the Supreme Court reminded that “the right to vote, *per se*, is not a constitutionally protected right,”<sup>19</sup> I believe this state electoral

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14. See *Gary B. v. Whitmer*, 957 F.3d 616, 621, 655 (6th Cir. 2020), *reh'g en banc granted, opinion automatically vacated by circuit rule*, 958 F.3d 1216 (6th Cir. 2020). For the sake of brevity, future references to the panel decision in *Gary B. v. Whitmer* will omit this subsequent history.

I served as co-counsel for Plaintiffs in this litigation. The ideas expressed here are entirely my own and do not necessarily reflect any views of the Plaintiffs or co-counsel.

15. See Ruby Emberling, *Vacatur Pending En Banc Review*, 120 MICH. L. REV. 505, 506–08 (2021) (describing questionable vacatur process); Ethan Bakuli, *Detroit's \$94 Million 'Right to Read' Lawsuit Settlement is Finally Coming Through for DPSCD*, BRIDGEDTROI (July 7, 2023, 4:02 PM), <https://www.bridgedetroit.com/detroits-94-million-right-to-read-lawsuit-settlement-is-finally-coming-through-for-dpscd/> [<https://perma.cc/2VKT-WJ4Z>] (describing favorable settlement).

16. *Gary B.*, 957 F.3d at 665–78 (Murphy, J., dissenting).

17. For another innovative but failed attempt, see *A.C. v. Raimondo*, 494 F. Supp. 3d 170, 174–75 (D.R.I. 2020) (rejecting the asserted right to “civic education” because “the arc of the law in this area is clear” and *Rodriguez* “leaves Plaintiffs here without a viable claim”), *aff'd sub nom.* *A.C. ex rel. Waithe v. McKee*, 23 F.4th 37 (1st Cir. 2022).

18. U.S. CONST. art. I, § 4, cl. 1. As explained below, this provision works hand-in-hand with other federal-officer-selection duties imposed on states. See *infra* notes 88–94 and accompanying text.

19. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 n.78 (1973).

duty—which clearly *does* contemplate voting—is a firmer foundation to which a right to education might anchor than those proffered in *Rodriguez* or since.<sup>20</sup>

Part I of this Essay explains *Rodriguez*'s rejection of a general federal constitutional right to education, highlights subsequent litigation and scholarly efforts employing prerequisite-rights reasoning to support narrower versions of such a federal right, and acknowledges the headwinds these efforts face from courts' general aversion to recognizing any affirmative rights. Part II demonstrates how the Elections Clause (and other provisions governing federal officer selection) affirmatively obligates states to structure and support our republican form of government. Part III articulates three important ways in which my novel focus contributes to the right-to-education dialog. First, the Elections Clause and related electoral duties debunk naysaying that the Constitution recognizes no affirmative rights or duties requiring state officials to act positively. Second, states' duty to establish and implement our democracy's infrastructure provides an obvious—in my view, the most obvious—foundation to which education might adhere. Third, focusing on state duties invites creative thinking about judicial enforcement approaches, including some that might surmount pragmatic roadblocks routinely invoked to thwart recognition of affirmative rights or duties and thus better fit federal courts' remedial comfort zone.

This Essay does not comprehensively and unreservedly defend a federal constitutional duty for states to provide some minimal public education, whether based on a prerequisite rights rationale or otherwise. Such a defense faces additional theoretical and doctrinal challenges that I merely bracket here. But I hope to reorient the right-to-education conversation in a direction that advances the ball and highlights issues for further development.<sup>21</sup> The crisis of public education today deserves our attention.

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20. At most, a few scholars defending a federal right to education have referenced this clause without meaningful development. See, e.g., R. George Wright, *The Place of Public School Education in the Constitutional Scheme*, 13 S. ILL. U. L.J. 53, 63–64 (1988) [hereinafter *The Place*] (mentioning the clause but then anchoring the foundation for democracy in the Constitution's preamble and elsewhere); Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 602–06, 602 n.305 (1992) [hereinafter *Theoretical Foundations*] (listing constitutional provisions referencing mandatory federal elections but then focusing on an implied “right to vote”).

21. I also hope this Essay's development of states' affirmative electoral duty is interesting and informative for its own sake. For a general discussion of Article I and the protection of federal voting rights, see Franita Tolson, *Protecting Political Participation Through the Voter Qualifications Clause of Article I*, 56 B.C. L. REV. 159 (2015) [hereinafter *Protecting Political Participation*] (contending this Clause requires states aggressively to protect voting rights in federal elections).

## I. RODRIGUEZ WORK-AROUNDS AND A FEDERAL RIGHT TO EDUCATION

## A. Rodriguez and Nexus-Based Justifications

In *Rodriguez*, the Texas schoolchildren's fundamental-rights argument for heightened equal protection scrutiny specifically advanced a prerequisite rights claim: "[E]ducation is distinguishable from other services and benefits provided by the State because" of its relationship to free speech and voting rights.<sup>22</sup> Specifically:

[Plaintiffs] urge that the right to speak is meaningless unless the speaker is capable of articulating his thoughts intelligently and persuasively. The 'marketplace of ideas' is an empty forum for those lacking basic communicative tools. Likewise, they argue that the corollary right to receive information becomes little more than a hollow privilege when the recipient has not been taught to read, assimilate, and utilize available knowledge.

A similar line of reasoning is pursued with respect to the right to vote. . . . The electoral process, if reality is to conform to the democratic ideal, depends on an informed electorate: a voter cannot cast his ballot intelligently unless his reading skills and thought processes have been adequately developed.<sup>23</sup>

In other words, the plaintiffs identified two protected base rights and argued that securing those rights' objectives requires protecting a prerequisite. Using various terms, courts have occasionally implied constitutional rights this way. For example, in *Richmond Newspapers, Inc. v. Virginia*, the Supreme Court recognized the public's right to attend criminal trials.<sup>24</sup> The Court explained that

[C]ertain unarticulated rights are implicit in enumerated guarantees. For example, the rights of association and of privacy, the right to be presumed innocent, and the right to be judged by a standard of proof beyond a reasonable doubt in a criminal trial, as well as the right to travel, appear nowhere in the Constitution or Bill of Rights. Yet these important but unarticulated rights . . . , even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined.<sup>25</sup>

The Court concluded that "the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects

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22. *Rodriguez*, 411 U.S. at 35.

23. *Id.* at 35–36 (footnote omitted).

24. *See Richmond Newspapers, Inc., v. Virginia*, 448 U.S. 555 (1980).

25. *Id.* at 579–80.



of freedom of speech and ‘of the press could be eviscerated.’”<sup>26</sup> Elsewhere the Court has protected implied “peripheral rights” without which “the specific [textual] rights would be less secure.”<sup>27</sup>

In *Rodriguez*, the Supreme Court did not question this nexus-based interpretive method. And the Court did not dispute the plaintiffs’ claim that education “is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote,”<sup>28</sup> though it cautioned that “the right to vote, *per se*, is not a constitutionally protected right.”<sup>29</sup> But the Court rejected this particular application of nexus-based reasoning, contending the Constitution does not “guarantee to the citizenry the most effective speech or the most informed electoral choice” despite those being “desirable goals.”<sup>30</sup>

Although the Court rejected the claim that education is an implied fundamental right *in a general sense* for purposes of spurring heightened equal protection scrutiny of unequal school funding, the Court held open whether some *minimal level* of educational quality might deserve protection. As the Court explained, the plaintiffs’ argument:

[P]rovides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where—as is true in the present case—no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.<sup>31</sup>

26. *Id.* at 580 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)).

27. *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965). Justice Douglas’s majority opinion in *Griswold* has been justly criticized for aggregating various “penumbral” rights to create a general “right of privacy.” But the Court correctly described previously using a nexus-based approach to protect “the right to distribute, the right to receive, the right to read,” as well as “privacy in one’s associations” whose “existence is necessary in making the express [First Amendment] guarantees fully meaningful.” *Id.* at 482–83.

For criminal procedure examples of nexus-based reasoning, see *Griffin v. Illinois*, 351 U.S. 12, 18–19 (1956) (explaining that convicted indigent defendants are entitled to free trial transcript for appeals); *Douglas v. California*, 372 U.S. 353, 355–58 (1963) (justifying similar entitlement to appointed counsel). For similar reasoning baked into historical analysis, see *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011) (invalidating a city ordinance restricting access to firing ranges because the Second Amendment “right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use; the core right wouldn’t mean much without the training and practice that make it effective”). See generally Caminker, *supra* note 10, at 5–22 (discussing nexus-based reasoning).

28. *Rodriguez*, 411 U.S. at 35–36.

29. *Id.* at 35 n.78. For further discussion of this disclaimer’s import, see *infra* Section III.B.3.

30. *Rodriguez*, 411 U.S. at 36 (emphasis omitted). The Court also noted federalism concerns with respect to judicial interference with states’ fiscal and educational policy decisions. *Id.* at 40–43.

31. *Id.* at 37.

The Court later confirmed it had not “foreclose[d] the possibility ‘that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either [the right to speak or the right to vote].’”<sup>32</sup>

But by leaving the door open only a crack, *Rodriguez* essentially foreclosed federal court school reform litigation. Litigants seeking to secure educational quality and equity for children in poor and minority communities turned to state court enforcement of state constitutional provisions.<sup>33</sup> Given mixed results there, public education today is plagued in many places by poor quality and inequity, especially in school districts dominated by poor and minority students.<sup>34</sup>

So, some litigants and scholars are seeking help from the federal constitution again.

### 1. Nexus-Based Litigation

In the *Gary B.* litigation introduced earlier, schoolchildren attending some of Detroit’s worst-performing public schools sued Michigan officials, claiming (among other things) that the appallingly poor quality of education they received violated an affirmative right of access to literacy.<sup>35</sup> The Sixth Circuit panel held two-to-one that the schoolchildren

32. *Papasan v. Allain*, 478 U.S. 265, 284 (1986) (second alteration in original) (quoting *Rodriguez*, 411 U.S. at 36).

33. See, e.g., Kimberly Jenkins Robinson, *Introduction: The Essential Questions Regarding a Federal Right to Education*, in *A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY* 1, 12–14 (Kimberly Jenkins Robinson ed., 2019) (noting that *Rodriguez* drove school reform litigation to state courts, with mixed success); EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA’S POSITIVE RIGHTS* 98 (2013) (same).

34. See, e.g., Robinson, *supra* note 33, at 3–9 (describing longstanding opportunity and achievement gaps); Jason P. Nance, *The Justifications for a Stronger Federal Response to Address Educational Inequalities*, in *A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY*, *supra* note 33, at 35, 35–38 (same); Martha Minow, *Education: Constitutional Democracy’s Predicate and Product*, 73 S.C. L. REV. 537, 540–45 (2022) [hereinafter *Education*] (describing societal costs of inadequate and inequitable provision of public education); Martha Minow, *San Antonio Independent School District v. Rodriguez at Fifty: Contingencies, Consequences, and Calls to Action*, 55 LOY. U. CHI. L.J. 363, 375–77 (2023) (inequities in educational resources track race and income differences); Kimberly Jenkins Robinson, *Rodriguez at Fifty: Lessons Learned on the Road to a Right to a High-Quality Education for All Students*, 55 LOY. U. CHI. L.J. 343, 348 (2023) (“[A]ssessment data reveals that millions of students are not acquiring basic minimum skills of numeracy and literacy that they need to function in society.”); *id.* at 348 (“[W]idespread racial and socioeconomic educational opportunity gaps persist in this country.”).

35. For description of the shockingly poor building conditions, critical shortages of qualified teachers and teaching materials, and their detrimental effects on student learning, see *Gary B. v. Whitmer*, 957 F.3d 616, 624–28 (6th Cir. 2020). The complaint read like a bleak Dickens novel: “Plaintiffs sit in classrooms where not even the pretense of education takes place, in schools that are functionally incapable of delivering access to literacy.” *Id.* at 624.

stated a valid claim under the Fourteenth Amendment substantive due process doctrine, which protects unenumerated rights that are “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty.”<sup>36</sup> The court determined that the country’s “longstanding practice of free state-sponsored schools, which were ubiquitous at the time of the Fourteenth Amendment’s adoption,” satisfied the “deeply rooted” doctrinal prong.<sup>37</sup>

Turning to the “ordered liberty” prong, the court relied primarily on prerequisite-rights reasoning based on literacy education’s instrumental value in securing foundational constitutional rights. As the court explained:

[T]he role of basic literacy education within our broader constitutional framework suggests it is essential to the exercise of other fundamental rights. Most significantly, every meaningful interaction between a citizen and the state is predicated on a minimum level of literacy, meaning that access to literacy is necessary to access our political process.<sup>38</sup>

The court observed that “[e]ffectively every interaction between a citizen and her government depends on literacy”<sup>39</sup> and later specifically mentioned both First Amendment<sup>40</sup> and voting rights.<sup>41</sup> However, the court primarily proclaimed more generally that literacy is essential to participation in our democratic political system.<sup>42</sup> Given this, a nexus-based approach to defining “ordered liberty”—even with a vaguely defined set of base rights—momentarily won the day for the affirmative right of access to literacy before the panel decision was vacated.

## 2. Nexus-Based Scholarship

Scholars “[w]ith little or no favorable precedent on their side” have “developed a multitude of theories for why the federal Constitution

36. *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997).

37. *Gary B.*, 957 F.3d at 648; *see id.* at 648–52 (detailing relevant history, including that thirty-six of thirty-seven state constitutions in 1868 provided for public school education).

38. *Id.* at 649.

39. *Id.* at 652.

40. *Id.* at 653 (mentioning “right to receive ideas” which itself “is a necessary prerequisite to the recipient’s meaningful exercise of his own rights of speech, press, and political freedom” (quoting *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982))).

41. *Id.* (“[T]he political franchise is perhaps the most fundamental of all such rights . . .”).

42. *See, e.g., id.* at 642 (referencing “political participation” and “political and social system”); *id.* at 652 (referencing “country’s democracy” and “political process and society” and “political participation”); *id.* at 653 (referencing “political process”); *id.* at 654, 659 (noting “political system”). The court gave secondary weight to egalitarian principles based on education’s instrumental value as a “great equalizer” which “provides the basic tools by which individuals might lead economically productive lives.” *id.* at 654–55.

should protect [a right to] education . . . run[ning] a large doctrinal gambit . . . rang[ing] from Due Process to Equal Protection to the Privileges [or] Immunities Clause to the rights of citizenship.”<sup>43</sup> For present purposes, these theories fall into three categories.

First, some scholars—essentially foreshadowing *Gary B.*'s move—support an affirmative right to education through straightforward nexus-based reasoning. They argue that (a) the Constitution establishes or presumes a base right (or a cluster of such rights); and (b) the base right implies an individual “prerequisite right” of education because the latter is necessary for, or at least will substantially enhance, the full realization of the base right's intended purpose or value. Within this category, scholars point to various base rights (as specific as rights to vote and free speech; as broad as a right to participate in self-governance) and describe the prerequisite to education in various ways (emphasizing one or more of literacy, minimal adequacy, or equity).<sup>44</sup>

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43. Derek W. Black, *Implying a Federal Constitutional Right to Education*, in A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY, *supra* note 33, at 135.

44. The archetype for this category is Professor Susan Bitensky's seminal analysis in 1982. See Bitensky, *Theoretical Foundations*, *supra* note 20, at 550. Professor Bitensky finds an implicit right to education in “the Fourteenth Amendment's Due Process Clause and Privileges or Immunities Clause, the First Amendment's Free Speech Clause, and . . . the right to vote” with each source “sufficient on [its] own” but “further supported by . . . historical evidences of original intent.” *Id.* at 553–54. Her “central thesis” directly invokes prerequisite-rights reasoning: “in order to give real meaning to certain express provisions of the Constitution (as well as to the unenumerated right to vote), these provisions must be understood as giving rise to an implied right to education.” *Id.* at 581 n.187. For example, “voting is preconditioned on the ability to engage in politically purposive conduct” which “in turn, is preconditioned on an educated citizenry” meaning voters must “at least be provided the wherewithal to make a ‘meaningful’ electoral choice.” *Id.* at 604 (quoting Penelope A. Prevolos, *Rodriguez Revisited: Federalism, Meaningful Access, and the Right to Adequate Education*, 20 SANTA CLARA L. REV. 75, 90 (1980)).

For other scholarship similarly relying on nexus-based reasoning, see, for example, Wright, *The Place*, *supra* note 20, at 53–54, 66 (grounding education prerequisite not in individual base rights but in “basic assumption embodied in the Constitution itself” as “a charter of representative self-government by enfranchised citizens,” which “presupposes a public capacity to ‘deliberate and communicate’ among the electorate” (quoting E. HIRSCH, *CULTURAL LITERACY* 12 (1987)); Areto Imoukhuede, *The Fifth Freedom: The Constitutional Duty to Provide Public Education*, 22 U. FLA. J.L. & PUB. POL'Y 45, 77 (2011) (“Denial of a quality education is a denial of the intellectual tools necessary for the meaningful exercise of the franchise, amounting to an effective denial of the right to vote.”); Peggy C. Davis, *Education for Sovereign People*, in A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY, *supra* note 33, at 177 (identifying “five explicit constitutional guarantees and briefly explain[ing] why each implicitly includes a right to education” and additionally “explain[ing] why the implicit right to education is also necessary to the US conception of ordered liberty, understood as the freedom to be a responsibly self-defining and self-actualizing member of a free polity”); Martha M. McCarthy, *Is There a Federal Right to Minimum Education?*, 2020 BYU EDUC. & L.J. 2, 17 (“[E]ducation is one of these implicit constitutional rights, the exercise of which is necessary for other rights to be realized, such as voting in state elections and fully exercising free speech rights.”).

Second, some scholars support an affirmative right to education using more conventional interpretive techniques, arguing that particular constitutional provisions are best understood given their textual and historical meaning to incorporate such a right implicitly.<sup>45</sup> These largely originalist analyses incorporate nexus-based reasoning indirectly—not as an interpretive method per se, but to explain why a provision’s framers or ratifiers intended or understood education to be a protected component.<sup>46</sup>

And third, some scholars defend a negative right to education of various forms. Some contend that, contra *Rodriguez*, education is sufficiently “fundamental” to trigger heightened scrutiny under the Equal Protection

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45. The lead scholar in this category is fellow Symposium-contributor Professor Derek Black, who has published a series of articles focusing on the Reconstruction Era. He contends that the combined actions of Congress (proposing and enacting statutes and constitutional amendments) and seceded states (amending their state constitutions to include education provisions and ratifying the federal Reconstruction amendments while seeking readmission to the United States) reflect and implicitly embody an understanding that the federal Constitution requires—and states must provide—a system of public education as a central component of constitutionally defined citizenship. See, e.g., Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735 (2018) [hereinafter *Constitutional Compromise*] (using this “original intent” argument to ground state duty to provide education in Fourteenth Amendment’s State Citizenship Clause); Derek Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. 1059 (2019) [hereinafter *Fundamental Right*] (using same historical argument to ground affirmative right to education in Fourteenth Amendment substantive due process doctrine); Derek W. Black, *Freedom, Democracy, and the Right to Education*, 116 NW. U. L. REV. 1031 (2022) [hereinafter *Freedom*] (using a broader set of historical arguments to ground affirmative right to education in Thirteenth Amendment’s prohibition on slavery and its incidences, Fourteenth Amendment’s Citizenship and (substantive) Due Process Clauses, and Article IV’s Republican Form of Government Clause). The right to education that Congress and the states mutually agreed to establish was implicit but predicated on a consensus view that education is a prerequisite to effective political and civic participation. See, e.g., Black, *Constitutional Compromise*, *supra*, at 741 (“Simply put, the Fourteenth Amendment guaranteed citizenship, and citizenship required education.”).

For other scholarship defending an affirmative right to education through conventional modalities while emphasizing originalist and historical lenses, see, for example, Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92 (2013), which uses “traditional constitutional interpretation” modalities to ground affirmative right to education in Fifth and Fourteenth Amendment substantive due process doctrine; and Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330 (2006), which argues that the Fourteenth Amendment’s National Citizenship Clause obligates Congress to ensure adequate education throughout the nation.

46. See, e.g., Black, *Constitutional Compromise*, *supra* note 45, at 742–43 (“Without public education, the masses would lack the capacity to engage in democratic self-government . . .”); Black, *Fundamental Right*, *supra* note 45, at 1097 (defining the scope of education right by “Framers’ and Ratifiers’ purpose” of “preparing the population at large for citizenship in a republican form of government”).

Clause, sometimes invoking nexus-based reasoning to justify that status.<sup>47</sup> Others argue that education is a liberty or property interest protected from state deprivation by the Fourteenth Amendment's Due Process Clause.<sup>48</sup>

Some scholars in each of these camps also invoke nexus-based reasoning to explain why they support a right to education but not a right to other important goods and social services. As Symposium contributor Professor Martha Minow explained when describing this body of work, "the tight connections between education and voting and between education and freedom of speech make it different from other human needs propelling theoretical arguments for rights recognition."<sup>49</sup> Thus, in both direct and indirect ways, a prerequisite-rights approach undergirds much of the scholarly effort to counter *Rodriguez's* brusque-if-incomplete dismissal of a constitutional right to education.

### B. Affirmative Rights Naysaying

Recognizing an affirmative right to education faces special headwinds because it is, well, affirmative in nature. These headwinds are both conceptual—as in “we just don't do that here,” and institutional—“courts are bad at doing that.”

As *Gary B.*'s dissenting judge protested, the notion of affirmative individual rights is foreign to the federal Constitution. The “Supreme Court

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47. See, e.g., Stuart Biegel, *Reassessing the Applicability of Fundamental Rights Analysis: The Fourteenth Amendment and the Shaping of Educational Policy After Kadrmas v. Dickinson Public Schools*, 74 CORNELL L. REV. 1078, 1080 (1989) (explaining that the Equal Protection Clause demands “intermediate scrutiny” of school funding inequalities, based partly on nexus-style reasoning); Derek W. Black, *Unlocking the Power of State Constitutions with Equal Protection: The First Step Toward Education as a Federally Protected Right*, 51 WM. & MARY L. REV. 1343, 1413 (arguing that education deserves heightened equal protection scrutiny because state constitutions identify education as fundamental).

48. For an argument that the deprivation of liberty worked by compulsory education laws can be justified only by states' provision of sufficiently adequate education, see, for example, Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 823–28 (1985); Emma Kent, *A “Right” of Access to Literacy: Due Process & Justifying Compulsory Education*, 52 U. MEM. L. REV. 451 (2021). See Matthew Patrick Shaw, *The Public Right to Education*, 89 CHI. L. REV. 1179 (2022), for an argument that education promised by a state's constitution and statutes is a protected property interest for Due Process Clause purposes, and therefore states may not limit or infringe upon an individual's access to education without satisfying heightened scrutiny.

49. Minow, *Education*, *supra* note 34, at 554; see *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 115 n.74 (1973) (Marshall, J., dissenting) (distinguishing education from food and housing by the former's “direct and immediate relationship to constitutional concerns for free speech and for our political processes”). All right-to-education arguments, no matter the source, must address the “why education and not food or shelter” question—whether through nexus-based reasoning, originalist or historical analyses, or otherwise.

has long recognized a ‘basic’ constitutional difference between a state’s use of its coercive power to regulate its residents and the state’s refusal to use its spending power to give them things,”<sup>50</sup> and our Constitution tells government actors only what they may not do, not what they must do.<sup>51</sup> Although every state constitution recognizes various affirmative rights,<sup>52</sup> the federal Constitution is described reflexively as merely a “charter of negative liberties.”<sup>53</sup> This is especially so with respect to rights against state governments, almost all of which are secured by the Fourteenth Amendment that declares “[n]o State shall make or enforce . . . nor deprive [or] deny”<sup>54</sup>—language appearing to target action rather than inaction.<sup>55</sup>

Some contend such conceptual naysaying is overblown by pointing to so-called quasi-affirmative rights, which superficially appear affirmative because, at some point, courts order state actors to act affirmatively in some manner.<sup>56</sup> For just a few examples, states must provide food, medical care, and legal services to persons in their custody;<sup>57</sup> lawyers and trial transcripts to indigent defendants;<sup>58</sup> and a speedy and public jury

50. *Gary B. v. Whitmer*, 957 F.3d 616, 665 (6th Cir. 2020) (Murphy, J., dissenting) (quoting *Maher v. Roe*, 432 U.S. 464, 475 (1977)).

51. See, e.g., Scott R. Bauries, *The Education Duty*, 47 WAKE FOREST L. REV. 705, 708–17 (2012) (discussing negative and affirmative rights); David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986) (same); ZACKIN, *supra* note 33, at 36–47 (same).

52. ZACKIN, *supra* note 33, at 67 (“[E]very state constitution currently contains at least one constitutional provision regarding public education.”); *id.* at 3 (state constitutions also contain mandates “with respect to government’s obligations to care for the poor, aged, and mentally ill, preserve the natural environment, . . . and protect debtors’ homes and dignity”).

53. *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982) (Posner, J., dissenting); see Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2274 (1990) (“The conventional wisdom” is that “[i]ndividuals have no right to have government *do* anything at all; it must only refrain from harming or coercing them”).

54. U.S. CONST. amend. XIV, § 1.

55. See, e.g., *DeShaney v. Winnebago Cnty. Dep’t of Soc. Services*, 489 U.S. 189, 195–96 (1989) (“The [Due Process] Clause is phrased as a limitation on the State’s power to act, not as a guarantee of certain minimal levels of safety and security.”).

56. See, e.g., David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1234 (2002) (using the term “quasi-affirmative rights” to reference “rights [that] obligate the government to do something, but only if the government first chooses to do something to the holder of the right”).

57. See, e.g., *Estelle v. Gamble*, 429 U.S. 97 (1976) (establishing that prisoners have a right to medical care); *Youngberg v. Romeo*, 457 U.S. 307 (1982) (holding that involuntarily committed persons must be provided with safe conditions and minimally adequate rehabilitative training to ensure personal safety); *Bounds v. Smith*, 430 U.S. 817 (1977) (providing that prisoners must have access to courts, including adequate law libraries or other forms of legal assistance).

58. *Gideon v. Wainwright*, 372 U.S. 333, 344–45 (1963) (counsel to indigent defendants); *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (trial transcript).

trial system to all defendants.<sup>59</sup> But naysayers correctly rejoin that, viewed in fuller context, these affirmative orders follow some antecedent state action (e.g., custody or prosecution), so the underlying rights can be viewed contextually as negative rights against certain long-term deprivations. They do not require affirmative state action where the state prefers to remain truly still.<sup>60</sup> Given this wholesale rejection of “pure” affirmative rights, the question whether the Constitution secures a particular affirmative right appears to answer itself.

*Gary B.*'s dissent also emphasized a litany of oft-voiced institutional or functional concerns raised by judicial enforcement of affirmative rights. First, recognizing an affirmative right presumably means that each person is entitled to receive a specific quantum and quality of the protected good or service. Such “one-size-fits-all” entitlements raise federalism concerns where “considerable disagreement exists about how best to accomplish [such] goal[s]” and a “nationwide right would undercut the . . . experimentation so necessary to find solutions that work.”<sup>61</sup> Second, remedying affirmative right denials typically requires spending public funds, which requires reallocating budgets or perhaps even raising new revenues. Judicial orders that states do either of these things raise separation of powers concerns.<sup>62</sup> And third, courts are generally incom-

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59. U.S. CONST. amend. VI.

60. See, e.g., Bauries, *supra* note 51 (illustrating this point). The *Gary B.* majority claimed that the Supreme Court endorsed an affirmative “right to marry” in *Obergefell v. Hodges*, 576 U.S. 644 (2015), and preceding cases. *Gary B. v. Whitmer*, 957 F.3d 616, 656–57 (6th Cir. 2020). I’m inclined to agree, given that the Court’s (in part) substantive due process-based ruling appears to require states affirmatively to provide marriage licenses and to recognize marriages. *But see id.* at 673–74 (Murphy, J., dissenting) (rejecting this characterization, noting the Court “never held that the government must give married couples any minimum level of public benefits”); *id.* at 674 (suggesting that the Court’s holding was equality-based).

61. *Gary B.*, 957 F.3d at 669 (Murphy, J., dissenting) (acknowledging that negative rights also constrain state experimentation, but typically less so than affirmative rights).

62. *Id.* at 669, 670–71 (Murphy, J., dissenting) (“States facing tight budgets must make delicate tradeoffs about how much money to devote to education as compared to other priorities like healthcare, welfare, or police protection,” and “[t]he Supreme Court has told us not to second-guess state officials charged with the difficult responsibility of” making these tradeoffs (quotation marks omitted) (quoting *Dandridge v. Williams*, 397 U.S. 471, 487 (1970))).

The separation-of-powers objection is sometimes linked to judicial mandates imposed on state legislatures. See, e.g., Robin West, *Unenumerated Duties*, 9 U. PA. CONST. L.J. 221, 250 (2006) (“[For] precedential, institutional, jurisprudential, and prudential [reasons] courts are not going to impose, and then enforce, legally binding obligations on legislatures to pass laws.”). This phrasing misleads. Just as negative injunctions do not actually operate against statutes or legislatures, so too affirmative injunctions do not require legislatures to enact laws. See Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 936 (2018) (noting that negative injunctions run against executive officers implementing statutes and do not “void” the statutes themselves). Rather, affirmative injunctions similarly run against state officials and direct them to act in specific ways. Of



petent to enforce affirmative rights because they may lack the “specialized knowledge and experience about the best . . . policies” to mandate<sup>63</sup>—clearly a legitimate concern for education policy, given its complexities.<sup>64</sup>

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Affirmative right to education advocates face three hurdles. They must construct a persuasive argument that (a) the federal constitution protects a right to education; (b) the constitution protects it in an affirmative and not merely negative sense; and (c) federal courts are institutionally competent to enforce it in an acceptable manner. Part II offers a new angle from which to approach these hurdles.

## II. STATES’ AFFIRMATIVE DUTY TO DESIGN AND IMPLEMENT FEDERAL ELECTIONS

Perhaps our Constitution’s most significant federalist feature is that states or their people select our highest-ranking federal legislative and executive officials. And the Constitution does not merely invite states to play this role; it affirmatively obligates them to do so.

Article I declares the House of Representatives “shall be composed of members chosen every second Year by the People of the several States.”<sup>65</sup> Article I originally declared the Senate “shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years,” with state legislatures appointing Senators directly or through other means, including popular elections.<sup>66</sup> The Seventeenth Amendment now requires that Senators be “elected by the people thereof.”<sup>67</sup>

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course, officials might be directed to do things for which they lack statutory authority or appropriations as required by state constitutions. Thus, the separation of powers concern, properly framed, is that a federal court’s affirmative injunction might place state officials between a rock (contempt of court) and a hard place (acting ultra vires according to state law). That is a legitimate concern; but it is not ordering “legislatures to pass laws.”

63. *Gary B.*, 957 F.3d at 671 (Murphy, J., dissenting) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973)).

64. *Id.* at 669 (Murphy, J., dissenting) (“Federal courts are not equipped to determine personnel policies or teacher-certification rules for the schools across this country.”). *Accord* R. George Wright, *Educational Opportunity and the Limits of Legal Obligation*, 30 S. CAL. INTERDISC. L.J. 717, 728 (2021) [hereinafter *Educational Opportunity*] (“There is currently no well-grounded consensus as to the most important and manageable causes of substantial illiteracy in the public schools.”).

65. U.S. CONST. art I, § 2, cl. 1.

66. U.S. CONST. art I, § 3, cl. 1.

67. U.S. CONST. amend. XVII.

For congressional elections, the Constitution establishes minimum qualifications for state electorates and empowers state procedures. First, the Constitution establishes baseline rules for what “People” in the several states may participate in elections for House Representatives and (post-Seventeenth Amendment) Senators. The original House and the Seventeenth Amendment’s Voter Qualifications Clauses provide that the “Electors in each State” choosing members of Congress “shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”<sup>68</sup> These Clauses ensure a minimal level of democratic participation; anyone eligible to vote for a state’s largest legislative chamber may also vote for Congress. So, federal election eligibility can and does vary by state.<sup>69</sup> Various constitutional amendments prohibit state franchise discrimination of various forms, and Congress may enforce these constraints.<sup>70</sup> But otherwise, congressional electorates are dictated by state law.

Beyond defining a minimal federal electorate,<sup>71</sup> the Constitution empowers states to design and implement federal elections. For House elections (from the beginning) and Senate elections (discretionary pre- and mandatory post-Seventeenth Amendment), Article I, Section 4 of the Constitution provides that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each

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68. U.S. CONST. art I, § 2, cl. 1; U.S. Const. amend. XVII.

69. At the Framing, many states restricted suffrage based on “age, sex, bondage, previous residence or habitation in the state or district, tax payment, and possession of a freehold or other designated property” and often excluded “imbeciles and the insane, criminals, paupers, the ignorant, and the alien.” Robert A. Maurer, *Congressional and State Control of Elections Under the Constitution*, 16 GEO. L.J. 314, 328–29 (1928). Common restrictions today involve felons, persons with mental disabilities, and noncitizens. Stephen E. Mortellaro, *The Unconstitutionality of the Federal Ban on Noncitizen Voting and Congressionally-Imposed Voter Qualifications*, 63 LOY. L. REV. 447, 452 (2017).

70. See U.S. CONST. amend. XV §§ 1–2 (prohibiting discrimination based on race); U.S. CONST. amend. XIX cl. 1–2 (sex); U.S. CONST. amend. XXIV §§ 1–2 (poll taxes); U.S. CONST. amend. XXVI §§ 1–2 (age over 18); see also U.S. CONST. amend. XIV §§ 1, 5 (requiring equal protection). “The overall effect of the Fourteenth Amendment and Suffrage Amendments has been to circumscribe, both directly and indirectly, state power over voter qualifications.” Mortellaro, *supra* note 69, at 478.

71. Statehouse voting eligibility sets a floor but not a ceiling for congressional voting eligibility; a state may permit non-voters for the statehouse to vote for Congress. See, e.g., *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 228–29 (1986) (“[The] fundamental purpose of the Qualifications Clauses . . . is satisfied if all those qualified to participate in the selection of members of the more numerous branch of the state legislature are also qualified to participate in the election of Senators and . . . Representatives.”). That said, “[a]s a practical matter . . . states typically choose to impose the same qualifications on voters in both state and federal elections.” Mortellaro, *supra* note 69 at 473.

State by the Legislature thereof.”<sup>72</sup> This grant of power is quite broad, authorizing states to establish “comprehensive, and in many respects complex, election codes” that create offices, rules, and processes sufficient to select congressional leaders through democratic elections.<sup>73</sup> Other provisions specify how state officials fill in-term congressional vacancies.<sup>74</sup> Article II similarly empowers states to define procedures for “appoint[ing], in such manner as the Legislature thereof may direct, a Number of Electors”<sup>75</sup> who, in turn, vote in their respective states for the President and Vice President.<sup>76</sup> When implementing what I’ll call these “federal-officer-selection clauses,” states essentially “exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States.”<sup>77</sup>

States’ power over congressional elections is provisional. After empowering states to prescribe election rules, Article I continues “but the Congress may at any time by Law make or alter such Regulations, except as to the Place of Chusing Senators.”<sup>78</sup> This provision authorizes Congress to override, either entirely or piecemeal, states’ times, places, and manner regulations. I will call the state-empowering provision the Times, Places and Manner Clause; the Congress-empowering provision the Make or Alter Clause; and the two collectively the Elections Clause.<sup>79</sup>

72. U.S. CONST. art. I, § 4, cl. 1.

73. *Storer v. Brown*, 415 U.S. 724, 730 (1974).

In *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 848 (1995), four dissenting Justices claimed that states’ authority to regulate federal elections stems not from this textual delegation but from their general Tenth Amendment “reserved powers.” U.S. CONST. amend. X; see *U.S. Term Limits*, 514 U.S. at 846–65 (Thomas, J., dissenting). Justice Thomas recently abandoned this position in *Moore v. Harper*, now accepting as “firmly supported by this Court’s precedents” the notion that states’ elections authority “had to be delegated to, rather than reserved by, the States.” 143 S. Ct. 2046, 2101 (2023) (quoting *Cook v. Gralike*, 531 U.S. 510, 522 (2001)). Nothing here turns on this distinction.

74. See U.S. CONST. art. I, § 2, cl. 4 (when House vacancies arise, “the Executive Authority thereof shall issue Writs of Election to fill such Vacancies”); U.S. CONST. amend. XVII (same for Senate vacancies; this supersedes the pre-Seventeenth Amendment directive that state legislatures “shall then fill such [Senate] Vacancies” when they next meet, U.S. CONST. art. I, § 3, cl. 2).

75. U.S. CONST. art. II, § 1, cl. 2. See *Chiafalo v. Washington*, 140 S. Ct. 2316, 2323 (2020) (“Article II, § 1’s appointments power . . . ‘convey[s] the broadest power of determination’ over who becomes an elector.”).

76. U.S. CONST. art. II, § 1, cl. 3; see also U.S. CONST. amend. XII (tweaking the process by which presidential Electors’ vote determines the selection of President and Vice President).

77. *Burroughs v. United States*, 290 U.S. 534, 545 (1934) (referencing the Presidential Electors Clause).

78. U.S. CONST. art. I, § 4, cl. 1.

79. By comparison, with respect to presidential elections, the constitutional text specifically empowers Congress to regulate only “the Time of chusing the Electors, and the Day on which they shall give their Votes . . .” U.S. CONST. art. II, § 1, cl. 4. But the Supreme Court has long interpreted the Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18, to grant Congress authority

Congress's supervisory authority reflects "the Framers' overriding concern" for the "potential for States' abuse" that "would leave the existence of the Union entirely at their mercy."<sup>80</sup> States might "not conduct federal elections at all" due to incapacity or recalcitrance,<sup>81</sup> ensure that "no candidate could be qualified for office,"<sup>82</sup> or more subtly undermine Congress's performance by designing schemes to elect partisan, corrupt, or feckless federal legislators.<sup>83</sup> And given this justification, Congress's Make or Alter power is unconstrained by state sovereignty principles: because the whole point is to override state decisions, the general rule against commandeering state action does not apply.<sup>84</sup> Indeed, if Congress merely "alters" states' schemes rather than "makes" its own afresh, Congress may insist that states continue to "bear the expense of the regulation" because "it is still the state's system, manned by state officers and hence paid for by the state."<sup>85</sup>

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to regulate presidential elections just like congressional ones. *See, e.g., Burroughs*, 290 U.S. at 544–49 (outlining how the Clause empowers Congress to regulate certain aspects of popular elections for presidential and vice-presidential Electors); *Buckley v. Valeo*, 424 U.S. 1, 13 n.16 (1976) (recognizing "broad congressional power to legislate in connection with the elections of the President and Vice President").

80. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 808–09 (1995).

81. *Id.* at 811 n.21. For example, framers worried about invasions or insurrections and recalled Rhode Island's refusal to send delegates to the Articles of Confederation's Congress and to the Constitutional Convention. *See, e.g.,* Eliza Sweren-Becker & Michael Waldman, *The Meaning, History, and Importance of the Elections Clause*, 96 WASH. L. REV. 997, 1004–15 (2021) (discussing drafting, convention, and ratification history).

82. *U.S. Term Limits*, 514 U.S. at 811.

83. *See* Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 34–38 (2010) (describing Framers' concerns that states might structure elections in partisan or self-dealing ways or not hold elections at all). These concerns seem "fanciful today, but the widespread, vociferous opposition to the proposed Constitution made it a very real concern in the founding era." *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 8 (2013); *see Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 815–16 (2015) (noting that the Make or Alter Clause "intended to act as a safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate," such as by holding "elections in such manner as would be highly inconvenient to the people" (citation omitted)).

84. *See* Evan H. Caminker, Printz, *State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 236–38 (1997) (arguing that the Make or Alter Clause authorizes commandeering despite the contrary general rule); *see also* Franita Tolson, *Election Law Federalism and the Limits of the Antidiscrimination Framework*, 59 WM. & MARY L. REV. 2211, 2278–83 (2018) [hereinafter *Election Law Federalism*] (same).

85. *Ass'n of Cmty. Orgs. for Reform Now v. Edgar*, 56 F.3d 791, 794–95 (7th Cir. 1995); *cf. Voting Rights Coal. v. Wilson*, 60 F.3d 1411, 1415 (9th Cir. 1995) ("The exercise of that [Alter] power by Congress is by its terms intended to be borne by the states without compensation.").

The Court's language often suggests that states are merely presumptive first movers: "[T]hey are given the initial task of determining the qualifications of voters" and how they vote.<sup>86</sup> As such, the Elections Clause creates a "default provision; it invests the States with responsibility for the mechanics of congressional elections . . . but only so far as Congress declines to preempt state legislative choices."<sup>87</sup>

But this characterization is impoverished and misleading. The Elections and other federal-officer-selection clauses do not merely empower state action—they compel it. States are constitutionally *obligated* to select our federal leaders; and regarding Congress, that means designing, building, and operating the machinery that fundamentally actuates our nation's participatory democracy.

The constitutional text could not be clearer. Rather than merely grant power, each provision declares that states or their legislatures or people "shall" act in particular ways to select federal officers and fill vacancies. House Representatives "*shall be . . . chosen*"<sup>88</sup> and election regulations "*shall be prescribed*."<sup>89</sup> Initially, the Senate "*shall be . . . chosen* by the Legislature thereof";<sup>90</sup> now the Senate "*shall be . . . elected* by the people thereof . . ."<sup>91</sup> Congressional vacancy-filling mechanisms are equally mandatory.<sup>92</sup> And each state "*shall appoint*" presidential Electors who then "*shall meet . . . and vote . . .*"<sup>93</sup> The juxtaposition of mandatory and permissive terms in the Congressional Elections Clause, declaring states "*shall . . . prescrib[e]*" and Congress "*may . . . make or alter*," underscores the intentionality of mandatory language for states' various roles.<sup>94</sup>

86. *Storer v. Brown*, 415 U.S. 724, 729–30 (1974).

87. *Foster v. Love*, 522 U.S. 67, 69 (1997).

88. U.S. CONST. art. I, § 2, cl. 1 (emphasis added).

89. U.S. CONST. art. I, § 4, cl. 1 (emphasis added).

90. U.S. CONST. art. I, § 3, cl. 1 (emphasis added).

91. U.S. CONST. amend. XVII (emphasis added).

Before the Seventeenth Amendment's ratification in 1913 required all states to select Senators through popular elections, many state legislatures voluntarily "chose" their Senators by incorporating electoral input. Indeed, "[b]y 1911 more than half of the states were utilizing some form of popular election to choose U.S. Senators." *Electing and Appointing Senators*, U.S. SENATE, <https://www.senate.gov/about/origins-foundations/electing-appointing-senators/overview.htm> [https://perma.cc/4SES-ESZR] (last visited Nov. 13, 2023) (describing historical developments). Prior to the amendment, the original Times, Places and Manner Clause authorized these efforts, but the original House-targeting Voter Qualifications Clause did not define voter eligibility.

92. See *supra* note 74 (quoting constitutional language dictating that states' executive authorities "shall issue" writs of election to fill vacancies).

93. U.S. CONST. art. II, § 1, cl. 2, 3 (emphasis added).

94. On this textual juxtaposition, see COMMITTEE ON ELECTIONS, 28TH CONG., 1ST SESS., H.R. REP. No. 28-60 (Mar. 15, 1842), reprinted in THE MISCELLANEOUS DOCUMENTS OF THE HOUSE

This state-duty reading also reflects a structural necessity. *Someone* must implement federal elections for the Constitution to work—and Congress enjoys remedial authority if states default on their obligations.<sup>95</sup>

Finally, the Supreme Court, along with individual Justices espousing quite varied approaches to constitutional interpretation, has repeatedly described the Elections Clause and other federal-officer-selection clauses as imposing affirmative duties on states. Long ago in *Ex parte Siebold*,<sup>96</sup> the Court invoked this understanding to explain why Congress may impose federal criminal penalties on state elections officials who violate state elections regulations. The Court reasoned that

It is the duty of the States to elect representatives to Congress. . . . The government of the United States . . . is directly interested in the faithful performance, by the [state] officers of election, of their respective duties. Those duties are owed as well to the United States as to the State.<sup>97</sup>

The modern Court has repeatedly affirmed this state-duty reading. In *U.S. Term Limits, Inc. v. Thornton*, the Court held that the Times, Places and Manner Clause does not authorize states to impose term limits on congressional representatives.<sup>98</sup> In so doing, the Court explained that this Clause “provides one of the few areas in which the Constitution expressly requires action by the States,”<sup>99</sup> further noting that “[t]his duty parallels the duty under Article II” that states must appoint presidential Electors.<sup>100</sup> Justice Thomas dissented but agreed that “[b]y specifying that the state legislatures ‘shall’ prescribe the details necessary to hold congressional

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OF REPRESENTATIVES, PRINTED DURING THE SECOND SESSION OF THE THIRTY-EIGHTH CONGRESS 49 (1865) (“[T]he two clauses of this section differ materially in the tone in which they address the different Governments. The one is commanded, and the other is permitted to act . . . . An imperative duty rests upon the [State] legislatures, whilst a mere privilege is granted to Congress.”); Tolson, *Election Law Federalism*, *supra* note 84, at 2279 (“The Elections Clause uses both ‘shall’ and ‘may’ in its language, so to interpret ‘shall’ to mean ‘may’ . . . would result in the perverse outcome that neither government is obligated to issue the laws that govern federal elections.”). The pre-Seventeenth Amendment process for filling Senate vacancies similarly juxtaposed (a) the state legislature “*shall fill*” vacancies” at its next meeting, and (b) the state Executive “*may make*” temporary appointments until then. U.S. CONST. art. I, § 3, cl. 2 (emphasis added).

95. See H.R. REP. No. 28-60 (Mar. 15, 1842), *supra* note 94, at 50 (“If the Legislatures of the States fail or refuse to act,” then the Make or Alter power “authorizes Congress to do that which the State Legislatures ought to have done”).

96. *Ex Parte Siebold*, 100 U.S. 371 (1879).

97. *Id.* at 388; see also *id.* at 391 (“If the [state] officers of election, in elections for representatives, owe a duty to the United States, and are amenable to that government as well as to the State—as we think they are—then . . . there is no reason why each should not establish sanctions for the performance of the duty owed to itself, though referring to the same act.”).

98. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

99. *Id.* at 804.

100. *Id.* at 805.

elections, the Clause ‘expressly requires action by the States.’”<sup>101</sup> Moreover, “[t]his command meshes with one of the principal purposes of Congress’ ‘make or alter’ power: to ensure that the States hold congressional elections in the first place, so that Congress continues to exist.”<sup>102</sup> Finally, Article II’s Presidential Electors Clause also “imposes an affirmative obligation on the States. In fact, some such barebones provision was essential in order to coordinate the creation of the electoral college.”<sup>103</sup>

In *Arizona v. Inter Tribal Council of Arizona, Inc.*, the Supreme Court held that Congress’s “make or alter”-based National Voter Registration Act preempted Arizona’s proof-of-citizenship requirement as applied to federal elections.<sup>104</sup> In his opinion for the Court, Justice Scalia explained that “[t]he Elections Clause has two functions. Upon the States it imposes the duty (‘shall be prescribed’) to prescribe the time, place, and manner of electing Representatives and Senators; upon Congress it confers the power to alter those regulations or supplant them altogether.”<sup>105</sup>

In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the Court held that Arizona’s ballot initiative creating an independent commission to draw congressional voting districts does not violate the Times, Places and Manner Clause.<sup>106</sup> The majority opinion penned by Justice Ginsburg described the original Senate Appointment Clause as imposing an affirmative duty on state legislatures “charged to perform that function to the exclusion of other participants.”<sup>107</sup> In dissent, Chief Justice Roberts affirmed that “[t]he Elections Clause both imposes a duty on States and assigns that duty to a particular state actor: In the absence of a valid congressional directive to the contrary, States must draw district lines for their federal representatives.”<sup>108</sup>

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101. *Id.* at 862 (Thomas, J., dissenting).

102. *Id.* at 863 (Thomas, J., dissenting); *see also id.* at 862 (“[T]his Clause . . . simply imposes a duty upon [states].”); *id.* at 896 (“In exactly the same way that § 3 requires the States to send people to the Senate, § 2 also requires the States to send people to the House,” referencing both initial selection and vacancy filling obligations).

103. *Id.* at 864 (Thomas, J., dissenting); *see also id.* at 897 n.21 (“[The] Constitution requires the States to appoint Presidential electors . . . .”); *Chiafalo v. Washington*, 140 S. Ct. 2316, 2329 (2020) (Thomas, J., concurring) (stating that the Presidential Electors Clause “imposes an affirmative duty” on states).

104. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8 (2013).

105. *Id.* at 8; *see also id.* at 9 (“[T]he Clause . . . ‘invests the States with *responsibility* for the mechanics of congressional elections, but only so far as Congress declines to pre-empt state legislative choices.’” (emphasis added) (quoting *Foster v. Love*, 522 U.S. 67, 69 (1997))).

106. *Arizona State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787 (2015).

107. *Id.* at 807.

108. *Id.* at 826 (Roberts, C.J., dissenting).

And last summer in *Moore v. Harper*, the Court held that the Elections Clause's specific reference to "the Legislature thereof" does not displace ordinary state constitutional review.<sup>109</sup> In so doing, the Court confirmed that the Times, Places and Manner "Clause 'imposes' on state legislatures the 'duty' to prescribe rules governing federal elections,"<sup>110</sup> and legislatures exercise their normal lawmaking function "[b]y fulfilling their constitutional duty to craft the rules governing federal elections."<sup>111</sup>

Given these consistent pronouncements, the Court could hardly be clearer: the Elections Clause obligates states to design, establish, fund, and operate the infrastructure necessary to elect federal officials.<sup>112</sup> Viewed more broadly, the Constitution commands states to actualize its foundational premise of representative democracy.

The Supreme Court has not defined the duty's minimum scope, taking into account both the "how" prescribed by the Times, Places and Manner Clause and the "who" defined by the Voter Qualifications Clauses. The "how" to "fulfill their constitutional duty" necessarily includes "a complete code for congressional elections," including regulations "relati[ng] to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns."<sup>113</sup> But the Court has never specified how easy states must make it for qual-

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109. *Moore v. Harper*, 143 S. Ct. 2065, 2081–85 (2023); *see also id.* at 2084 ("The legislature acts both as a lawmaking body created and bound by its state constitution, and as the entity assigned particular authority by the Federal Constitution. Both constitutions restrain the legislature's exercise of power.").

110. *Id.* at 2074 (quoting *Inter Tribal Council of Ariz.*, 570 U.S. at 8).

111. *Id.* at 2085.

112. Judge Posner put it bluntly:

[A] state cannot say to Congress, "We are not interested in elections for federal office. If you want to conduct such elections in our state you must do so yourself—establish your own system of registration, hire your own registrars, find your own places for voting." The state is obligated to do these things.

*Ass'n of Cmty. Orgs. for Reform Now v. Edgar*, 56 F.3d 791, 794 (7th Cir. 1995). The same goes for filling congressional vacancies. *See, e.g., ACLU of Ohio, Inc. v. Taft*, 385 F.3d 641, 644 (6th Cir. 2004) ("Article I, section 2, clause 4 . . . is mandatory, imposing upon a state executive the duty to issue a writ of election when one of her state's [House] seats . . . becomes vacant during a congressional term.").

113. *Moore*, 143 S. Ct. at 2085 (alteration in original) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)); *see also id.* (describing how states must "dictate everything from the date in which voters will go to the polls to the dimensions and font of individual ballots").



ified individuals to vote in order to meet their obligations, given competing interests in efficiency, election integrity, and the like.<sup>114</sup> As for “who,” the Court has never specified whether states must create some minimum-sized electorate either for congressional elections or their own largest statehouse.<sup>115</sup>

Taking these “how” and “who” variables together, the Constitution might impose a substantively thin duty (permitting states to impose meaningful obstacles on a small electorate), or a substantively robust duty (implementing a founding vision of participatory democracy),<sup>116</sup> or something in-between. The Court might hope to rely on Congress’s essentially remedial power to override states’ too-stingy “how” rules, but Congress

114. See, e.g., *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983) (discussing how states may adopt “generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself”); see also *Storer v. Brown*, 415 U.S. 724, 730 (1974) (crediting states’ interest in having orderly, fair, and honest elections “rather than chaos”).

115. The Republican Form of Government Clause, coupled with a framing premise of popular sovereignty shaping state governance, might create a constitutional floor for the statehouse electorate that the Voter Qualifications Clauses would incorporate by reference. See *Duncan v. McCall*, 139 U.S. 449, 461 (1891) (“[T]he distinguishing feature of that [Republican] form is the right of the people to choose their own officers for governmental administration . . . .”); Black, *Constitutional Compromise*, *supra* note 45, at 795 (“[S]tates cannot entirely deny citizens the right to elect their public officials and still call themselves republican forms of government.”). Cf. *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8 n.8 (1982) (acknowledging but not addressing the claim that the Republican Form of Government Clause secures a federal constitutional right to vote in Puerto Rico’s elections, because the Commonwealth’s constitution already requires popular elections).

But even absent any floor for a statehouse electorate, recall that states may enfranchise a broader congressional pool. See *supra* note 71. So, one might derive a constitutional floor just for the congressional electorate from the House and later Senate Voter Qualifications Clauses themselves, based on their purpose and motivating notions of popular sovereignty. See, e.g., *United States v. Classic*, 313 U.S. 299, 316 (1941) (“That the free choice by the people of representatives in Congress . . . was one of the great purposes of our Constitutional scheme of government cannot be doubted.”); *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964) (discussing how “the principle of a House of Representatives elected ‘by the People,’” one of “our fundamental ideas of democratic government” captured in Article I § 2, was “tenaciously fought for and established at the Constitutional Convention”); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 625–26 (1969) (“[S]tatutes distributing the franchise constitute the foundation of our representative society.”).

For a broad-based discussion of these issues, see Tolson, *Protecting Political Participation*, *supra* note 21 (arguing that the Voter Qualifications Clause requires states to safeguard political participation so as to protect federal voting rights, a duty enforced through heightened judicial scrutiny of state voting regulations).

116. See Jack Rakove, written supplement to congressional testimony, in COMM. ON HOUSE ADMIN., 117TH CONG., 1ST SESS., THE ELECTIONS CLAUSE: CONST. INTERPRETATION AND CONG. EXERCISE 90 (July 12, 2021) (stating that “comments from the ratification debates demonstrate” that one goal of the Elections Clause was “to make sure that the regulations governing congressional elections fulfilled the fundamental purposes of representative government in a democratic republic”); see also Tolson, *Protecting Political Participation*, *supra* note 21, at 187 (“[T]he framers also assumed that voter participation in House elections would be consistent with the political norms present in the states” that favored robust suffrage).

may not use its Make or Alter power (by contrast to its enforcement powers for the suffrage amendments) to expand “who” votes.<sup>117</sup> What might the Court say if faced with a state electoral scheme, left intact by Congress because it either could not (partisan gridlock) or would not (partisan approval) step in, that incorporates a statehouse electorate of a random 1 percent of the voting-age population and opens federal election precincts for a single hour—mocking the Framers’ aspirations of popular sovereignty? Whatever the more precise answer, states must do what is “necessary in order to enforce the fundamental right involved.”<sup>118</sup>

### III. IMPLICATIONS OF STATES’ AFFIRMATIVE ELECTORAL DUTY FOR PUBLIC EDUCATION

The constitutional mandate that states erect the pillars of American democracy advances the right-to-education dialog in three important ways, which I address below in this order. First, the Elections Clause and other federal-officer-selection clauses rebut the common-but-casual precept that the Constitution requires no affirmative state action. Second, states’ Elections Clause duty to design and run federal elections provides a more plausible foundation on which a right to education might rest. Third, re-orienting the foundation focus from individual rights to systemic duties

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117. See *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 16 (2013) (“[N]othing in [the relevant] provisions lends itself to the view that voting qualifications in federal elections are to be set by Congress.”); *id.* at 26 (Thomas, J., dissenting) (“Congress has no role in setting voter qualifications, or determining whether they are satisfied, aside from the powers conferred by the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments . . .”).

118. *Smiley*, 285 U.S. at 366. By saying above that the Court might *hope to rely* on Congress’s power to supersede stingy mechanics and thereby reduce the likelihood of litigation, I do not mean to suggest that the Court does, or should, treat Congress’s power as displacing judicial review. Elsewhere the Court regularly remedies constitutional wrongs despite Congress’s overlapping enforcement power (for example, when protecting Fourteenth Amendment rights). And here, the Court regularly assesses the constitutionality of states’ Times, Places and Manner regulations on congressional elections. See, e.g., *Storer v. Brown*, 415 U.S. 724 (1974) (congressional candidates’ access to ballot); *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986) (senatorial candidate’s access to primary ballot); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986) (voters’ eligibility to vote in federal and state office primaries).

That said, Justice Gorsuch recently highlighted Congress’s Make-or-Alter authority in urging substantial judicial deference to state election regulations. After noting the difficulties judges face when deciding whether voting rules are too restrictive, Justice Gorsuch asserted:

The Constitution dictates a different approach to these how-much-is-enough questions. The Constitution provides that state legislatures—not federal judges, not state judges, not state governors, not other state officials—bear primary responsibility for setting election rules. And the Constitution provides a second layer of protection too. If state rules need revision, Congress is free to alter them. . . . Nothing in our founding document contemplates the kind of judicial intervention that took place here.

*Democratic Nat’l Comm. v. Wis. State Legis.*, 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring in denial of application to vacate stay) (citing U.S. CONST. art. I, § 4, cl. 1.).

illuminates alternative remedial approaches, which may better navigate the institutional roadblocks that affirmative-rights naysayers routinely invoke.

*A. States' Elections Clause and Other Federal-Officer-Selection Duties Neutralize "No Affirmative Rights" Naysaying*

First, the affirmative duties collectively imposed by the federal-officer-selection clauses belie the axiom that the Constitution recognizes no affirmative rights. These officer-selection duties are no small exception to the supposed rule; they establish a foundational edifice of our constitutional order.

I confess I am surprised that these foundational duties have largely escaped the attention of affirmative-rights naysaying judges and scholars. Perhaps they've missed the mandatory nature of states' role in running elections and selecting officers? Or perhaps they've looked only for things called "affirmative rights" rather than "duties"?<sup>119</sup> The latter would still be surprising, as courts frequently refer to a "constitutional right to vote" (though I think mistakenly so, as explained below<sup>120</sup>). And even if such a right exists, it is surely affirmative in nature: to respect any such "right to vote," states must provide an election. Therefore, whether the Constitution is coded (properly) as imposing a duty or as generating a right, state inaction offends the Elections and other officer-selection clauses and punctures the postulate that the Constitution imposes only "prohibitory constraints on the power of government, rather than affirmative duties with which government must comply."<sup>121</sup>

And these foundational officer-selection duties turn out to be merely a few among many that assist in establishing and maintaining a well-functioning and accountable system of governance. These, too, may escape attention because our juricentric perspective leads judges and scholars to focus almost entirely on duties or rights that are regularly defined and

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119. This might explain Judge Posner's recognizing states' duty to implement federal election schemes while claiming that the Constitution protects only "negative liberties." Compare *supra* note 112 (reciting Judge Posner's "blunt" affirmative duty description in *Edgar*), with *supra* note 53 (noting Judge Posner's "charter of negative liberties" characterization in *DeVito*).

120. See *infra* Section III.B.3 (discussing how judicial references to a "right to vote" in federal elections are better understood as reflections of the electoral duty).

121. Bandes, *supra* note 53, at 2273. One might claim the postulate remains intact with respect to asserted Fourteenth Amendment claims governed by the "No State shall" make/enforce/deprive/deny language; see *supra* text accompanying note 55 (discussing language appearing to target action rather than inaction).

enforced by courts; duties and rights that typically escape courts' attention tend to disappear from view.<sup>122</sup> But that is a shortsighted way of viewing our Constitution, many parts of which operate without judicial guidance or oversight at all. Indeed, for anyone looking, affirmative duties are everywhere.

One affirmative duty serving a similar foundational purpose obligates the United States to “guarantee to every State in this Union a Republican Form of Government” and to “protect each of them against Invasion; and . . . against domestic Violence.”<sup>123</sup>

Congress's express duties include “assembl[ing] at least once in every Year” to do business;<sup>124</sup> prescribing the “manner . . . by Law” how the decennial census and representative reapportionment take place;<sup>125</sup> publishing the public budget “from time to time”;<sup>126</sup> and “ascertain[ing] by Law” federal “Compensation for [its own members'] Services.”<sup>127</sup> Congress has a similar-but-implicit duty to compensate the President and Supreme Court Justices.

Each House of Congress bears additional duties. These include choosing its Speaker and other officers;<sup>128</sup> judging “the Elections, Returns and Qualifications of its own Members”;<sup>129</sup> “keeping and episodically publishing a “Journal of its Proceedings”;<sup>130</sup> and playing a role (depending on circumstances) in receiving and assessing presidential electoral votes

122. See West, *supra* note 62, at 240–42 (discussing how our juricentric jurisprudential worldview turns questions about legislative obligations into questions about judicially enforceable obligations).

123. U.S. CONST. art. IV, § 4. This provision implicitly obligates both Congress (to create and fund a military force sufficient to protect states) and the President (to wield that force as required by contingent circumstances). The Supreme Court has “several times concluded, however, that the Guarantee Clause does not provide the basis for a justiciable claim” in federal court. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019).

124. U.S. CONST. art. I, § 4, cl. 2; *see also id.* amend. XX, § 2.

125. U.S. CONST. art. I, § 2, cl. 3; *see also id.* amend. XIV, § 2 (note that the President is impliedly obligated to execute these tasks as prescribed).

126. U.S. CONST. art. I, § 9, cl. 7 (this duty arguably falls additionally or perhaps alternatively on the President).

127. U.S. CONST. art. I, § 6, cl. 1.

128. U.S. CONST. art. I, § 2, cl. 7 (House); § 3, cl. 5 (Senate).

129. U.S. CONST. art. I, § 5, cl. 1.

130. U.S. CONST. art. I, § 5, cl. 3 (specifically including presidential veto objections and individual Member votes on veto override attempts, U.S. CONST. art. I, § 7, cl. 2).

(collectively) and, if necessary, “chusing” the President (House) and Vice President (Senate).<sup>131</sup>

The president’s express duties include “tak[ing] Care that the Laws be faithfully executed”;<sup>132</sup> periodically, “giv[ing] to the Congress Information of the State of the Union” and “recommend[ing] to their Consideration such Measures as he shall judge necessary and expedient”;<sup>133</sup> “receiv[ing] Ambassadors and other public Ministers”;<sup>134</sup> “[c]ommission[ing] all the Officers of the United States”;<sup>135</sup> nominating a new Vice President to fill a vacancy;<sup>136</sup> and appointing (with senatorial advice and consent) people to the federal offices created by the Constitution or established by law.<sup>137</sup> The Vice President’s singular duty, acting as President of the Senate,<sup>138</sup> is “opening all the Certificates [of states’ electoral votes], and the Votes shall then be counted.”<sup>139</sup>

The Supreme Court’s Chief Justice must preside over a Senate’s trial after a President’s impeachment, whenever that contingency occurs.<sup>140</sup>

Finally, states bear other constitutional duties aside from federal officer selection. State executive officials must return fugitives from justice when their sister executives demand.<sup>141</sup> More relevant to governmental structure, the Judges Clause nested with the Supremacy Clause insists that “the Judges in every State shall be bound [by federal law, state law] to the Contrary notwithstanding.”<sup>142</sup> And all state legislators, executive officers, and judges “shall be bound by Oath of Affirmation, to support

131. U.S. CONST. art. II, § 1, cl. 3; *see also* U.S. CONST. amend. XII (same with language slightly tweaked). *See* Dan T. Coenen & Edward J. Larson, *Congressional Power Over Presidential Elections: Lessons from the Past and Reforms for the Future*, 43 WM. & MARY L. REV. 851, 910 (2002) (explaining that vote-counting is a congressional duty, not power).

132. U.S. CONST. art. II, § 3 (and as noted above, Congress must enact some such laws).

133. U.S. CONST. art. II, § 3.

134. U.S. CONST. art. II, § 3 (if such present themselves).

135. U.S. CONST. art. II, § 3 (if there are such).

136. U.S. CONST. amend. XXV, § 2 (if one arises).

137. U.S. CONST. art. II, § 2.

138. U.S. CONST. art. I, § 3, cl. 4.

139. U.S. CONST. art. II, § 1, cl. 3, *amended by* U.S. CONST. amend. XII (same with language slightly tweaked).

140. U.S. CONST. art. I, § 3, cl. 6.

141. U.S. CONST. art. IV, § 2, cl. 2. The related original duty to return fleeing enslaved persons, U.S. CONST. art. IV, § 2, cl. 3, was blessedly mooted by the Thirteenth Amendment, U.S. CONST. amend. XIII. But as Justice Thomas recently noted, that Amendment imposed a new affirmative duty on states: it “not only prohibited States from themselves enslaving persons, but also obligated them to end enslavement by private individuals within their borders.” *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2178 (2023) (Thomas, J., concurring).

142. U.S. CONST. art. VI, cl. 2.

this Constitution”<sup>143</sup>—a seemingly ministerial act that bolsters a fundamental pillar of our governmental superstructure.

The takeaway: the states’ federal-officer-selection obligations, especially viewed within this panoply of structural and accountability-enhancing duties, reveal that our Constitution indeed imposes affirmative duties—including foundational and burdensome ones. The oft-asserted axiom that our Constitution merely prohibits state (or federal) action is false.

### *B. States’ Elections Clause Duty Offers a Better Nexus Foundation*

As explained above, many post-*Rodriguez* efforts to support an affirmative right to education employ a prerequisite rights approach. Some do so directly (arguing education is necessary for, or will substantially enhance, a base constitutional right), and some do so indirectly (using nexus-based reasoning to give historical content to some Fourteenth Amendment provision or to explain why education is “fundamental” or uniquely required). The foundational right is sometimes described narrowly (voting and speech) and sometimes majestically (democratic participation); the prerequisite right is sometimes described substantively (minimally adequate literacy or education) and sometimes relationally (equitable access).<sup>144</sup>

Part II demonstrated that the Constitution establishes a state duty to create and run federal elections. From this alternative constitutional foundation, education rights advocates may use similar prerequisite-rights reasoning to derive a state duty to provide public education in some form or fashion. In this Section, I first explain why the Elections Clause duty provides a uniquely strong foundation for nexus-based arguments. I then sketch some additional questions that a full-throated, duty-based defense of a right to education must address.<sup>145</sup>

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143. U.S. CONST. art. VI, cl. 3.

144. For a discussion of differing descriptions of the foundational and prerequisite rights, see *supra* Section I.A.

145. While Section III.A’s challenge to the “negative rights only” axiom rests on all of the federal-officer-selection clauses, this Section’s “better foundation” argument rests directly on the Elections Clause and subsequent Seventeenth Amendment because those provisions directly require democratic participation through popular elections. The other officer-selection provisions, most importantly the Presidential Electors Clause, permit but do not require states to rely on popular elections. That said, early historical practice provides strong extra-textual support for the foundational norm of democratic participation. With respect to presidential elections, about half of the states originally, and all but one by 1832, appointed presidential Electors based on popular vote. *McPherson v. Blacker*, 146 U.S. 1, 29–32 (1892). And it is noteworthy that many state legislatures shifted from direct selection to popular election of Senators before the Seventeenth Amendment so required. See *Electing and Appointing Senators*, *supra* note 91 (“By 1911 more than half of the

### 1. Already Requires State Action

Because the federal-officer-selection clauses already require states to act, attaching a nexus-based right to education similarly requiring state action involves a conceptual jump only in degree rather than in kind. The base voting and speech rights invoked by others are mere negative rights with which the government may not wrongly interfere. One might well wonder how a negative-right foundation can produce an affirmative-right prerequisite, rather than (at best) a negative right against government interference.<sup>146</sup> No need to wonder here: if the Elections Clause obligates states to provide, operate, and pay for the infrastructure for American democracy, and if education is deemed a central infrastructure component, then education more easily fits as an extension of the states' existing duty. Put differently, when linked to this base, the nexus rationale requires states to do more of the same (additional duties) rather than something entirely different (affirmative duties to serve negative rights).

### 2. Avoids Substantive Due Process

Compared to the substantive due process-based reasoning *Gary B.* momentarily embraced, the electoral-duty foundation has two advantages. First, as Judge Murphy observed in dissent, the current Supreme Court clearly disfavors substantive due process-based unenumerated individual rights<sup>147</sup>—an observation predating the Court's overruling of *Roe v. Wade*.<sup>148</sup> Second, both substantive due process and all other Fourteenth Amendment-based theories must overcome the text-based state action requirement.<sup>149</sup>

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states were utilizing some form of popular election to choose U.S. senators.”); see also Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347, 1352–55 (1996) (discussing historical shift from legislative selection to direct election).

146. Cf. *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) (invalidating compulsory education law interfering with private religious educational alternatives).

147. *Gary B. v. Whitmer*, 957 F.3d 616, 670 (6th Cir. 2020) (Murphy, J., dissenting); see *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (discussing how the Court has “always been reluctant to expand the concept of substantive due process” (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992))).

148. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022) (overruling *Roe v. Wade*, 410 U.S. 113 (1973), and holding that “[t]he Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including . . . the Due Process Clause of the Fourteenth Amendment”).

149. See *supra* notes 54–55 and accompanying text (explaining the specific concern that the Fourteenth Amendment’s language proscribes only state action).

### 3. Firmer Constitutional Footing than Voting Rights Rhetoric

As previously noted, most nexus-based defenses ground a right to education, directly or indirectly, on a “right to vote” or generalized “right to democratic participation.”<sup>150</sup> But upon close inspection, those rights are best understood as stemming from states’ Elections Clause duty rather than being protected directly by the Constitution. Let me explain.

The Supreme Court occasionally describes a “right to vote” majestically. For example: “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”<sup>151</sup> Or: “Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society . . . [and] the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.”<sup>152</sup> Many advocates ground education rights in these grand declarations; *Gary B.*’s majority repeatedly invoked a purported right “to participation in our country’s democracy” or “political process” or “political system.”<sup>153</sup>

Here is the problem: while these declarations surely capture our nation’s democratic zeitgeist, they lack textual footing. Recall the Supreme Court said in *Rodriguez* that the “[t]he right to vote, *per se*, is not a constitutionally protected right”;<sup>154</sup> elsewhere, the “Court has often noted that the Constitution ‘does not confer the right of suffrage upon anyone.’”<sup>155</sup> What best explains the lofty rhetoric absent “*per se*” support?

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150. *See supra* Section I.A.

151. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

152. *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964); *see Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (“[T]he political franchise of voting is . . . regarded as a fundamental political right, because preservative of all rights.”); *Evans v. Cornman*, 398 U.S. 419, 422 (1970) (“[T]he right to vote, as the citizen’s link to his laws and government, is protective of all fundamental rights and privileges.”); *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (“It is beyond cavil that ‘voting is of the most fundamental significance under our constitutional structure.’” (quoting *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979))).

153. *See supra* Section I.A.

154. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 n.78 (1973).

155. *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982) (quoting *Minor v. Happersett*, 88 U.S. 162, 178 (1875)). *See Susan H. Bitensky, Advancing America’s Emblematic Right: Doctrinal Bases for the Fundamental Constitutional Right to Vote Per Se*, 77 U. MIA. L. REV. 613, 617–18 (2023) [hereinafter *Advancing*] (Supreme Court has “twice declared that there is absolutely no such right” to vote but “more often . . . sounded as if there is”); *id.* at 617–18, 628–29 (describing and listing scholars engaged in a “thriving dispute” over whether the Court has recognized a right to vote).



Start with state elections for state officials. The Court repeatedly acknowledges that “the right to vote in state elections is nowhere expressly mentioned.”<sup>156</sup> Rather, the Court has more carefully and narrowly held that once a state *chooses* to extend the state franchise to some citizens, others enjoy an *equality*-based right to vote as well: “a citizen has a constitutionally protected right to participate in [state] elections on an equal basis with other citizens in the jurisdiction.”<sup>157</sup> Thus, any federal “right to vote” in statehouse elections is merely an equality right attached to a state’s contingent suffrage rules.<sup>158</sup>

The Court’s language describing federal rather than state elections is more equivocal. The Court once declared that “the right to vote in federal elections is conferred by Art. I, § 2,”<sup>159</sup> and when defining Congress’s Make or Alter power, the Court claimed the “right of the people to choose” members of Congress is “established and guaranteed by the Constitution.”<sup>160</sup> But understood in context, such references to “rights” are really manifestations of the states’ Elections Clause duty, for two reasons.

First, as just noted, the Court grounds this purported federal-election right in the House Voter Qualifications Clause, which says that the House (and the Senate post-Seventeenth Amendment) must be chosen by the “People” as defined by the largest statehouse electorate. But the choosing occurs via the elections that states must conduct per the Times, Places and Manners Clause. At a minimum, then, the right-and-duty are chicken-and-egg; the former depends on the latter.

More fundamentally, whether someone enjoys this so-called right depends on how states define their largest statehouse electorate. Each time the Court references a federal right to vote, the Court carefully notes this contingency. For example, in *United States v. Classic*, the Court described a voting right “guaranteed by the Constitution . . . to those citizens

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156. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665 (1966); see *McPherson v. Blacker*, 146 U.S. 1, 38 (1892) (“The right to vote in the states comes from the states . . . [and] has not been granted or secured by the constitution of the United States . . .”).

157. *Rodriguez*, 411 U.S. at 34 n.74 (quoting *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972)). Indeed, in *Rodriguez* the Court “assumed” that the plaintiffs’ references to a base right to vote were “simply shorthand references to the [implicit] protected right” of equal voting. *Id.* at 36 n.78.

158. As the Court noted in *Dunn v. Blumstein*, “[t]his ‘equal right to vote’ is not absolute” because “the States have the power to impose voter qualifications.” 405 U.S. 330, 336 (1972) (quoting *Evans v. Comm’n*, 398 U.S. 419, 426 (1970)). See Black, *Constitutional Compromise*, *supra* note 45, at 794–95 (“The Constitution does not explicitly or affirmatively extend the right to vote in any particular election to citizens”; it merely “prohibit[s] certain forms of discrimination in those elections that states see fit to hold”).

159. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665 (1966).

160. *United States v. Classic*, 313 U.S. 299, 314 (1941).

and inhabitants of the *state entitled to exercise the right*.”<sup>161</sup> In *Wesberry v. Sanders*, the Court explained the House Voter Qualifications Clause “gives persons *qualified to vote* a constitutional right to vote and to have their votes counted.”<sup>162</sup> This more careful language supports the conclusion that “under the provisions of the main body of the Federal Constitution, the power to determine who shall have the right to vote is left to the States, and this applies to votes for federal officers as well as to votes for state officers.”<sup>163</sup> So, any “individual right to vote” depends on state discretion, whereas the duty to run elections does not.

In sum, while many advocates use nexus-based reasoning to append an education right to a rhetorical “right to vote” or broader “right to democratic participation,” the states’ duty to establish and hold elections provides a firmer foothold. Based on both constitutional text and more careful Court language, the oft-referenced “right to vote” is best understood as derived from the state duty expounded above rather than as an independently protected entitlement.<sup>164</sup>

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161. *Id.* (emphasis added). *See id.* at 310 (“Such right as is secured by the Constitution to *qualified* voters to choose members of the House of Representatives is thus to be exercised in *conformity to the requirements of state law* subject to the restrictions prescribed by § 2 . . . .” (emphasis added)); *id.* at 315 (“[T]he right of *qualified* voters within a state to cast their ballots and have them counted at Congressional elections . . . is a right secured by the Constitution.” (emphasis added)).

162. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964); *Shelby County, Ala. v. Holder*, 570 U.S. 529, 543 (2013) (discussing how for congressional elections, “[s]tates have ‘broad powers to determine the conditions under which the right of suffrage may be exercised’” (quoting *Carrington v. Rash*, 380 U.S. 89, 91 (1965))); Black, *Constitutional Compromise*, *supra* note 45, at 795 (“Thus, the basic qualifications to vote remain primarily in the hands of the state.”). *Cf.* *McPherson v. Blacker*, 146 U.S. 1, 39 (1892) (“The right to vote intended to be protected” by Section 2 of Fourteenth Amendment “refers to the right to vote as established by the laws and constitution of the state.”).

163. Robert A. Maurer, *Congressional and State Control of Elections Under the Constitution*, 16 GEO. L.J. 314, 327–38 (1928).

164. *Cf.* Bitensky, *Advancing*, *supra* note 155, at 636–64 (suggesting a federal right to vote might be inferred from any (or collectively all) of six constitutional provisions plus structural arguments).

My focus on states’ electoral duty does not mean the Court is wrongheaded to articulate a so-called “right to vote” when addressing elections schemes. We should just understand this terminology as a more colloquial and visceral shorthand for the corollary to states’ constitutional duty. I’d say the same thing regarding any so-called right to vote of presidential Electors. Surely duly appointed Electors have a valid constitutional complaint if they “meet in their respective states” and yet are precluded by government officials from then “vot[ing] by ballot.” U.S. CONST. amend. XII. I’d call this interfering with a constitutional duty rather than a personal right; but I wouldn’t protest if the Court colloquially called this interfering with “an elector’s ‘constitutional freedom’ to ‘vote.’” *Chiafalo v. Washington*, 140 S. Ct. 2316, 2323 (2020) (quoting *Ray v. Blair*, 343 U.S. 154, 230 (1952)).

One potential shortcoming of an electoral-duty-based foundation is that it arises at the framing—presumptively meaning so too does a nexus-based education duty. To be sure, many important constitutional framers heralded the importance of an educated citizenry for the incipient republic. *See, e.g.*, Friedman & Solow, *supra* note 45, at 113 (“[M]any of the intellectual and

#### 4. Further Issues to Explore

I lack space here fully to evaluate the argument that states—after creating and implementing our democratic infrastructure through elections—must further provide public education to their residents to promote the intelligent and beneficial use of the franchise. My more modest goal is to highlight particular questions raised by appending an education right to this duty (defenders of other nexus foundations may need to address similar questions).

Recall that nexus theorists define the prerequisite nature and quantum of education in various ways. For example, some focus on literacy,<sup>165</sup> others on civics,<sup>166</sup> and still others on general knowledge and critical reasoning skills.<sup>167</sup> In determining how best to cash out an educational prerequisite for the states' Elections Clause duty, one might consider the following:

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political heavyweights of the Framing era championed education . . . as a building block of democratic society” and believed “government had a duty to make education widely available to safeguard the democratic order”); Bitensky, *Theoretical Foundations*, *supra* note 20, at 628–29 (same); Black, *Freedom*, *supra* note 45, at 1083–84 (explaining that “the Founders believed that education was a necessity” and “worried that the new form of government with which they were experimenting would implode without educated voters”). But no widespread system of public education was immediately established, leaving a mismatch between theoretical obligation and actual practice. *Cf.* Black, *supra* note 43, at 149 (discussing how “only a few states affirmatively provided for education” during the framing period and so “it is difficult to claim that education was part of the original understanding of the [Republican Form of Government] clause”).

Of course, arguments grounded in voting rights rhetoric face the same historical mismatch challenge. By contrast, arguments grounded in Fourteenth Amendment provisions don't face this mismatch, given the simultaneous growth of state educational systems. *See supra* note 37 and accompanying text.

One response to this mismatch might emphasize that, as the scope of the mandated electorate expanded over time due to constitutional amendments prohibiting discriminatory exclusions, so too did the need to ensure that these new voters were equipped to participate and contribute. *See supra* note 70 (listing constitutional amendments). For example, prior to emancipation, “teaching slaves to read was a crime” and an effective ban on educating newly freed Blacks “continued through extrajudicial violence during the Reconstruction era.” *Gary B.*, 957 F.3d 616, 650–51 (6th Cir. 2020).

165. *See, e.g., Gary B.*, 957 F.3d at 652–55 (access to literacy); Black, *Fundamental Right*, *supra* note 45, at 1111, 1095–1112 (describing “critical literacy” as derived from historical discussions during, and purposes identified during, Reconstruction Amendments debates).

166. *See, e.g., A.C. ex rel. Waithe v. McKee*, 23 F.4th 37, 42–45 (1st Cir. 2022) (rejecting a nexus-based affirmative constitutional right to an “adequate civics education”); Minow, *Education*, *supra* note 34, at 556–58 (describing civics-focused basis for *Waithe* litigation); Kimberly J. Robinson, *Designing the Legal Architecture to Protect Education as a Civil Right*, 96 IND. L.J. 51, 98 (2020) (discussing importance of “civic knowledge, such as knowledge of the structure of the political system in the United States and [the people’s] role in this system, and civic skills, such as the ability to comprehend and analyze an array of complex knowledge”).

167. *See, e.g., Bitensky, Theoretical Foundations*, *supra* note 20, at 604 (discussing how “voting is preconditioned on the ability to engage in politically purposive conduct” which “in turn, is

- How broadly should we understand the scope of the foundational electoral duty?

As noted above, the duty might require states to facilitate easy voting by a comprehensive electoral pool, or merely facilitate laborious voting by a small electoral pool, or something in-between.<sup>168</sup> And one might focus narrowly on the discrete act of voting or broadly on an array of associated political activities (including formulating political opinions and monitoring officials' behavior).<sup>169</sup> And one might consider the duty in conjunction with other base rights (such as free speech or state/national citizenship) to define a nexus foundation transcending elections.<sup>170</sup> Each of these choices might influence the implied educational prerequisite.

- Are positive externalities relevant in determining the nature and quantum of prerequisite education?

As the Court has recognized in the electoral duty context, one state's selection of Congresspersons affects the governance not just of that state but also of the entire nation.<sup>171</sup>

- Does the principle that voters must have comparable voting power suggest that a prerequisite education must be somewhat egalitarian rather than merely individually "adequate"?<sup>172</sup>

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preconditioned on an educated citizenry" requiring people to have the "wherewithal to make a 'meaningful' electoral choice").

168. See *supra* notes 113–18 and accompanying text (discussing minimum requirements, if any, of the "how" and "who" voting variables).

169. Arguably, marking a ballot requires only minimal literacy whereas making and helping others to make an informed and wise choice requires much more. See Wright, *Educational Opportunity*, *supra* note 64, at 725–27 (discussing relationship between narrower versus broader visions of voting or citizenship discussed in *Gary B.* and narrower versus broader prerequisites of literacy and education).

170. For example, some nexus theorists aggregate voting, speech, and even jury service rights into a broader base right of "citizenship." See, e.g., Christine M. Naassana, *Access to Literacy Under the United States Constitution*, 68 *BUFF. L. REV.* 1215, 1267 (2020) ("Citizenship requires basic literacy abilities to carry out duties such as voting, serving on a jury, participating in community affairs, and exercising the freedom of speech.").

171. See *U.S. Term Limits, Inc., v. Thornton*, 514 U.S. 779, 869 (1995) (Thomas, J., dissenting) ("[W]hen the people of one State send immature, disloyal, or unknowledgeable representatives to Congress, they jeopardize not only their own interests but also the interests of the people of other States."); see also Wright, *The Place*, *supra* note 20, at 62–63 (discussing "informed voting" as a public good for which participants require literacy).

172. See *Westberry v. Sanders*, 376 U.S. 1, 7 (1964) (explaining importance of equally weighted votes in congressional elections).

- Would an Elections Clause-based education argument necessarily authorize Congress to “make or alter” not only states’ elections rules but also their prerequisite education policies?

Some would welcome such a direct congressional power, and others would decry its threat to federalism values.<sup>173</sup>

Note that I phrased these questions from the perspective of one invoking the prerequisite rights rationale to recognize an education right. But the questions also bear on the scope of the right emerging from some originalism-based rationales advanced in recent scholarship.<sup>174</sup>

In sum: Applying a prerequisite-rights rationale to the electoral duty base highlighted here requires further work. But the inquiry appears fruitful and has some advantages over competitive approaches.

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173. Compare, e.g., Kimberly Jenkins Robinson, *A Congressional Right to Education: Promises, Pitfalls, and Politics*, in *A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY*, *supra* note 33, at 186, 186–202 (advocating federal statutory right to education), with Eloise Pasachoff, *Doctrine, Politics, and the Limits of a Federal Right to Education*, in *A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY*, *supra* note 33, at 84, 90–92 (voicing concerns). Even if Congress had such power, I think it would extend only to securing education’s constitutional contours and not dictating mere policy judgments (for example, by regulating non-prerequisite-related curricular decisions or sports programs). This reach would mimic that of Congress’s authority under Section Five to enforce an education right grounded in the Fourteenth Amendment’s National or State Citizenship, Privileges or Immunities, Due Process, or Equal Protection Clauses. U.S. CONST. amend. XIV, §§ 1, 5. For a discussion of exemplary scholarship, see *supra* Section I.B.2. Section Five would also empower Congress to enforce any due-process-based “right to vote” viewed as the colloquial corollary to the states’ electoral duty. See *supra* note 164 (discussing that “right to vote” terminology is better understood as colloquial shorthand for the corollary to states’ constitutional duty).

That said, one might protest that the Make or Alter power is expressly limited to electoral and no other duties. This rejoinder would raise the question whether Congress’s Necessary and Proper Clause power to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers,” would provide Congress with any broader implied power to ensure state satisfaction of prerequisite educational duties. U.S. CONST. art. I, § 8, cl. 18. My initial take is yes: ensuring the educational prerequisite underlying states’ electoral duties could carry into execution Congress’s Make or Alter power to implement those state duties—especially given the Court’s characterization of these duties as delegated federal functions. See *supra* text accompanying note 77 (quoting *Burroughs* to this effect). Others might disagree. See Gary S. Lawson, *The Constitution’s Congress*, 89 B.U. L. REV. 399, 404 (2009) (“[T]he Necessary and Proper Clause only lets Congress carry into effect constitutional powers vested in federal, not state, officials.”) (emphasis omitted).

In any event, as it does now, Congress may rely on its Spending Clause power to encourage compliant state action. U.S. CONST. art. I, § 8, cl. 1; see, e.g., Pasachoff, *supra*, at 85–87 (discussing Spending Clause power).

174. See *supra* notes 45–46 and accompanying text (discussing originalism-based scholarship).

*C. Rethinking Judicially Enforceable Remedies for a Public Education Duty*

Finally, connecting education to states' affirmative electoral duty can help shape the way courts think about enforcing a further state duty to support public education. As explained above through the eyes of *Gary B.*'s dissenting judge,<sup>175</sup> affirmative rights naysayers point to institutional concerns sounding in federalism, separation of powers, and judicial competency and claim that these concerns present hurdles too difficult for federal courts to overcome.<sup>176</sup>

Affirmative rights advocates respond. Federalism concerns can be managed through judicial decrees that provide states great flexibility in choosing how to satisfy their ultimate duties.<sup>177</sup> Competency concerns can be mitigated through a significant but careful reliance on professional expertise and consensus.<sup>178</sup> Regarding education specifically, “[c]oncerns about judicial competency to rule on and design remedies

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175. See *supra* notes 61–64 and accompanying text.

176. See, e.g., Pasachoff, *supra* note 173, at 93–100 (discussing these and related concerns with enforcing federal right to education).

177. For example, while in *Bounds v. Smith* the Supreme Court noted “our decisions have consistently required States to shoulder affirmative obligations to assure all prisoners meaningful access to the courts,” the Court immediately explained that “while adequate law libraries are one constitutionally acceptable method to assure meaningful access to the courts, our decision here . . . does not foreclose alternative means to achieve that goal.” 430 U.S. 817, 824, 830 (1977). See also *id.* at 831 (describing many satisfactory remedial options); *Lewis v. Casey*, 518 U.S. 343, 350–51 (1996) (emphasizing remedial flexibility). In *Gary B.*, the court stressed that although the adequacy of access to literacy depends on facilities, teaching, and educational materials, these features should not be considered separate requirements but should be assessed “as a whole” such that “how each state reaches the basic minimum level of education discussed above can vary dramatically . . . .” *Gary B. v. Whitmer*, 957 F.3d 616, 660 (6th Cir. 2020).

178. See, e.g., *Search the WWC*, WHAT WORKS CLEARINGHOUSE, U.S. DEP’T OF EDUC., <https://ies.ed.gov/ncee/wwc/> [<https://perma.cc/DCE5-2BDZ>] (last visited Nov. 13, 2023) (online information about illiteracy’s causes and solutions collected and produced by the What Works Clearinghouse, an initiative of the Institute of Education Sciences within the United States Department of Education); Linda Darling-Hammond, *Assuring Essential Educational Resources Through a Federal Right to Education*, in *A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY*, *supra* note 33, at 235 (proposing and defending contours of federal education right).

For example, in *Youngberg v. Romeo*, the Supreme Court held that an involuntarily committed mental patient who is deemed dangerous “is entitled to minimally adequate training . . . as may be reasonable in light of respondent’s liberty interests in safety and freedom from unreasonable restraints.” 457 U.S. 307, 322 (1982). In determining what is “reasonable,” the Court “emphasize[d] that courts must show deference to the judgment exercised by a qualified professional” and thereby “interference by the federal judiciary with the internal operations of these institutions should be minimized.” *Id.*

More generally, federal courts have also considered professional judgments while “overseen[ing] institutional reforms of the railroads, prisons, mental institutions, housing authorities—and schools.” Minow, *Education*, *supra* note 34, at 561.

enforcing a constitutional right to education can be countered by reference to decades of state judicial decisions interpreting and enforcing state rights to education.”<sup>179</sup> Finally, I believe courts’ long-standing enforcement of quasi-affirmative rights mollifies institutional concerns. While these are not “pure” affirmative rights, their state-action triggers are not truly discretionary either—for example, no state can actually do nothing when its inhabitants face private violence, as punishing and deterring criminal acts is a central *raison d’être* of government.<sup>180</sup> Given that states *will* inevitably prosecute defendants and run prisons, judicial enforcement of technically negative rights to defendants and prisoners (among others) that require states to provide them with various goods and services—including some that are quite costly and whose contours require subjective line-drawing at the margins—essentially raise similar naysaying concerns as does enforcement of true affirmative rights.<sup>181</sup> “In short,” as Symposium contributor Professor Martha Minow has well documented, “although there are familiar objections to judicial involvement in announcing or enforcing a federal right to education, there are equally longstanding responses.”<sup>182</sup>

And, of course, judicial protection of affirmative rights simply through declarations of states’ affirmative obligations, even without additional coercive injunctions, is not nothing. Just as we expect federal officials to carry out many constitutionally imposed duties without judicial oversight,<sup>183</sup> we might expect state officials to do more to provide adequate and fair public education once they are told by federal courts that they

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179. Minow, *Education*, *supra* note 34, at 562; *see, e.g.*, Jonathan Feldman, *Separation of Powers and Judicial Review of Positive Rights Claims: The Role of State Courts in an Era of Positive Government*, 24 RUTGERS L.J. 1057, 1089–99 (1993) (noting some successes and arguing that separation of powers concerns for state courts are exaggerated). Indeed, one might argue that defining a minimally adequate education is no more and perhaps less challenging than defining a minimally robust “right to vote” under the Court’s current doctrine.

180. *See* Sklansky, *supra* note 56, at 1235–36 (explaining that states cannot realistically refrain from imprisoning dangerous criminals, leaving states with “de facto, unavoidable obligations to pay for prison kitchens, prison medical services, and prison law libraries”).

181. *See id.* at 1237–38 (stating that quasi-affirmative rights impose “obligations on governments” that “may not lose all of their obligatory character simply because” the state in theory can remain inactive); *id.* at 1230 (“[T]hese quasi-affirmative rights resemble genuine affirmative rights more closely than might be imagined.”); *but see* Black, *supra* note 43, at 151 (“[E]ven if the distinction between education and other [quasi-affirmative] rights is one of quality rather than kind, the qualitative distinction is immense.”).

182. Minow, *Education*, *supra* note 34, at 564.

183. For a discussion of affirmative constitutional obligations imposed on federal officials, *see supra* notes 123–40 and accompanying text.

have a federal constitutional obligation to do so.<sup>184</sup> Mere federal court announcement of such an affirmative duty, even accompanied by only declaratory relief, might go a long way toward spurring both compliant state activity and political support for that activity. Although “judges cannot change a society, they can motivate it to move in a direction consistent with public norms.”<sup>185</sup>

My goal here is not to fully rehash or comprehensively engage, let alone resolve, this general debate. Rather, I suggest grounding an education right in states’ Elections Clause duty illuminates a different approach to judicial remedies that might further mitigate naysaying concerns. I then close by offering two additional thoughts about education rights enforcement that avoid these concerns altogether.

#### 1. Duty-Based rather than Rights-Based Approaches to Education Remedies

When courts (however infrequently) and scholars contemplate judicial enforcement of affirmative rights, they traditionally think about individual entitlements enjoyed by all persons or citizens (depending on the right’s constitutional source) to a defined quantum and quality of a protected good or service. An asserted right to food suggests an individual entitlement to a certain set of meals; an asserted right to medical care suggests an individual entitlement to a certain access to and quality of care. Even if the entitlement is defined flexibly, the focus is on the product and whether it is up to snuff. And that focus feeds into competency concerns if every schoolchild may walk into federal court and demand a specific level and content of public education. Of course, courts inevitably make similar assessments when enforcing quasi-affirmative rights to those in state custody;<sup>186</sup> but naysayers insist that defining a “minimum access to literacy” or “minimally adequate education” is more daunting.<sup>187</sup>

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184. Minow, *Education*, *supra* note 34, at 552 (“As public officials swear an oath to uphold it, each legislator, governor, mayor, and others in office have the duty to interpret and implement the Constitution.”).

185. Friedman & Solow, *supra* note 45, at 151; *see, e.g.*, Bitensky, *Theoretical Foundations*, *supra* note 20, at 635–37 (discussing pedagogic effect of rights-declaration).

186. For a discussion of quasi-affirmative rights, see *supra* notes 56–60 and accompanying text.

187. For a discussion of institutional concerns, see notes 161–64 and accompanying text. Note this comparison may equally reflect a lack of concern for prisoners’ rights. Dieticians and doctors would likely claim that responsibly serving persons with special dietary or nutritional needs and those with extraordinary medical needs requires a good deal of professional and nuanced judgment. Courts generally skirt any competency concerns through blunt assessments.



By contrast, the Elections Clause duty imposed on states suggests a focus on production rather than product. Even when misleadingly thinking from a voting rights-based perspective, we do not naturally think of each eligible voter as having an individually enforceable right to an “X% opportunity to vote given state-imposed and background obstacles,” or a right to an “equally easy path to voting as every other voter.” Some eligible voters might live or work further away from their assigned voting precincts, have less available time in which to vote, have more trouble finding transportation, face longer lines, or confront other circumstances that make it more difficult for them to vote than it is for others. Some differential ease of voting is considered inevitable, not per se unconstitutional. Rather, we think about whether the electoral system, taken as a whole, produces a reasonable balance between voting access and legitimate state election-running interests, cabined by specific negative rights around the margin.<sup>188</sup> In other words, the affirmative electoral duty implies a remedy that is driven by systemic rather than individual-entitlement concerns.

Appending an education duty to the existing electoral duty naturally suggests a similar remedial focus, one that assesses the system holistically and protects against wholesale rather than retail failures. The enforcement question is whether a state is sufficiently educating its electorate in general terms, considering (depending on variables sketched above) both qualitative and egalitarian issues—without guaranteeing each child a particular or identical experience. Here again, I merely sketch some potential approaches, which fall into two categories: process-based and substance-based.

First, federal courts might impose process requirements on how state legislatures or executive officials design and implement public education systems. In the context of discussing judicial enforceability of quasi-affirmative rights, Professor David Sklansky has highlighted two strategies for “involv[ing] the political branches in an ongoing process of inter-

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188. While different Justices have characterized the interest-balancing process in somewhat different ways, *see, e.g.*, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008) (comprising three opinions offering three different standards for assessing facial challenge to state photo identification law), the sense of a systemic approach is perhaps best captured by Justice Scalia’s statement that “we consider[] the laws and their reasonably foreseeable effect on voters generally” and not on a plaintiff’s “own right to vote, given his particular circumstances.” *Id.* at 206 (Scalia, J., concurring in the judgment) (emphasis omitted); *id.* at 208 (Scalia, J., concurring in the judgment) (fact that “[v]ery few new election regulations improve everyone’s lot” suggests a general balancing approach according to which a state’s “judgment must prevail unless it imposes a severe and unjustified overall burden upon the right to vote, or is intended to disadvantage a particular class”).

branch decisionmaking, rather than simply substituting judicial commands for political judgments.”<sup>189</sup> First, courts might articulate a “constitutional common law”-type remedy that can be overridden to some extent by the political branches. Second, courts might impose an administrative-law-derived “hard look” doctrine to ensure that political actors have done their homework and that they understand, intend, and have reasoned justifications for the consequences of their choices.<sup>190</sup> The goal is to use process-oriented evaluations to “protect fundamental values without entirely displacing democratic decisionmaking.”<sup>191</sup>

Second, channeling the electoral context, federal courts might impose substantive but systemic requirements on how state legislatures or executive officials design and implement public education systems. Put differently, a state duty to provide public education might be satisfied by ensuring that a sufficient percentage of the state population is provided sufficient education in a way that covers a sufficient cross section of the electorate—with what counts as “sufficient” obviously awaiting further specification. Symposium contributor Professor Derek Black, while fleshing out his State Citizenship Clause version of a right to education, argues that courts should protect against two concerns. First, “states cannot actively manipulate educational opportunity for partisan or other illegitimate reasons,” such as by “targeting particular communities or groups for educational disadvantage.”<sup>192</sup> Second, states may not license or tolerate “systemic gaps in educational opportunity that are so large as to threaten particular groups’ participation in the democratic process (or

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189. Sklansky, *supra* note 56, at 1293.

190. *See id.* at 1294–96 (“The ‘hard look’ doctrine is a creature of administrative law, not of constitutional law.”).

191. *Id.* at 1293. For process-based approaches to enforcing public education duties based on state constitutional provisions, see, for example, Bauries, *supra* note 51, at 706, 756–64 (proposing a process-based fiduciary duty of “loyalty and care”); Rebecca I. Yergin, *Rethinking Public Education Litigation Strategy: A Duty-Based Approach to Reform*, 115 COLUM. L. REV. 1563, 1565, 1595–1604 (2015) (proposing a process-based “duty of responsible administration”).

192. Black, *Constitutional Compromise*, *supra* note 45, at 747.

leave them subject to domination by other groups).”<sup>193</sup> One might creatively imagine other systematic standards.<sup>194</sup>

Whether or not these are the best process- or substance-based guideposts, the broader point is this. While an affirmative-rights-based obligation directs courts to define and protect individual entitlements to a particular quantum and quality of educational services, connecting education to the foundational Elections Clause duty invites courts to focus more on public education’s systemic properties in a way that might better fit federal courts’ remedial comfort zone.

## 2. Additional Enforcement Options

Here, I offer two additional enforcement avenues that could circumvent naysaying concerns.

### *Leveraging the Atypical Power of Negative Injunctions*

We typically envision that courts enforcing affirmative duties or rights will issue affirmative injunctions requiring state officials to do particular things. “Though shalt not” negative injunctions seem insufficient, because if officials are merely told to stop doing things in a bad way, they remain free to stop doing them at all.

While theoretically true, this concern applies only weakly to public education. Universal compulsory education requirements reveal states’ general commitment to the project: education is still widely hailed as “the most important function of state and local governments.”<sup>195</sup> Just as states

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193. *Id.*; *see id.* at 819–29 (fleshing out details for both standards). This “systemic gap” standard would address a concern advanced by the plaintiffs in the *Gary B.* litigation, where the alleged “schools in name only” served “a group of almost entirely low-income children of color.” *Gary B. v. Whitmer*, 957 F.3d 616, 621, 637 (6th Cir. 2020). Despite the obvious role race played in the state’s indifference as to the quality of these schools compared to “schools serving predominantly white, affluent student populations,” *id.* at 636, the plaintiffs failed to state a claim under prevailing equal protection doctrine because they could not point to a “specific decision or policy implemented by [state officials] that treats their schools differently from others in the state.” *Id.* at 633. Although equal protection doctrine does not address even race-infused benign neglect absent facially discriminatory treatment, a court-enforced duty such as that proposed by Professor Black to avoid “systemic gaps” threatening to exclude groups enduringly from democratic participation would directly address this concern. Black also advocates a more process-based requirement that “states must ensure stable funding streams for their education systems.” Black, *supra* note 45, at 747; *see Gary B.*, 957 F.3d at 816–19 (fleshing out details).

194. For an example of a very precise output-oriented test, see Ratner, *supra* note 48, at 859 (subject to narrow justifications, “no school should allow more than 20% of its students in any grade from two through six to fall as much as one year or more below grade level, nor more than 10% of its students to fall as much as two years or more below grade level, in reading, mathematics, or composite basic skills”).

195. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

are unlikely to stop prosecuting wrongdoers to avoid a negative injunction against non-public trials,<sup>196</sup> states are unlikely to respond to a court order of the negative form “stop providing quality schools to these kids while you leave others in a virtual warehouse” by folding up shop and stopping public education altogether. Rather, states will likely work hard to address the court’s concern so they can continue providing education in a form that is acceptable to all.

Second, every state constitution contains a provision promising, in various terms, the provision of public education.<sup>197</sup> So, while state officials could comply with a negative federal court injunction through inaction, doing so might run afoul of their own state constitutional obligation. This reinforces federal courts’ leverage in shaping school reform through negative injunctions alone, notwithstanding theoretical under-enforcement of the affirmative duty.<sup>198</sup>

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196. See *supra* notes 56–60 and accompanying text (listing examples of quasi-affirmative rights).

197. See, e.g., Kristine L. Bowman, *The Inadequate Right to Education*, in A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY, *supra* note 33, at 65, 66 (“All fifty states have a right to education in their state constitutions. . . . [T]he language of the right varies significantly, and the interpretation of that language varies even more.”); Friedman & Solow, *supra* note 45, at 129 (“[S]ome thirty-one state courts, most of them high courts, have held that the state constitutional provision . . . guarantees a right to a minimally-adequate education.”).

198. While the preceding argument suggests that federal courts can effectively (albeit imperfectly) enforce an affirmative education duty through negative injunctions, courts might plausibly reach the same results by enforcing a more traditional *negative* right to education through negative injunctions based on a creative and aggressive application of state action doctrine. Each state has a compulsory education statute requiring (with minor exceptions) children to attend public schools. See Friedman & Solow, *supra* note 45, at 127 (explaining the compulsory nature of state education systems). When states consign students to severely substandard schools, they “deprive” those students of a negative right to education in both momentary and enduring ways. First, compulsory confinement for many weekly hours in a “school in name only” prevents children from using that time to learn in other (and more effective) contexts. Second, the combination of a state’s constitutional commitment to education and compulsory attendance rules crowds out, over time, the growth of plausible alternative educational fora, as families justifiably rely on the state’s promise. The court hints at this second concern in *Gary B.* under the guise of a “state-created danger” theory of state responsibility: “[T]he state has come to effectively occupy the field in public education, and so is the only practical source of learning for the vast majority of students. We can think of no other area of day-to-day life that is so directly controlled by the state. And with that control must come responsibility . . . .” *Gary B.*, 957 F.3d at 658. I think this line of thinking is better packaged as a creative argument for extending state action doctrine in this context. For a fuller development, see Evan Caminker, *A Constitutional Commitment to Access to Literacy: Bridging the Chasm Between Negative and Positive Rights*, JUSTIA (Apr. 30, 2020), <https://verdict.justia.com/2020/04/30/a-constitutional-commitment-to-access-to-literacy-bridging-the-chasm-between-negative-and-positive-rights> [<https://perma.cc/9XJG-7SVY>].

*Channeling Federal Education Duties through State Constitutional Provisions*

Thus far, I have focused on federal court enforcement of a federally defined duty. State courts likewise must enforce federal law, including federal constitutional affirmative duties. And state courts face, not none, but different and arguably lesser institutional challenges when crafting enforcement mechanisms for affirmative duties or rights.

But let me plant a flag for a novel approach: one might implement a federal education duty through state courts' interpretation and enforcement of *their own state constitutions*. Professor Derek Black has argued that the Fourteenth Amendment, viewed through the lens of Reconstruction Era congressional debates and actions, embodied a unique compromise—the new State Citizenship Clause mandated public education as a prerequisite to a robust concept of state citizenship, *and* that mandate would be implemented through state constitutional guarantees rather than by Congress or federal courts.<sup>199</sup> Creatively riffing off this premise, one might argue that these now-ubiquitous *state* constitutional provisions must be interpreted by state courts (at least in part) to fulfill the *federal* duty.

More specifically, when state courts interpret and implement their state constitutional provisions, they should do so with the understanding that (a) the provisions were intended to bind state legislative and executive officials to their Reconstruction-Era agreements and thus should today be deemed justiciable; and (b) the original and primary purpose of these state provisions, perhaps among other purposes, was to implement the “compromise” that states carry out the duty to educate their electorates.<sup>200</sup> Under this approach, the enterprise of state courts interpreting state constitutional provisions presents another vehicle for breathing life into the federal duty.

#### CONCLUSION

When the Court in *Rodriguez* addressed the plaintiffs' prerequisite-rights claim to heightened scrutiny by implicitly asking whether the Constitution “guarantee[s] to the citizenry the *most* effective speech or the

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199. See generally Black, *Constitutional Compromise*, *supra* note 45; see *supra* note 45 (describing Professor Black's additional scholarly work on right to education).

200. For example, the federal duty could inform the definition of “adequacy” in state constitutional provisions promising an adequate public education. See Nicole Sunderlin & Evan Caminker, *Channeling a Federal Right to Education through State Constitutions* (2023) (unpublished manuscript) (on file with author) for initial development of the argument flagged here.

*most* informed electoral choice,”<sup>201</sup> Justice Powell obviously reframed the question uncharitably. The Court more fairly channeled nexus-based reasoning when it held open the question of whether “some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right.”<sup>202</sup> But decades of scholarship and recent federal litigation have thus far failed to persuade federal courts to answer yes (more than momentarily).

This Essay proposes both a different starting point—the states’ unsailable affirmative duty to design, establish, and implement congressional elections; and a different question—whether state-provided public education is a constitutionally required prerequisite for fulfilling this duty to, essentially, erect the edifice of our representative democracy. For the reasons explained above, I believe this is both a more promising way to advance a colloquially-termed federal “right” to education through nexus-based reasoning than previous efforts, and a more satisfactory way to explicate the education-citizenship connection motivating more conventional interpretive efforts to ground an education right in various Reconstruction-Era provisions.

In my view, the states’ constitutional duty to constitute and conduct federal elections provides a firmer foundation than does a nebulous “right to vote” or vague “right of political participation” or general notions of citizenship. The affirmative nature of this and related federal-officer-selection duties also pierces the naysaying shield that generally deflects positive rights recognition. Finally, the focus on state duties invites more creative approaches to judicial enforcement that might better fit federal courts’ remedial comfort zone. In sum, I envision a firmer, shorter, and yet more flexible bridge between states’ clear duty to run federal elections and a proposed duty to provide public education—and I invite others to help build and consider crossing that bridge.

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201. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36 (1973) (emphasis added).

202. *Id.* at 36.