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Education, Antidomination, and the Republican Guarantee

Kip M. Hustace

EDUCATION, ANTIDOMINATION, AND THE REPUBLICAN GUARANTEE

Kip M. Hustace*

ABSTRACT

This Article offers a new interpretation of the United States Constitution's republican guarantee and theorizes its protection of a fundamental right to education. Courts and education law scholars have identified the republican guarantee as a plausible source of educational rights but have not detailed how. Drawing on recent work by legal scholars, historians, political scientists, and philosophers, this Article reinterprets the guarantee as the federal government's obligation to secure freedom as nondomination, and it argues that excellent, equitable public education is necessary to fulfilling this duty. Nondomination, a robust conception of freedom, is freedom from subjection to the will of others, protecting against potential interference and not merely against actual interference. Nondomination has deep roots in American social movements and in the antislavery constitution, and it requires active government answerable to all people, prioritizing laws and institutions that constrain private as well as public power. Under this theory of the republican guarantee, education has a potent role in overcoming the costs of domination, which include psychological costs—such as the atomization of citizens and their failure to see each other as equals—and material costs—such as unpreparedness for democratic participation and individual pursuit of the good life. Although a nondomination guarantee requires strong institutions outside of schools, education has a further role in equipping people with the tools to resist domination when other institutions fail to prevent it. In laying out this theory, this Article addresses both the conventional teaching that the republican guarantee raises nonjusticiable political questions and the genuine conceptual challenge of lawmaking under an ongoing antidomination duty.

* Visiting Assistant Professor, Sandra Day O'Connor College of Law, Arizona State University. JD, Stanford Law School; LLM, University of Washington School of Law. For their advice and insights on this Article, my thanks to Aysha Bagchi, Matt Henry, Salvador E. Pérez, Stephen Rosenbaum, Nick Sidney, and Hugh Spitzer. For their diligent editing and contributions to legal scholarship, my thanks also to Madeline Blackburn, Sun Shen, and their colleagues at the *William & Mary Bill of Rights Journal*.

INTRODUCTION

The instructor said,

> *Go home and write*
> *a page tonight.*
> *And let that page come out of you—*
> *Then, it will be true.*
>
> . . . .
> So will my page be colored that I write?
> Being me, it will not be white.
> But it will be
> a part of you, instructor.
> You are white—
> yet a part of me, as I am a part of you.
> That's American.
> Sometimes perhaps you don't want to be a part of me.
> Nor do I often want to be a part of you.
> But we are, that's true!
> As I learn from you,

> I guess you learn from me—
> although you're older—and white—
> and somewhat more free.
>
> This is my page for English B.
>
> —Langston Hughes, *Theme for English B*[1]

For almost a month in early 2020, the Sixth Circuit Court of Appeals recognized that the United States Constitution protects a fundamental right to a basic minimum education.[2] The case was *Gary B. v. Whitmer*, the cause the conditions of Detroit, Michigan public schools.[3] Reviewing the district court's dismissal of the case, a Sixth Circuit panel used the doctrine of substantive due process to unearth the right to a basic minimum education in the Fourteenth Amendment.[4] The panel reasoned that "[a]ccess to a foundational level of literacy . . . has an extensive historical legacy and is so central to our political and social system as to be 'implicit in the concept of ordered liberty.'"[5] Therefore, by complaining of unqualified teachers, dangerous facilities, and inadequate learning materials, Detroit students had plausibly alleged the denial of their educational rights.[6] Within a month of the panel's ruling, the parties settled the case,[7] and the Sixth Circuit then took the unusual step of deciding on its own to rehear the case *en banc*, thus vacating the panel decision but leaving it as the last substantive decision in the case.[8]

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[1] LANGSTON HUGHES, *Theme for English B*, *in* THE COLLECTED POEMS OF LANGSTON HUGHES 409–10 (Arnold Rampersad ed., 1994).

[2] Gary B. v. Whitmer (*Gary B. I*), 957 F.3d 616, 621, 642, 662 (6th Cir. 2020), *vacated*, 958 F.3d 1216 (6th Cir. 2020) (en banc). Scholars and court watchers alike noted the decision's groundbreaking recognition of a fundamental right that the United States Supreme Court has yet to acknowledge explicitly. *E.g.*, Kimberly Jenkins Robinson, *A Constitutional Right to Education Fulfills Our Democratic Promise*, THE HILL (May 11, 2020, 3:00 PM EDT), https://thehill.com/opinion/education/497149-a-constitutional-right-to-education-fulfills-our-democratic-promise [https://perma.cc/CG7M-KZHQ]; Valerie Strauss & Derek W. Black, *Federal Court Delivers Holy Grail of Education Advocacy: A Fundamental Right to Basic Education. Don't Count on Supreme Court to Uphold It.*, WASH. POST (Apr. 29, 2020), https://www.washingtonpost.com/education/2020/04/29/federal-court-delivers-holy-grail-education-advocacy-fundamental-right-basic-education-don't-count-supreme-court-uphold-it/ [https://perma.cc/4JKQ-KH7T].

[3] *Gary B. I*, 957 F.3d at 620–21.

[4] *Id.* at 642–55.

[5] *Id.* at 642 (quoting Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997)).

[6] *Id.*

[7] Valerie Strauss, *Michigan Settles Historic Lawsuit after Court Rules Students Have a Constitutional Right to a 'Basic' Education, Including Literacy*, WASH. POST (May 14, 2020, 12:50 PM), https://www.washingtonpost.com/education/2020/05/14/michigan-settles-historic-lawsuit-after-court-rules-students-have-constitutional-right-basic-education-including-literacy/ [https://perma.cc/7QQC-A8SH].

[8] *See* Gary B. v. Whitmer (*Gary B. II*), 958 F.3d 1216, 1216 (6th Cir. 2020).

Although relying explicitly on substantive due process doctrine, the panel focused on the necessity of education for republican government. Education, the panel wrote, is "foundational to our system of self-governance";[9] "essential to nearly every interaction between a citizen and her government";[10] and "at minimum, highly important to 'maintaining our basic institutions.'"[11] Courts, the panel noted, have consistently identified education as a prerequisite to any meaningful democratic participation or pursuit of happiness.[12] Our constitutional framers and reframers viewed robust, universal education as the bedrock of republicanism, without which self-government would soon be six feet under.[13]

Given this focus, we might expect the Sixth Circuit panel to have based its decision on Article IV, Section 4 of the Constitution, under which "[t]he United States shall guarantee to every state in [the] union a republican form of government."[14] Yet the panel invoked the republican guarantee only once, citing Charles Sumner's view that New England's "system of common schools is part of the republican form of government as understood by the framers of the Constitution."[15] Sumner, senator from Massachusetts from 1851 to 1874, maintained that the Civil War in particular awoke the republican guarantee, which "now comes forward with a giant's power" to compel the Reconstruction projects of emancipation, education, and enfranchisement.[16]

The Sixth Circuit is hardly alone in perceiving republican needs for excellent and equitable public education while saying little else on the subject. Scholars have argued that the republican guarantee is arguably the "most obvious constitutional provision to anchor a constitutional right to education."[17] Federal and state judges

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[9] *Gary B. I*, 957 F.3d at 662.

[10] *Id.*

[11] *Id.* at 644–45 (quoting Plyler v. Doe, 457 U.S. 202, 221 (1982)).

[12] *Id.* at 640 (citing Wisconsin v. Yoder, 406 U.S. 205 (1972); Prince v. Massachusetts, 321 U.S. 158 (1944); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923)); *id.* at 645 (citing Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)); *id.* at 645–46 (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35–37 (1973)); *id.* at 646–47 (citing *Plyler*, 457 U.S. at 221).

[13] *See id.* at 649–52, 654.

[14] U.S. CONST. art. IV, § 4.

[15] *Gary B. I*, 957 F.3d at 650 (internal citation and quotation marks omitted).

[16] *See* CONG. GLOBE, 40th Cong., 1st Sess. 614 (1867); *see also* WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 188, 290–92 (1972); Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 541–43 (1962).

[17] *E.g.*, Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. 1059, 1072 (2019) [hereinafter Black, *Fundamental Right*]; *see* Derek W. Black, *Implying a Federal Constitutional Right to Education*, *in* A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY 135, 149–50 (Kimberly Jenkins Robinson ed., 2019) [hereinafter FEDERAL RIGHT TO EDUCATION]; Peggy Cooper Davis, *Education for Sovereign People* [hereinafter Davis, *Education for Sovereign People*], *in* FEDERAL RIGHT TO EDUCATION, *supra*, at 164, 179–80; Kara A, Millonzi, *Education as a Right of National*

too have proclaimed that education is essential to republican government.[18] Beyond this exhortation, however, the reasons given and the references to republicanism have remained general. Meanwhile, the inequities and insufficiencies of American public education worsen,[19] accentuated by racial, wealth, and other gaps in access to safe, high-quality learning during the COVID-19 pandemic and by our susceptibility to deep fakes, "fake news," and the dangers of conspiracy thinking.[20]

Citizenship Under the Privileges or Immunities Clause of the Fourteenth Amendment, 81 N.C. L. REV. 1286, 1286, 1303–09 (2003).

[18] *E.g.*, Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 469 (1988) (Marshall, J., dissenting); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 278 (1988) (Brennan, J., dissenting); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986); Wisconsin v. Yoder, 406 U.S. 205, 221 (1972); Meyer v. Nebraska, 262 U.S. 390, 400 (1923); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 205–06 (Ky. 1989) (citations omitted); Hartzell v. Connell, 679 P.2d 35, 39–41 (Cal. 1984); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 94–95 (Wash. 1978); Serrano v. Priest, 487 P.2d 1241, 1256–58 (Cal. 1971).

[19] *See, e.g.*, DEREK W. BLACK, SCHOOLHOUSE BURNING: PUBLIC EDUCATION AND THE ASSAULT ON AMERICAN DEMOCRACY 36–55, 226–50 (2020) [hereinafter BLACK, SCHOOLHOUSE BURNING] (discussing contemporary crises facing public schools, especially from privatization advocates); Kristi L. Bowman, *The Failure of Education Federalism*, 51 U. MICH. J.L. REFORM 1, 11 (2017) (citing Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118, 1181 (2014)) ("[I]t is not only state legislatures but also state courts across the country that appear to be increasingly amenable to a skin-and-bones night watchman state in public education."); Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 113–15, 119–20 (2004); Colin M. Macleod, *Just Schools and Good Childhoods: Non-preparatory Dimensions of Educational Justice*, 35 J. APPLIED PHIL. 76, 77 (2018) (citation omitted); Seth Moglen, *Sharing Knowledge, Practicing Democracy: A Vision for the Twenty-First-Century University*, *in* EDUCATION, JUSTICE, AND DEMOCRACY 267, 267 (Danielle Allen & Rob Reich eds., 2013) [hereinafter EDUCATION, JUSTICE, AND DEMOCRACY] ("Although democracy is a foundational value in our society, we live at a moment of widespread pessimism about its effective, meaningful practice in the United States."); Kimberly Jenkins Robinson, Fisher*'s Cautionary Tale and the Urgent Need for Equal Access to an Excellent Education*, 130 HARV. L. REV. 185, 205–11 (2016) [hereinafter Robinson, Fisher*'s Cautionary Tale*]; Kimberly Jenkins Robinson, *No Quick Fix for Equity and Excellence: The Virtues of Incremental Shifts in Education Federalism*, 27 STAN. L. & POL'Y REV. 201, 202–04 (2016).

[20] *See, e.g.*, JOEL BREAKSTONE ET AL., STUDENTS' CIVIC ONLINE REASONING: A NATIONAL PORTRAIT 4–5, 26–27 (2019), https://purl.stanford.edu/gf151tb4868 [https://perma.cc/2NHQ-M9N2]; Kinga Bierwiaczonek, Jonas R. Kunst, & Olivia Pich, *Belief in COVID-19 Conspiracy Theories Reduces Social Distancing Over Time*, 12 APPLIED PSYCH.: HEALTH & WELL-BEING 1270, 1280–81 (2020); Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753, 1771–86 (2019); Tia Sherèe Gaynor & Meghan E. Wilson, *Social Vulnerability and Equity: The Disproportionate Impact of COVID-19*, 80 PUB. ADMIN. REV. 832, 833 (2020); Mordechai Gordon, *Lying in Politics: Fake News, Alternative Facts, and the Challenges for Deliberative Civics Education*, 68 EDUC. THEORY 49, 51, 60–64 (2018); Clarence Gravlee, *Systemic Racism, Chronic Health Inequities, and COVID-19: A Syndemic in the Making?*, 32

In this Article, I confront our refusals to delve deeper. We conventionally teach that republican guarantee claims raise political questions and thus are not justiciable. In Part I, however, I argue that we are wrong to do so, offering four arguments. First, this conventional teaching is based on a misinterpretation of *Luther v. Borden*, which held not that all republican guarantee claims raise nonjusticiable political questions but that the Supreme Court would defer to its coordinate branches in deciding which of two competing state governments was legitimate.[21] Second, although the Court's decision in *Baker v. Carr* rightly held that redistricting claims are justiciable, the six factors it gifted us for discerning when a question is "political" are self-negating and on their own should not bar consideration of the republican guarantee.[22] Third, the political question doctrine is, at least formally, premised on a false divide between what is "political" and what is "judicial." Fourth, to the extent that the doctrine's motivating concerns are that judges might not competently decide certain disputes, such as disputes over educational rights, those concerns are misplaced. Ultimately, the barrier that justiciability seems to pose is superficial, merely concealing a weightier challenge.

Fundamentally, we ignore the republican guarantee because it imposes an obligation to bring about a demanding republicanism. Thus, in Part II, I reinterpret the republican guarantee as a guarantee of nondomination. Nondomination is freedom from being "subject to the will of others."[23] Whereas noninterference refers to freedom from *actual* interference with one's choices, nondomination refers to freedom from *potential* interference when that potential is not suitably constrained. "If someone is in a position to restrain and coerce you without being contested, then you are in their power regardless of whether they happen to leave you be."[24] The upshot is that nondomination is a more robust kind of liberty than mere noninterference. I explain how recent scholarship has revived and refined an understanding of republicanism organized around nondomination, a more compelling vision than one premised on preserving certain constitutional structures for their own sakes. Moreover, I draw on nondomination's deep roots in the United States' abolition, labor, and civil rights traditions to explain some of nondomination's key characteristics: it is freedom not *from* law but *through* law; it is materialist freedom, presupposing the resources to

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AM. J. HUM. BIOLOGY e23482, at 5 (2020); Roland Imhoff & Pia Lamberty, *A Bioweapon or a Hoax? The Link Between Distinct Conspiracy Beliefs about the Coronavirus Disease (COVID-19) Outbreak and Pandemic Behavior*, 11 SOC. PSYCH. & PERSONALITY SCI. 1110, 1114, 1116–17 (2020); Alina Tugend, *These Students Are Learning About Fake News and How to Spot It*, N.Y. TIMES (Feb. 20, 2020), https://www.nytimes.com/2020/02/20/education/learning/news-literacy-2016-election.html [https://perma.cc/A9T9-XRPL].

[21] 48 U.S. (7 How.) 1, 39–44 (1849).

[22] 369 U.S. 186, 217 (1962).

[23] PHILIP PETTIT, ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY 7 (2012) [hereinafter PETTIT, ON THE PEOPLE'S TERMS].

[24] LENA HALLDENIUS, MARY WOLLSTONECRAFT AND FEMINIST REPUBLICANISM 15 (2015) [hereinafter HALLDENIUS, MARY WOLLSTONECRAFT].

make it effective; and it is universal, presuming the equal status of all members of the would-be republic. In doing so, I try to show how we can understand the republican guarantee as establishing an antidomination duty, satisfied by eliminating domination, or at least minimizing it, and achieving nondomination.

Finally, in Part III, I explain how education, as a form of antidomination, is a necessary component of the republican guarantee. Robust public education is essential to negating two specific costs of domination. There are psychological costs, such as failures to understand one another as equals, as well as material costs, such as a lack of knowledge with which to resist domination. I briefly clarify that the goal of republican education goes beyond merely inculcating civic virtue and requires equipping students with the capability to resist domination when other institutions fail to prevent it. In addition, I show how the convergence of equity and adequacy in school reform evinces a growing appreciation for education's antidomination role. I then conclude this Article with an acknowledgment of the conceptual challenge that an antidomination duty presents. Specifically, it constitutes an ongoing obligation; even if we successfully redress one violation, there might well be many others outstanding. I describe the genuine difficulty of making laws to keep up with an ongoing obligation, one that seems perfectionist, but I offer several responses and proposals to meet the challenge.

My aims for this Article are threefold. First, I seek to show why our courts have so far declined to hold that education is a fundamental right under the republican guarantee. The reason that I give is not the usual one; it is less that the guarantee is not justiciable than that we, and our courts, sense how challenging it will be to deliver on the guarantee's true purpose. Second, I reenvision that true purpose as an antidomination duty, a kind of ratchet toward nondomination. Third, I propose how excellent, equitable public education itself comprises antidomination. Education, in this view, is not merely a fundamental right—if "right" can begin to convey all that education is—but rather the most fundamental right, without which it is not possible to vote or even to understand what it means to vote.[25]

I. A COURT MAY MAKE A REMARK

The republican guarantee sits at a fulcrum in the United States Constitution. Between Articles I, II, and III, which establish our national political institutions, and Articles V, VI, and VII, which set out the document's instrumental character, Article IV lays out substantive duties between the nation and its states.[26] Article IV, Section 4 provides:

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[25] *See* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (observing that a right is fundamental at the very least when "preservative of all rights").

[26] *E.g.*, U.S. CONST. art. IV, § 1 (requiring states to give "full faith and credit" to other states' laws); *id.* § 2 (guaranteeing citizens' "privileges and immunities"); *id.* § 3 (regulating state admission to the union and congressional control of national land).

> The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.[27]

Section 4 links internal to external: republicanism to national self-defense.[28] This reflects an old, twofold understanding of "a free people": free only when exercising independence from foreign powers and when exercising collective self-government, its constituents undominated.[29]

Lawmakers and scholars have long contested what the republican guarantee entails. Throughout the nineteenth century, Congress debated how much authority the guarantee afforded for restructuring states. Proslavery legislators contended that it merely locked in eighteenth-century governance practices; prohibited monarchy; protected wealthy Anglo-Americans' rights; or, even more perversely, required the federal government to quell enslaved Americans' uprisings.[30] Antislavery legislators argued that the guarantee required nothing less than abolition, universal public education, and extending suffrage to Black people (or at least to Black men).[31] Courts too weighed in, interpreting republican government as securing (or not securing) specific rights, like rights to assemble, to petition, to vote, and to be treated as equals under law.[32] Lawmakers relied on originalist as well as dynamic modes of constitutional interpretation.[33]

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[27] *Id.* § 4.

[28] *Id.*

[29] *See, e.g.*, QUENTIN SKINNER, MACHIAVELLI: A VERY SHORT INTRODUCTION 62–63 (2d ed. 2001); QUENTIN SKINNER, 1 THE FOUNDATIONS OF MODERN POLITICAL THOUGHT 157 (1978).

[30] WIECEK, *supra* note 16, at 291.

[31] ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 30, 58 (2019); Bonfield, *supra* note 16, at 538–47 (discussing congressional efforts to use the republican guarantee to reconstruct the South); Davis, *Education for Sovereign People*, *supra* note 17, at 171–72, 179–81 (discussing Reconstruction arguments for education as a corrective to the damage done by chattel slavery); Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 377–78 (2006) (discussing congressional efforts to use the republican guarantee to establish universal public education).

[32] *E.g.*, United States v. Cruikshank, 92 U.S. 542, 552, 555 (1875) (citing Minor v. Happersett, 88 U.S. (21 Wall.) 162, 178 (1874)) (arguing that republican government implies equal rights, rights to assemble and petition, and yet not the right to vote).

[33] *Compare* Salmon P. Chase, Address to the Southern and Western Liberty Convention, in Cincinnati, Ohio (June 11, 1845) ("We insist that from the assembling of the First Congress in 1774, until its final organization under the existing constitution in 1789, the American Government was anti-slavery in its character and policy."), *and* ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 73–74 (1970) [hereinafter FONER, FREE SOIL] (describing Chase's widely adopted antislavery constitutionalism), *with* Plessy v. Ferguson, 163 U.S. 537, 563–64 (1896) (Harlan, J., dissenting)

And although moderate free soil and non-extension doctrine overtook a more demanding republicanism as the main antislavery interpretive mode,[34] the republican guarantee continued to be a "lodestar" during Reconstruction for developing education and voting laws.[35]

Scholars in turn have interpreted the guarantee to protect individual democratic participation rights;[36] to protect popular sovereignty;[37] to secure majority rule;[38] to curb majority rule's excesses;[39] to insulate states from federal regulation;[40] to secure some

("[A] system [that restricts liberty on the basis of race] is inconsistent with the [republican] guarantee . . . ."), *and* Bonfield, *supra* note 16, at 541–42, 541 n.126 (describing Charles Sumner's and others' dynamic understanding of republicanism).

[34] *See* DAVID W. BLIGHT, FREDERICK DOUGLASS: PROPHET OF FREEDOM 214 (2018) (noting free soil ideology's ascendance over the view that the pre-Reconstruction U.S. Constitution required abolishing slavery everywhere); FONER, FREE SOIL, *supra* note 33, at 73–76. Legislators did rely on the republican guarantee, however, to lobby for and ratify the Reconstruction Amendments. *See* JACOBUS TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 161–62 (1951); David S. Louk, *Reconstructing the Congressional Guarantee of Republican Government*, 73 VAND. L. REV. 673, 715–18 (2020).

[35] Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735, 784, 775–94 (2018) [hereinafter Black, *Constitutional Compromise*] (discussing congressional conditioning of states' readmission to the union on their constitutional commitments to education).

[36] 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, 602–03 (1992); Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 851, 867 (1994) [hereinafter Chemerinsky, *Cases Under the Guarantee Clause*].

[37] WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 24 (2001); Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 749 (1994); *see* Peggy Cooper Davis, *Post-Colonial Constitutionalism*, 44 N.Y.U. REV. L. & SOC. CHANGE 1, 9 (2019) (arguing that the republican guarantee "can be understood to require a degree of family sovereignty as a means of assuring the people's sovereignty").

[38] Gabriel J. Chin, *Justifying a Revised Voting Rights Act: The Guarantee Clause and the Problem of Minority Rule*, 94 B.U. L. REV. 1551, 1562–64 (2014); Fred O. Smith, Jr., *Due Process, Republicanism, and Direct Democracy*, 89 N.Y.U. L. REV. 582, 640–41 (2014); Fred O. Smith, Jr., *Awakening the People's Giant: Sovereign Immunity and the Constitution's Republican Commitment*, 80 FORDHAM L. REV. 1941, 1954–55 (2012).

[39] Hans A. Linde, *When Is Initiative Lawmaking Not "Republican Government"?*, 17 HASTINGS CONST. L.Q. 159, 163–72 (1989). *But see* Eoin Daly, *A Republican Defence of the Constitutional Referendum*, 35 LEGAL STUD. 30, 47–54 (2015) (arguing that direct democracy can, but does not necessarily, comport with republican constitutionalism).

[40] Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 36, 70 (1988); *see* Ryan C. Williams, *The "Guarantee" Clause*, 132 HARV. L. REV. 602, 611–12 (2018) (reading "guarantee" as an international law term of art that might restrict standing to state governments).

states against the deleterious effects of other states' antidemocratic governance;[41] to prevent elite entrenchment and political lockup;[42] to enable legislative deterrence of vote suppression;[43] to guard against not only eradication of republican government but also its "death by a thousand cuts";[44] or to fulfill whatever commitments a reader wants from the clause.[45] Many of these interpretations might be right, if less for their own sake than for their coincidence with a commitment to nondomination. Some structural insights from the scholarship are independently valuable. For example, the guarantee does not restrict republicanism either to the nation or to the states, and so is best understood as securing at least two layers of republics.[46] In addition, the guarantee obligates "[t]he United States,"[47] thus not one or two branches but all three "in their appropriate spheres."[48]

But lawmakers and scholars alike have sustained a mistaken view that courts cannot resolve disputes under the republican guarantee, even when they recognize its relevance.[49] Such claims raise political questions, the conventional view holds,

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[41] Carolyn Shapiro, *Democracy, Federalism, and the Guarantee Clause*, 62 ARIZ. L. REV. 183, 193–97 (2020).

[42] Ari J. Savitzky, *The Law of Democracy and the Two* Luther v. Borden*s: A Counter-history*, 86 N.Y.U. L. REV. 2028, 2065–68 (2011); Jarret A. Zafran, *Referees of Republicanism: How the Guarantee Clause Can Address State Political Lockup*, 91 N.Y.U. L. REV. 1418, 1449–55 (2016).

[43] Cormac H. Broeg, *Waking the Giant: A Role for the Guarantee Clause Exclusion Power in the Twenty-First Century*, 105 IOWA L. REV. 1319, 1358–62 (2020) (arguing that the republican guarantee allows Congress to exclude, or refuse to seat, representatives who benefited from vote suppression efforts).

[44] Jacob M. Heller, *Death by a Thousand Cuts: The Guarantee Clause Regulation of State Constitutions*, 62 STAN. L. REV. 1711, 1716–17, 1727–34, 1748–49 (2010).

[45] Richard L. Hasen, *Leaving the Empty Vessel of "Republicanism" Unfilled: An Argument for the Continued Nonjusticiability of Guarantee Clause Cases*, *in* THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES 75, 82 (Nada Mourtada-Sabbah & Bruce E. Cain eds., 2007) ("'Republicanism' is an empty vessel to be filled by whatever individual right the particular writer desires the courts to enforce.").

[46] *See* Shapiro, *supra* note 41, at 194 (citing WIECEK, *supra* note 16, at 26, 73). Indeed, through vote suppression, gerrymandering, and other devices, elite capture of one state government can have adverse "spillover" effects on other states, not least outsized power to oppose national and international initiatives. *See id.* at 222–27.

[47] U.S. CONST. art. IV, § 4.

[48] Bonfield, *supra* note 16, at 523; *see* Louk, *supra* note 34, at 699 (describing each branch as a "guarantor" of republican government); *cf.* Gwynne Skinner, *Misunderstood, Misconstrued, and Now Clearly Dead: The Political Question Doctrine as a Justiciability Doctrine*, 29 J.L. & POL. 427, 428 (2014) ("It is more accurate to say that when the Court has discussed a 'political question,' it has referred to decisions appropriately made by another branch, i.e., within that branch's authority.").

[49] *See, e.g.*, Rucho v. Common Cause, 139 S. Ct. 2484, 2506 (2019) (citing Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912)) ("This Court has several times concluded, however, that the Guarantee Clause does not provide the basis for a justiciable claim."); Black, *Fundamental Right*, *supra* note 17, at 1072 ("[A]s neatly as an education right might

and thus are not justiciable. Often courts have summarily dismissed them, providing scant rationale; what reasoning they do provide tends to suggest a perceived mismatch between the character of a claim and the proper role of the court.[50]

Although legislative and executive actors have wide latitude to provide for education under the guarantee, any general theory for doing so should confront our judicial refusals to resolve republican guarantee disputes. Therefore, in this Part, I raise four arguments against nonjusticiability: (1) the political question doctrine, at least vis-à-vis the republican guarantee, rests on misread precedent; (2) the nonjusticiability considerations raised in *Baker v. Carr* are inconsistent and do not bar republican guarantee claims; (3) the political question doctrine falsely divides the "judicial" from the "political"; and (4) judicial incompetence concerns are overstated and, more importantly, beside the point.

A. Misinterpreted Republican Guarantee Precedent

The doctrinal argument that courts cannot resolve republican guarantee claims is based mainly on a misreading of the Supreme Court's decision in *Luther v. Borden*.[51] The case concerned a crisis in Rhode Island between two state governments, each claiming to be legitimate.[52] Between 1841 and 1842, Thomas Wilson Dorr and other Rhode Islanders rebelled against their state government, which had maintained its colonial charter as its constitution and continued to deny voting rights to most of its citizens.[53] The Dorr Rebellion briefly managed to set up a new state government and eventually ratified a new state constitution, but not before triggering a little trespass dispute with a big upshot.[54]

In 1842, one Martin Luther, a rebellion supporter, sued one Luther Borden for leading a posse of rebellion opponents into his house, searching for incriminating evidence, and harassing his family.[55] Borden argued that he had acted under the charter government's martial law, to which Luther responded that the Dorrite government was the true one.[56] The case thus appeared to turn on which government was legitimate. The Supreme Court decided, however, that it could not answer this question.[57] Roger Taney, eventual author of *Dred Scott v. Sandford*, wrote the opinion,

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fit within the Guarantee Clause, the prospects of judicially enforcing a right to education through the Guarantee Clause are relatively bleak given the Court's general precedent in the area."); Hasen, *supra* note 45, at 75; Shapiro, *supra* note 41, at 184.

[50] *See* Chemerinsky, *Cases Under the Guarantee Clause*, *supra* note 36, at 849, 852–53.

[51] 48 U.S. (7 How.) 1 (1849).

[52] *Id.* at 34–38.

[53] WIECEK, *supra* note 16, at 85–110; *see also* GEORGE DENNISON, THE DORR WAR: REPUBLICANISM ON TRIAL, 1831–1861, 13–15, 32–109 (1976).

[54] DENNISON, *supra* note 53, at 32–109; WIECEK, *supra* note 16, at 85–110; *see also* Shapiro, *supra* note 41, at 197–99.

[55] DENNISON, *supra* note 53, at 12–13; WIECEK, *supra* note 16, at 113–14.

[56] WIECEK, *supra* note 16, at 114–15.

[57] *Luther*, 48 U.S. at 42–47.

arguing that Congress alone could determine which government was legitimate, and Congress had not done so.[58] Taney then assumed anyway that the charter government was legitimate and upheld the circuit court's decision in favor of Borden.[59]

In *Luther*, the Court implied that "political" power differs from "judicial" power, but it defined neither.[60] Nor did it explain what makes a question "political" or "judicial."[61] State courts, Taney ventured, had not yet recognized the question of which of multiple state governments was legitimate "as a judicial one."[62] Indeed, a *state* court could not do so, because "[j]udicial power presupposes an established government capable of enacting laws and enforcing [them], and of appointing judges to expound and administer them."[63] But Taney justified the *federal* courts' own inaction not on notions of "judicial" power but on the fact that neither Congress nor the president had interceded first.[64]

Although the Court later invoked *Luther* to argue that all republican guarantee claims are not justiciable,[65] the decision held at most that the Court would not weigh in on which state government was legitimate until other branches had.[66] The Court first botched this point in *Taylor v. Beckham*, while considering which candidates in a disputed Kentucky election had been rightfully sworn in.[67] The Court reached the merits, determining that "no exigency [had] arisen" requiring the federal government to intercede under the republican guarantee, but the Court opined also that it "must decline to take jurisdiction."[68] Notwithstanding its confused decision,[69] the Court misread *Luther* to have "long ago settled" that the guarantee is not justiciable.[70] The Court then propped up this misreading in *Pacific States Telephone & Telegraph Co. v. Oregon*, which concerned an Oregon telecommunications tax enacted by ballot initiative.[71] The Court rejected an argument that ballot initiatives violated the

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[58] *Id.* at 42.

[59] *Id.* at 45–47. Taney's assumption rested on then-president John Tyler's empty pledge to send federal troops to support the original charter government. *Id.* at 44; *see* DENNISON, *supra* note 53, at 71–73; WIECEK, *supra* note 16, at 100–10, 117–18.

[60] *See Luther*, 48 U.S. at 39–44.

[61] *See id.*

[62] *Id.* at 39.

[63] *Id.* at 40.

[64] *See id.* at 42–44.

[65] *E.g.*, Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 143–48 (1912); Taylor v. Beckham, 178 U.S. 548, 578–81 (1900).

[66] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 118 n.* (1980); Bonfield, *supra* note 16, at 535; Chemerinsky, *Cases Under the Guarantee Clause*, *supra* note 36, at 861–62.

[67] *Taylor*, 178 U.S. at 573–76.

[68] *Id.* at 580.

[69] *See* Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1932–33 n.129 (2015) (pointing out conflicting interpretations of *Taylor* as decided on the merits or on jurisdiction).

[70] *See Taylor*, 178 U.S. at 578.

[71] Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 133–36 (1912).

republican guarantee but insisted nonetheless that adjudicating the case would invite countless challenges to state governance practices.[72] Holding that the guarantee presents only "political and governmental" questions, the Court relied on *Taylor*'s gloss of *Luther* and explicitly refused to consider intervening precedents.[73]

Those intervening, post–Civil War cases undermine interpretations of *Luther* that forbid courts from resolving republican guarantee claims. In *Texas v. White*, for example, the Court held that it had jurisdiction over a disputed bond sale by Texas's wartime government.[74] That government was illegitimate, the Court reasoned, because the state could not actually secede from the union.[75] Congress, therefore, met its obligation under the republican guarantee to fix Texas's "broken relations . . . with the Union" by establishing a new, postwar government.[76]

In *Minor v. Happersett*, the Court advanced a substantive, albeit miserly, interpretation of the republican guarantee, holding that it did not protect women's voting rights.[77] Although the guarantee "necessarily implies a duty on [states]" to provide republican government, wrote Chief Justice Waite for the Court, it merely secured whatever rights had existed when states ratified the Constitution.[78]

Then, in *United States v. Cruikshank*, the Court carried this miserly interpretation forward to even more grotesque effect.[79] Another Waite decision, *Cruikshank* overturned the convictions of perpetrators of the Colfax massacre,[80] the ultimately "unpunished slaughter" of more than sixty-two African Americans by White supremacists in Colfax, Louisiana.[81] Waite interpreted various constitutional rights as arising from the republican guarantee and, as in *Minor*, emphasized the states' duties to secure republican government in the first instance.[82] Among the decision's more

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[72] *Id.* at 136–39, 141–42.

[73] *Id.* at 151; *see id.* at 148 ("We do not stop to cite other cases which indirectly or incidentally refer to the [republican guarantee] . . . .").

[74] Texas v. White, 74 U.S. (7 Wall.) 700, 726–32 (1869).

[75] *Id.* at 721, 726.

[76] *Id.* at 727–28; *see also* WIECEK, *supra* note 16, at 233–37 (discussing the Supreme Court's "lassitude" in setting out standards for republicanism in *Texas v. White*); Louk, *supra* note 34, at 718–22 (interpreting *Texas v. White* as both judicial engagement with the republican guarantee and deference to Congress).

[77] Minor v. Happersett, 88 U.S. (21 Wall.) 162, 178 (1874). Nor is the right to vote a Fourteenth Amendment privilege or immunity, the Court opined, conceding that women "are persons" and thus "may be citizens" under that Amendment. *Id.* at 165, 170–73.

[78] *Id.* at 175–77.

[79] 92 U.S. 542 (1875).

[80] *Id.* at 556–57, 559.

[81] CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION 251, 265–66 (2008); *see* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, 531 (1988) ("[*Cruikshank*] rendered national prosecution of crimes committed against blacks virtually impossible, and gave a green light to acts of terror where local officials either could not or would not enforce the law.").

[82] *Cruikshank*, 92 U.S. at 552–55.

puzzling aspects, however, is Waite's further argument that "the people must look to the States" to enforce federal rights.[83] "The only obligation resting upon the United States," he wrote, "is to see that the States do not deny [their citizens'] right[s]."[84] Yet Waite did not explain how the federal government could fulfill its "only obligation" short of interceding and either coercing or bypassing states when they would not—and did not[85]—effectuate rights.

As the nineteenth century came to a close, the Court continued to adjudicate disputes over the republican guarantee's requirements.[86] Although the Court has never settled on an interpretation of the guarantee's substance,[87] the lesson here is that for much of its history, the Court has generally treated the guarantee as justiciable. It has declined to do so when relying on its misinterpretation of *Luther*.[88] In recent years, moreover, scholars have observed the political question doctrine's decline,[89] and the Court itself has acknowledged that the doctrine does not bar all republican guarantee claims.[90]

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[83] *Id.* at 552.

[84] *Id.* at 555.

[85] *See, e.g.*, MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 10–17, 62–69, 385–442 (2004).

[86] *E.g.*, Att'y Gen. of Mich. *ex rel.* Kies v. Lowrey, 199 U.S. 233, 239 (1905); Forsyth v. Hammond, 166 U.S. 506, 519 (1897); *In re* Duncan, 139 U.S. 449, 461 (1891). Justice O'Connor acknowledged these cases on the republican guarantee's merits in her opinion in *New York v. United States*. 505 U.S. 144, 184 (1992) (citations omitted) ("In a group of cases decided before the holding of *Luther* was elevated into a general rule of nonjusticiability [in *Pacific States*], the Court addressed the merits of claims founded on the Guarantee Clause without any suggestion that the claims were not justiciable.").

[87] *See, e.g.*, WIECEK, *supra* note 16, at 238–43, 254–63; Louk, *supra* note 34, at 677–78.

[88] *E.g.*, Rucho v. Common Cause, 139 S. Ct. 2484, 2506 (2019) (citing Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912)). The Supreme Court's decision in *Rucho* can be understood as limited to partisan gerrymandering, which the Court has long considered controversial. *See* Gill v. Whitford, 138 S. Ct. 1916, 1926 (2018). Moreover, to consider the claims in *Rucho* as nonjusticiable because political is impossible to square with other recent political decisions. *See generally, e.g.*, Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020); Dep't of Com. v. New York, 139 S. Ct. 2551 (2019); Shelby Cnty. v. Holder, 570 U.S. 529 (2013); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012); Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009); Crawford v. Marion Cnty. Elec. Bd., 553 U.S. 181 (2008); Bush v. Gore, 531 U.S. 98 (2000); *cf.* Laurence Claus, *A Republic, If the Courts Can Keep It?*, 2020 WIS. L. REV. 395, 409 (2020) (contending that "[t]he Court has been finding political questions in all the wrong places," for example in *Rucho* and not in cases like *Shelby County*).

[89] *E.g.*, Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 336 (2002); Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1459 (2005) (noting consensus that "political questions are in serious decline" because they are "clearly at odds with the [Court's recent turn to] judicial supremacy"); Matthew L. M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627, 674 (2006).

[90] *E.g.*, *New York*, 505 U.S. at 185 (citing Reynolds v. Sims, 377 U.S. 533, 582 (1964))

B. The Self-Negating Political Question Doctrine

The Supreme Court's formulation of "political" questions in *Baker v. Carr* likewise cannot bar republican guarantee claims.[91] With *Baker*, the Court arguably launched the Reapportionment Revolution,[92] overturning its refusal to hear congressional malapportionment claims in *Colegrove v. Green*.[93] Writing for the Court in *Colegrove*, Justice Frankfurter opined famously that to resolve such claims "would cut very deep into the very being of Congress" and that courts "ought not to enter this political thicket."[94] But in *Baker*, the Court defied Justice Frankfurter's admonition, holding that such claims are justiciable.[95] Although in the opinion Justice Brennan left the Court's misreading of *Luther* in place,[96] he nonetheless "consider[ed] the contours of the 'political question' doctrine" in order to show how it did not apply.[97]

Under Justice Brennan's formulation, questions are "political" where their resolution (1) is committed to another branch by constitutional text, (2) is precluded by "a lack of judicially discoverable and manageable standards," (3) would require "an initial policy determination of a kind clearly for nonjudicial discretion," (4) would require disrespecting another branch, (5) would require "unquestioning adherence" to prior policy determinations, or (6) would result in conflicting resolutions by different branches.[98] These considerations did not control *Baker*'s outcome, but they comprise maneuvers with which the Court can avoid cases or prescribe other branches' authority.[99]

The *Baker* considerations do not apply to republican guarantee claims, to the extent that they make sense at all. Considerations one and six (constitutional text and interbranch conflict) can apply at most when text provides that courts *shall not*

(observing that "perhaps not all claims under the [republican guarantee] present nonjusticiable political questions").

[91] 369 U.S. 186, 209–10 (1962).

[92] *See, e.g.*, Avery v. Midland Cnty., 390 U.S. 474, 475–76, 481 (1968) (prescribing "one person, one vote" for county and local government districting); *Reynolds*, 377 U.S. at 577–78, 586–87 (same for state legislature districting); Wesberry v. Sanders, 376 U.S. 1, 5–7, 18 (1964) (same for congressional districting); Gray v. Sanders, 372 U.S. 368, 381 (1963) (devising the "one person, one vote" standard). I write "arguably," because two years prior to *Baker*, the Court decided *Gomillion v. Lightfoot*, holding that racial gerrymanders are justiciable and violate the Fifteenth Amendment. 364 U.S. 339, 347–48 (1960).

[93] 328 U.S. 549, 550–51, 556.

[94] *Id.* at 556.

[95] *Baker*, 369 U.S. at 187–95, 197–98.

[96] *Id.* at 219–23; *see* Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 106 & n.15 (2000).

[97] *Baker*, 369 U.S. at 209–10.

[98] *Id.* at 217.

[99] *See* Grove, *supra* note 69, at 1914 (observing that, in *Baker*, the Court "claimed the power to decide whether, and the extent to which, any other branch may be involved in constitutional decisionmaking").

consider a given issue; otherwise, these considerations challenge the entirety of judicial review.[100] And as mentioned above, the republican guarantee itself attaches an obligation to "the United States," meaning all branches, not just one or two.[101] Consideration two (manageable standards) would likewise vitiate the entire judicial enterprise if taken seriously, given the inevitable lack of known standards prior to adjudicating a given issue or even to establishing a court to adjudicate it.[102] Considerations three, four, and five (policy determinations and interbranch respect) in fact weigh in favor of adjudication. Courts have made and will continue to make law and policy, interbranch contestation is the point of mixed government, and respect and reputation should guide *how*, not *whether*, courts decide cases.[103] Uncritically reciting the existence of *Baker* "political" questions, even more than misreading *Luther*, amounts only to deceiving ourselves about how courts and governments really function. We should take care not to do so and unwittingly rule out republican guarantee claims.

C. The False Political-Judicial Divide

Beyond mistaken doctrine, the formal distinction between the "political" and the "judicial" misrepresents reality. The distinction's apparent import is that courts, because they are "judicial," ought to decide "judicial" claims but not "political" ones.[104] The argument depends on a premise that courts are not also political, a premise too rarely interrogated.[105] Even the doctrine's critics consistently, perhaps habitually,

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[100] *See, e.g.*, Campaign for Quality Educ. v. State, 209 Cal. Rptr. 3d 888, 926 (Dist. Ct. App. 2016) (Liu, J., dissenting from denial of review) ("The potential for conflict between courts and the [other] branches is inherent in the power of judicial review."); Martin H. Redish, *Judicial Review and the Political Question*, 79 NW. U. L. REV. 1031, 1060–61 (1985) (rejecting the political question doctrine's "asserted rationales" as incoherent, not least because courts' avoidance of "political" questions is self-negating).

[101] *See supra* notes 47–48 and accompanying text; *accord* Chemerinsky, *Cases Under the Guarantee Clause*, *supra* note 36, at 871.

[102] *See* Chemerinsky, *Cases Under the Guarantee Clause*, *supra* note 36, at 871 ("[T]here is no reason why 'republican form of government' is more lacking in standards than 'due process' or 'equal protection.'"); *accord* McConnell, *supra* note 96, at 105–07.

[103] *See, e.g.*, MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 17–36 (1981) (describing courts' administrative functions, especially social control and conflict resolution, as well as courts' lawmaking functions, especially common law judging and ordering remedies); THE FEDERALIST NO. 51 (James Madison) (describing the value of interbranch contestation and of democratic contestation more broadly). For further arguments on how *Baker* does not foreclose republican guarantee questions, see Chemerinsky, *Cases Under the Guarantee Clause*, *supra* note 36, at 872–74.

[104] *See, e.g.*, Rucho v. Common Cause, 139 S. Ct. 2484, 2500 (2019); Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 133 (1912). *But cf.* Barkow, *supra* note 89, at 245–46 ("[Political questions] become 'political' [merely] in the sense that, after that determination, their resolution is left to the political branches.").

[105] *Cf.* JOHN DEWEY, DEMOCRACY AND EDUCATION 168 (1916) [hereinafter DEWEY, DEMOCRACY AND EDUCATION] ("Words, the counters for ideals, are, however, easily taken for ideas.").

describe "the political branches" as excluding the judiciary.[106] But consider the words themselves. In our constitutional lexicon, "legislative," "executive," and "judicial" are of the same ilk,[107] whereas "political"—relating to government or engaging in governance—pertains to all three.[108] The opposite of "political" is "apolitical"—having no relation to government or governance—not "legal," and certainly not "judicial."

In terms of the institutions to which these words refer, the political-judicial divide makes even less sense. In his lectures on law, James Wilson observed:

> [W]e hear the legislature mentioned as the *people's representatives*. The distinction, . . . probably[] not avowed upon reflection, is, that the executive and judicial powers are not connected with the people by a relation so strong, or near, or dear. But[] we should look upon the different parts of government with a just and impartial eye. The executive and judicial powers are now drawn from the same source, are now animated by the same principles, and are now directed to the same ends, with the legislative authority: they who execute, and they who administer the laws, are as much the servants, and therefore as much the friends of the people, as they who make them.[109]

Each branch of government undertakes (1) lawmaking and (2) administration on behalf of the people, deriving its authority to govern from them, and is thus political.[110] The legislative enacts statutes as well as conducts investigations and hearings; the executive issues regulation as well as investigates, adjudicates, and rectifies noncompliance; and the judicial devises, revises, and negates laws as well as resolves individual disputes.[111] Moreover, "[t]he very notion of a countermajoritarian difficulty, long disputed by positive political scientists, presupposes that courts stand courageously

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[106] *E.g.*, JACK M. BALKIN, LIVING ORIGINALISM 242–44 (2011); Chemerinsky, *Cases Under the Guarantee Clause*, *supra* note 36, at 862–63; Redish, *supra* note 100, at 1059–60; Skinner, *supra* note 48, at 431.

[107] *Compare* U.S. CONST. art. I, § 1, *with id.* art. II, § 1, *and id.* art. III, § 1.

[108] Indeed, in *Marbury v. Madison*, the Supreme Court described certain executive powers as "political" because based in "discretion," not because counterpoised to judicial powers. *See* 5 U.S. (1 Cranch) 137, 164–67, 169–70 (1803). Moreover, the Court referred to itself as one of the "political institutions" improved by a written constitution. *See id.* at 178.

[109] JAMES WILSON, *Of Government*, *in* 1 THE WORKS OF JAMES WILSON 293 (Robert Green McCloskey ed., 1967) [hereinafter WORKS OF JAMES WILSON].

[110] *See* ROBERT L. HALE, FREEDOM THROUGH LAW: PUBLIC CONTROL OF PRIVATE GOVERNING POWER 49–54 (1952); Josh Chafetz, *Governing and Deciding Who Governs*, 2015 U. CHI. LEGAL F. 73, 111 (2015) (citation omitted) ("Courts govern all the time, simply because that is what it is to make decisions that control the actions and interactions of others.").

[111] *See* SHAPIRO, *supra* note 103, at 17–21. Along these lines, arguments that "political" means "engaged in lawmaking" fail to account for common law adjudication.

(if unaccountably) apart from society, as a 'they' rather than a 'we.'"[112] What makes each branch political is its representative role, not the manner in which its officers are installed.

Nor should we conflate being political with being partisan. Judges have long cultivated an air of independence from partisan politicking,[113] whether they have succeeded or not.[114] Whether courts can enhance their credibility by being nonpartisan does not absolve them of their duty to resolve all questions put to them by the people, even "political" ones. A sometime author of the political-judicial divide, Chief Justice Marshall nonetheless wrote:

> The judiciary cannot . . . avoid a measure because it approaches the confines of the constitution. . . . With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. . . . Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty.[115]

Some scholars have warned against eliminating "political" questions or resuscitating the republican guarantee, perhaps due to a rise in judicial supremacy and judges' unavoidable, if minimizable, partisanship.[116] Concerns for fairness and effective democratic processes will always be valid. "[W]hen a robust version of judicial interpretive supremacy is combined with a narrow construction of key enumerated powers, there is a serious danger that the Court will disable the government from addressing critical national problems."[117] However, such concerns should lead us not

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[112] Jamal Greene, *(Anti)Canonizing Courts*, 143 DAEDALUS 157, 158 (2014) (citing Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957)).

[113] *See, e.g.*, Colegrove v. Green, 328 U.S. 549, 556 (1946); Giles v. Harris, 189 U.S. 475, 488 (1903) ("Unless we are prepared to supervise [Alabama] voting . . . it seems to us that all that the [voting discrimination] plaintiff could get from equity would be an empty form."). *But cf.* CHRISTOPHER MARLOWE, *Hero and Leander*, *in* THE COLLECTED POEMS OF CHRISTOPHER MARLOWE 193, 204 (Patrick Cheney & Brian J. Striar eds., 2006) ("What virtue is it that is born with us? / Much less can honour be ascribed thereto, / Honour is purchased by the deeds we do.").

[114] *See, e.g.*, Bush v. Gore, 531 U.S. 98, 128 (2000) (Stevens, J., dissenting); Pamela S. Karlan, *Democracy and Disdain*, 126 HARV. L. REV. 1, 13 (2012) ("The Court's dismissive treatment of [the democratic process] raises the question whether, and for how long, the people will maintain their confidence in a Court that has lost its confidence in them and their leaders.").

[115] Cohens v. Virginia, 19 U.S. 264, 404 (1821).

[116] *E.g.*, Hasen, *supra* note 45, at 77; Barkow, *supra* note 89, at 317–35.

[117] Karlan, *supra* note 114, at 69; *cf.* RICHARD THOMPSON FORD, RIGHTS GONE WRONG: HOW LAW CORRUPTS THE STRUGGLE FOR EQUALITY 234–35 (2011) ("[N]othing in the Constitution gives the judiciary exclusive authority over its meaning or enforcement."); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 233–41 (2004) (critiquing contemporary judicial supremacy).

to leave "political" questions unanswered but to invite judges to consider them.[118] Courts must guard their credibility, and when judges, like other representatives, must answer petitions put to them, they risk answering unwisely, even embarrassing themselves or triggering reprisal.[119] "[I]t is surely preferable for conflicts to be stated openly so that the actions of the court can be more fairly evaluated: the policymaking power of the Court hardly vanishes merely because the Court isn't transparent about the implications of its actions."[120]

D. Overstated Judicial Incompetence Concerns

Finally, we give too much credit to judicial incompetence concerns. Courts uninterested in resolving republican guarantee (and other) disputes have long voiced these worries, arguing that they lack the necessary expertise.[121] But judicial incompetence arguments tend to conflate judges' past demonstrated ability to resolve such disputes with judges' actual institutional capabilities and their possible exercise in the future. Consider *Juliana v. United States*, in which a Ninth Circuit Court of Appeals panel held that a lawsuit brought by youth seeking to enjoin the federal government

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[118] *See* Campaign for Quality Educ. v. State, 209 Cal. Rptr. 3d 888, 929 (2016) (Cuéllar, J., dissenting from denial of review) ("[N]ever have [separation of powers] principles meant that we should strain to avoid our responsibility . . . simply because the right at issue touches on concerns the Legislature might ultimately address, or because the task . . . demands careful attention to the proper role of courts as well as our sister branches.").

[119] *See, e.g.*, JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART 164 (2021) [hereinafter GREENE, HOW RIGHTS WENT WRONG]; FRANK LOVETT, A REPUBLIC OF LAW 191–92 (2016) [hereinafter LOVETT, REPUBLIC OF LAW] (observing that however a legislature defines courts' jurisdiction, "[t]he most important challenge will be ensuring that some mechanism exists for holding courts accountable for properly exercising whatever legislative authority they may possess"); Michael S. Kang & Joanna M. Shepherd, *The Long Shadow of* Bush v. Gore*: Judicial Partisanship in Election Cases*, 68 STAN. L. REV. 1411, 1447 (2016) (finding that judges' partisan loyalty "appears to be tempered by the potential for public exposure").

[120] SCOTT E. LEMIEUX & DAVID J. WATKINS, JUDICIAL REVIEW AND CONTEMPORARY DEMOCRATIC THEORY: POWER, DOMINATION, AND THE COURTS 73–74 (2018); *accord* LOVETT, REPUBLIC OF LAW, *supra* note 119, at 171–72; *cf.* Richard L. Hasen, Shelby County *and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. 713, 727 (2014) (critiquing *Shelby County v. Holder* as "audacious, rather than modest" and for "creat[ing] new law without adequate justification which limits congressional power to enforce voting rights").

[121] *E.g.*, Vieth v. Jubelirer, 541 U.S. 267, 277–81 (2004); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 36–37, 41 (1973); Colegrove v. Green, 328 U.S. 549, 553 (1946); *see* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1263 (1978) ("The federal courts comprise a crucial bulwark against evulsive depredations of constitutional values; but against scattered erosion they are relatively powerless."); Julia A. Simon-Kerr & Robynn K. Sturm, *Justiciability and the Role of Courts in Adequacy Litigation: Preserving the Constitutional Right to Education*, 6 STAN. J. C.R. & C.L. 83, 97–103 (2010) (discussing judges' concerns regarding line-drawing and identifying constitutional violations).

"to implement a plan to phase out fossil fuel emissions and draw down excess atmospheric CO_2" was not redressable by Article III judges.[122] The panel contended that "any effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches."[123] Yet the panel did not explain why it lacked the ability to issue any relief at all, even conceding that it could issue an order "goad[ing] the [other] branches into action."[124] Thus, Judge Staton observed in dissent, the panel's "real concerns [lay] not in the judiciary's ability to draw a line between lawful and unlawful conduct, but in our ability to equitably walk the government back from that line without wholly subverting the authority of our coequal branches."[125] Common law judges have great discretion, however, to devise tailored, enforceable remedies without denying that such remedies exist, and an initial lack of standards never stops them from pressing onward, as they must.[126]

Ultimately, incompetence is beside the point. Even if courts were once "not capable of understanding social science facts or overseeing reform processes," those concerns have "largely abated" in light of "overwhelming evidence" to the contrary.[127] Education law scholars, for example, have imagined various models for courts to engage with complex issues like educational adequacy, from overseeing legislatures' "fiduciary" duties to provide education,[128] to serving as a "catalyst" for legislative or executive action,[129] to engaging in a "colloquy" with other branches.[130] Which

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[122] 947 F.3d 1159, 1164–65 (9th Cir. 2020) (internal quotation marks omitted).

[123] *Id.* at 1171.

[124] *See id.* at 1171–73, 1175. *But see id.* at 1175 (Staton, J., dissenting) ("No case can singlehandedly prevent the catastrophic effects of climate change predicted by the government and scientists. But a federal court need not manage all of the delicate foreign relations and regulatory minutiae implicated by climate change to offer real relief, and the mere fact that this suit cannot alone halt climate change does not mean that it presents no claim suitable for judicial resolution.").

[125] *Id.* at 1188 (Staton, J., dissenting).

[126] *See id.* at 1189 ("Courts routinely grant plaintiffs less than the full gamut of requested relief, and our inability to compel legislation . . . speaks nothing to our ability to enjoin the government from exercising its discretion in violation of plaintiffs' constitutional rights."); *see also* Justin Driver, *Rules, the New Standards: Partisan Gerrymandering and Judicial Manageability after* Vieth v. Jubelirer, 73 GEO. WASH. L. REV. 1166, 1182–85 (2005) (arguing that "judicially manageable standards" need only be standards and not immediately transformed into rules); *supra* note 106 and accompanying text.

[127] *See* Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1537 (2007) [hereinafter Rebell, *"Meaningful" Educational Opportunity*].

[128] Scott R. Bauries, *The Education Duty*, 47 WAKE FOREST L. REV. 705, 705–07, 756–67 (2012).

[129] William S. Koski, *Of Fuzzy Standards and Institutional Constraints: A Re-Examination of the Jurisprudential History of Educational Finance Reform Litigation*, 43 SANTA CLARA L. REV. 1185, 1241, 1297–98 (2003).

[130] Rebell, *"Meaningful" Educational Opportunity*, *supra* note 127, at 1539–42.

approach courts adopt will not change the need for their involvement in such disputes. "[I]t is precisely because the legislative and executive branches have failed to target funds in an equitable and effective manner that constitutional rights have been violated and courts have felt compelled to take jurisdiction of these cases."[131] Lastly, to the extent that competence is a matter of capacity—meaning not enough judges to handle the courts' caseload—well, there is an obvious solution for that.[132]

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Taking these arguments together, there is no reason to perpetuate and give outsized importance to the political question doctrine.[133] The federal courts, just the same as Congress and the executive branch, must enforce the republican guarantee. The real question, to borrow Justin Driver's words, "is not whether the courtroom offers the *ideal* forum . . . but whether it has been the *necessary* forum."[134] Just as "the desire for political power cannot be destroyed, but at most, channeled into different forms," the people's complaints will always find their way to some kind of resolution.[135]

II. SHINE, CHERISHED REPUBLIC

If courts can work with the republican guarantee, and given that legislatures and executives always could, then the question becomes: what does the guarantee? In this Part, I interpret the guarantee as an antidomination duty on the federal government. I explain that the organizing principle of republicanism is freedom as nondomination, which is freedom not from mere interference but from the uncontrolled capacity for

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[131] *Id.* at 1538. Indeed, courts' demonstrations that they can adjudicate educational adequacy cases have even inspired arguments that they can adjudicate partisan gerrymandering cases too, contrary to the frequent hand-wringing. *E.g.*, Christopher S. Elmendorf, *From Educational Adequacy to Representational Adequacy: A New Template for Legal Attacks on Partisan Gerrymanders*, 59 WM. & MARY L. REV. 1601, 1632–35 (2018).

[132] *See* ANDREW COAN, RATIONING THE CONSTITUTION: HOW JUDICIAL CAPACITY SHAPES SUPREME COURT DECISION-MAKING 4 (2019) (distinguishing capacity, "the total volume of cases" that courts can handle, from competence, the ability "to produce reliably good decisions," and from independence, the "inclination . . . to produce social change against the tide of dominant political forces").

[133] *Cf.* EMILY DICKINSON, *A Man may make a Remark* (952), *in* THE COMPLETE POEMS OF EMILY DICKINSON 446 (Thomas H. Johnson ed., 1960) ("Let us deport—with skill— / Let us discourse—with care— / Powder exists in Charcoal / Before it exists in Fire.").

[134] JUSTIN DRIVER, THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND 19 (2018) [hereinafter DRIVER, SCHOOLHOUSE GATE]; *see id.* (citing Hobson v. Hansen, 269 F. Supp. 401, 517 (D.D.C. 1967) (Wright, J.) ("[T]hese are social and political problems which seem at times to defy such resolution. In such situations . . . the judiciary must bear a hand and accept its responsibility to assist in the solution where constitutional rights hang in the balance.")).

[135] *See* Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1705 (1999).

interference. As a commitment to republicanism, therefore, the republican guarantee requires that the branches of the federal government eliminate (or minimize) domination through their respective powers. I do not belabor arguments either that republicanism is a mere catch-all or that our framers and reframers did not provide a blueprint for "a republican form of government,"[136] showing instead that nondomination both has desirable features and has deep roots in our history.

A. The Instrumental Turn in Republicanism

Since the middle of the twentieth century, scholars have devoted increasing attention to republicanism and to its roots in the revolutions and quasi-revolutions of early modern Europe.[137] Convention had taught that the United States, notwithstanding separation from the British Empire, maintained a constitutionalism continuous with the metropole's.[138] Historians demonstrated, however, that the American framers in fact broke sharply from prevailing British views, looking instead to republican thinkers from seventeenth-century England, the seventeenth-century Netherlands, and the northern Italian city-states of the European Renaissance.[139] Of course, the seventeenth-century English republicanism of Algernon Sidney, James Harrington, John Milton, and the Levellers had itself appropriated earlier Florentine and Venetian ideas.[140]

In the final decades of the twentieth century, legal scholars in particular began to consider this legacy's effects on our laws.[141] They focused on identifying which features of republicanism our Constitution and government embody, including: popular

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[136] U.S. CONST. art. IV, § 4.

[137] *See generally* Robert E. Shalhope, *Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in American Historiography*, 29 WM. & MARY Q. 49 (1972).

[138] *See* J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION 506–13 (1975).

[139] *E.g.*, BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 22–54 (1967); POCOCK, *supra* note 138, at 506–52; CAROLINE ROBBINS, ABSOLUTE LIBERTY: A SELECTION FROM THE ARTICLES AND PAPERS OF CAROLINE ROBBINS 55–58, 267–348 (Barbara Taft ed., 1982); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 18–28, 32–36, 48–53, 197–206, 423–25 (1969).

[140] *See, e.g.*, POCOCK, *supra* note 138, at 334 ("Republican and Machiavellian ideas had to become domiciled in an environment dominated by monarchical, legal, and theological concepts apparently in no way disposed to require the definition of England as a polis or the Englishman as a citizen."); *see generally* PHILIP BOBBITT, THE GARMENTS OF COURT AND PALACE: MACHIAVELLI AND THE WORLD THAT HE MADE (2013); ARIHIRO FUKUDA, SOVEREIGNTY AND THE SWORD: HARRINGTON, HOBBES, AND MIXED GOVERNMENT IN THE ENGLISH CIVIL WARS (1997); MACHIAVELLI AND REPUBLICANISM (Gisela Bock, Quentin Skinner, & Maurizio Viroli eds., 1990).

[141] *E.g.*, Amar, *supra* note 37; Jerry Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685 (1988); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988) [hereinafter Sunstein, *Republican Revival*]; Robin West, *Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 60–63 (1990).

sovereignty;[142] anti-corruption;[143] pluralism;[144] political equality;[145] active citizenship, deliberation, and civic virtue;[146] and federalism.[147] Yet despite renewed attention to republicanism, some have lamented the apparent failures of this theorizing "to live up to its promise."[148] The ostensibly republican features that theorists emphasized are excellent, necessary even, but they do not on their own explain republican government's *raison d'être*.

But our understanding of republicanism has taken an "instrumental turn."[149] Legal theory developed during the so-called republican revival tended to cast devices like popular sovereignty and civic virtue as "intrinsically valuable components" of republicanism.[150] In the last two decades, however, scholars have shown how these devices are merely instrumental to republicanism's organizing principle: freedom as nondomination, also known as republican liberty.[151] Understanding the republic in this way heeds its underlying purpose in advancing this robust, deeply felt freedom.[152]

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[142] Amar, *supra* note 37, at 749.

[143] LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT 14–21 (2011); ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO *CITIZENS UNITED* 276–90 (2014) [hereinafter TEACHOUT, CORRUPTION IN AMERICA]; Yasmin Dawood, *Classifying Corruption*, 9 DUKE J. CONST. L. & PUB. POL'Y 103, 106–20 (2014); Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 121–30 (2010); Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 344 (2009).

[144] Michelman, *supra* note 141, at 1507–15.

[145] Sunstein, *Republican Revival*, *supra* note 141, at 1552–53.

[146] CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 134–36 (1993); Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 145–56 (1995); Sunstein, *Republican Revival*, *supra* note 141, at 1548–51, 1555–58.

[147] Merritt, *supra* note 40, at 3–10.

[148] *See* Sherry, *supra* note 146, at 134 (citing Daniel T. Rodgers, *Republicanism: The Career of a Concept*, 79 J. AM. HIST. 11, 12–13 (1992)); *see also* ADAMS, *supra* note 37, at 96–97; West, *supra* note 141, at 62–63.

[149] Frank Lovett, *Republicanism*, STAN. ENCYCLOPEDIA PHIL. (June 19, 2006), https://plato.stanford.edu/entries/republicanism/ [https://perma.cc/BQ4W-9DEM].

[150] *Id.*

[151] *E.g.*, PETTIT, ON THE PEOPLE'S TERMS, *supra* note 23, at 7; PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 50 (1997) [hereinafter PETTIT, REPUBLICANISM]; QUENTIN SKINNER, LIBERTY BEFORE LIBERALISM ix–x (1998); David Watkins, *Institutionalizing Freedom as Non-Domination: Democracy and the Role of the State*, 47 POLITY 508, 513–14 (2015).

[152] *See, e.g.*, Letter from Mercy Otis Warren to John Adams, March 1776, *in* MERCY OTIS WARREN: SELECTED LETTERS 69, 70 (Jeffrey H. Richards & Sharon M. Harris eds., 2009) [hereinafter WARREN: SELECTED LETTERS] ("But we will yet hope the present generation will leave ['a perfect Commonwealth'] to posterity,—and that the American republic will come as near the point of perfection, as the condition of humanity will admit."); WOOD, *supra* note 139, at 47 ("Republicanism meant more for Americans than simply the elimination of a king and the institution of an elective system. It added a moral dimension, a utopian depth, to the political separation from England[.]").

The instrumental turn in republican thought has itself flowered into a global discourse. Some scholars continue to set out general republican theory,[153] in transnational contexts,[154] and by questioning conventional source readings.[155] Others have excavated the history of American social movements correcting or resolving contradictions in our framers' asserted republicanism.[156] Others still have scrutinized individual thinkers' work,[157] or have considered republican schools, workplaces, and markets.[158] This more focused republicanism has begun to surface in American legal scholarship,[159] but it deserves greater attention.

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[153] *E.g.*, LEMIEUX & WATKINS, *supra* note 120; FRANK LOVETT, A GENERAL THEORY OF DOMINATION AND JUSTICE 157–89 (2010) [hereinafter LOVETT, DOMINATION AND JUSTICE]; LOVETT, REPUBLIC OF LAW, *supra* note 119, at 171–72; PHILIP PETTIT, JUST FREEDOM: A MORAL COMPASS FOR A COMPLEX WORLD (2014) [hereinafter PETTIT, JUST FREEDOM]; PETTIT, ON THE PEOPLE'S TERMS, *supra* note 23, at 7.

[154] *E.g.*, EOIN DALY & TOM HICKEY, THE POLITICAL THEORY OF THE IRISH CONSTITUTION: REPUBLICANISM AND THE BASIC LAW (2015); CÉCILE LABORDE, CRITICAL REPUBLICANISM: THE HIJAB CONTROVERSY AND POLITICAL PHILOSOPHY 1–4 (2008); Mortimer N.S. Sellers, *The Republican Foundations of International Law*, *in* LEGAL REPUBLICANISM: NATIONAL AND INTERNATIONAL PERSPECTIVES 187, 187–94 (Samantha Besson & José Luis Martí eds., 2009) [hereinafter LEGAL REPUBLICANISM]; Yiftah Elazar & Geneviève Rousselière, *Introduction: Republicanizing Democracy, Democratizing the Republic*, *in* REPUBLICANISM AND THE FUTURE OF DEMOCRACY 1, 4–9 (Yiftah Elazar & Geneviève Rousselière eds., 2019).

[155] *E.g.*, LAWRENCE HAMILTON, FREEDOM IS POWER: LIBERTY THROUGH POLITICAL REPRESENTATION 1–8 (2014); JOHN MCCORMICK, MACHIAVELLIAN DEMOCRACY vii–ix (2011); CAMILA VERGARA, SYSTEMIC CORRUPTION: CONSTITUTIONAL IDEAS FOR AN ANTI-OLIGARCHIC REPUBLIC 2–6 (2020); Nadia Urbinati, *Competing for Liberty: The Republican Critique of Democracy*, 106 AM. POL. SCI. REV. 607, 607–08 (2012).

[156] *E.g.*, ALEX GOUREVITCH, FROM SLAVERY TO THE COOPERATIVE COMMONWEALTH: LABOR AND REPUBLICAN LIBERTY IN THE NINETEENTH CENTURY 7–11 (2015); AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM 2–4 (2014); Melvin L. Rogers, *Race, Domination, and Republicanism*, *in* DIFFERENCE WITHOUT DOMINATION: PURSUING JUSTICE IN DIVERSE DEMOCRACIES 59, 59–64 (Danielle Allen & Rohini Somanathan eds., 2020) [hereinafter Rogers, *Race, Domination*, *and Republicanism*].

[157] *E.g.*, ANDREW HADFIELD, SHAKESPEARE AND REPUBLICANISM (2005); HALLDENIUS, MARY WOLLSTONECRAFT, *supra* note 24; Melvin L. Rogers, *David Walker: Citizenship, Judgment, Freedom, and Solidarity*, *in* AFRICAN AMERICAN POLITICAL THOUGHT: A COLLECTED HISTORY 52, 52–55 (Melvin L. Rogers & Jack Turner eds., 2021) [hereinafter Rogers, *David Walker*].

[158] *E.g.*, ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) vii–xii (2017) [hereinafter ANDERSON, PRIVATE GOVERNMENT]; GEOFFREY HINCHLIFFE, LIBERTY AND EDUCATION: A CIVIC REPUBLICAN APPROACH (2015); K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION (2017) [hereinafter RAHMAN, DEMOCRACY AGAINST DOMINATION]; ROBERT S. TAYLOR, EXIT LEFT: MARKETS AND MOBILITY IN REPUBLICAN THOUGHT (2017).

[159] *E.g.*, Jack M. Balkin, *Republicanism and the Constitution of Opportunity*, 94 TEX. L. REV. 1427, 1431–37 (2016); Yasmin Dawood, *The Antidomination Model and the Judicial Oversight of Democracy*, 96 GEO. L.J. 1411, 1429–31 (2008) [hereinafter Dawood, *Antidomination Model*]; Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U.

The republican guarantee is best understood as a nondomination guarantee, imposing on the federal government a duty to undertake antidomination. Many of the guarantee interpretations that others have offered coincide with my interpretation (at least somewhat); the norms that they raise are either instrumental to or result from nondomination.[160] In the following sections, I explain in greater detail what nondomination is. In particular, I explain how freedom from involuntary servitude epitomizes nondomination and how nondomination 1) is freedom not from law but through law; 2) is materialist, presuming the resources needed to realize it; and 3) is universal, presuming as its subjects all people who live within a would-be republic.

To explain these aspects of republican liberty, and thus the heart of the republican guarantee, I draw on the instrumental turn while focusing on the American tradition. In doing so, I show how nondomination is at home in our constitutional law and how it is more consistent with our national struggles and progress than other proposed purposes of the guarantee. For example, it respects the antislavery constitutionalism of the early to mid-nineteenth century that sought to remake the republicanism that the founding generations asserted but then controverted with their own systems of domination, especially chattel slavery and settler colonialism. Under this view, the republican guarantee commits to Americans' lived experience of freedom, down to the last person, and obligates the federal government to redress domination where it arises.[161]

B. A Guarantee Against Domination

What, then, is liberty as nondomination? In short, it is freedom not from mere interference but from subjection to another's will, or domination.[162] If this sense of freedom feels unfamiliar, it can help to start with an account more commonly on offer today, Isaiah Berlin's negative-positive dichotomy.[163] Negative freedom, as Berlin explained, is noninterference; I am free "to the degree to which no human being

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L. REV. 669, 670–73 (2014); K. Sabeel Rahman, *Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism*, 94 TEX. L. REV. 1329, 1345–52 (2016); Zephyr Teachout, *Antitrust Law, Freedom, and Human Development*, 41 CARDOZO L. REV. 1081, 1110 (2020).

[160] *See supra* notes 36–45 and 148–53 and accompanying text.

[161] *See, e.g.*, TENBROEK, *supra* note 34, at 50 (citing JOEL TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY: TOGETHER WITH THE POWERS AND DUTIES OF THE FEDERAL GOVERNMENT IN RELATION TO THAT SUBJECT (1849)).

[162] PETTIT, JUST FREEDOM, *supra* note 153, at xv (citing LOVETT, DOMINATION AND JUSTICE, *supra* note 153, at 236–38).

[163] ISAIAH BERLIN, TWO CONCEPTS OF LIBERTY 3–57 (Oxford Univ. Press 1958). Another famous account of liberty is Benjamin Constant's ancient-modern dichotomy. *See* BENJAMIN CONSTANT, *The Liberty of the Ancients Compared with That of the Moderns*, *in* CONSTANT: POLITICAL WRITINGS 309, 310–12 (Biancamaria Fontana ed., 1988) (contrasting ancient collective sovereignty with modern individual self-direction).

interferes with my activity" and unfree when "prevented by other persons from doing what I want."[164] Noninterference is "not, at any rate logically, connected with democracy or self-government."[165] Positive freedom, in contrast, is self-mastery; I am free when "a subject, not an object" and when "moved by reasons, by conscious purposes which are my own, not by causes which affect me . . . from outside."[166] Positive freedom entails perceiving oneself "as a thinking, willing, active being, bearing responsibility for [one's] choices and able to explain them by reference to [one's] own ideas and purposes."[167]

Freedom as nondomination far predates the negative-positive dichotomy, but it remains potent today nonetheless.[168] In his *Discourses on the First Ten Books of Livy*, Niccolò Machiavelli refined this vision of freedom, rooted in ancient Rome and regrown during the Renaissance of northern Italy.[169] On whether the people or elites best preserve freedom, he wrote:

> If we consider the aims of elites and the people, then we see without doubt that elites desire to dominate and the people desire not to be dominated; thus the people have a greater will to live freely, being less able to exploit liberty than elites. Guardians of liberty, the people will take greater care of it, unable to keep it from others and so not allowing others to keep it from them.[170]

Republican freedom thus contrasts with domination, which "refers not to any actual interference, but rather to the *ability* to interfere when that ability is not suitably controlled."[171] Power is not suitably controlled "to the extent that its exercise is not subject to effective and reliable constraints that are common knowledge to all

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[164] BERLIN, *supra* note 163, at 7.

[165] *Id.* at 14.

[166] *Id.* at 16.

[167] *Id.*

[168] *See* Frank Lovett, *Non-Domination*, *in* THE OXFORD HANDBOOK OF FREEDOM 106, 108–09 (David Schmidtz & Carmen E. Pavel eds., 2018) [hereinafter Lovett, *Non-Domination*] (citing ORLANDO PATTERSON, FREEDOM IN THE MAKING OF WESTERN CULTURE (1991)).

[169] *See* QUENTIN SKINNER, 1 THE FOUNDATIONS OF MODERN POLITICAL THOUGHT 2–112, 139–89 (1978) (recounting the spread of republican liberty as an ideal in the northern Italian city-states from the twelfth through sixteenth centuries); Orlando Patterson, *Freedom, Slavery, and Identity in Renaissance Florence: The Faces of Leon Battista Alberti*, *in* THE OXFORD HANDBOOK OF FREEDOM 194, 198 (David Schmidtz & Carmen E. Pavel eds., 2018) (describing fifteenth-century Florentines' obsession with liberty).

[170] *See* NICCOLÒ MACHIAVELLI, *Discorsi sopra la prima deca di Tito Livio* [Discourses on Livy] I.5, *in* NICCOLÒ MACHIAVELLI: TUTTE LE OPERE 269, 324 (Mario Martelli ed., Bompiani 2018) (1531) (It.).

[171] Lovett, *Non-Domination*, *supra* note 168, at 109; *accord* PETTIT, ON THE PEOPLE'S TERMS, *supra* note 23, at 27–28, 56–59, 296.

persons or groups concerned."[172] The potential for interference, with or without actual interference, is domination's most striking feature.

Meanwhile, domination's clearest manifestation has been slavery, in particular chattel slavery.[173] Orlando Patterson has described slavery as "the permanent, violent domination of natally alienated and generally dishonored persons."[174] It is "one of the most extreme forms" of domination, if not the most extreme form, "approaching the limits of total power from the viewpoint of the master, and of total powerlessness from the viewpoint of the [en]slave[d]."[175] Traditionally, republicanism has traced the freedom-slavery dichotomy to ancient Rome, though of course involuntary servitude has been ubiquitous.[176] Moreover, we should not construe as epitomizing domination the abstract political "slavery" that Anglo-American revolutionaries invoked to justify separation from the British Empire.[177] "A full account of republicanism, and of freedom as nondomination, must . . . address the conditions of domination that attach to a phenomenon like chattel slavery, namely social death."[178]

1. Nondomination as Freedom Through Law

Republican liberty, or nondomination, is not freedom *from* law but rather freedom *through* law.[179] Some have construed nondomination as a kind of negative liberty, emphasizing that it is freedom *from* domination in the same way that noninterference is freedom *from* interference.[180] But even if this is so, it might well be where the

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[172] *See* LOVETT, REPUBLIC OF LAW, *supra* note 119, at 115.

[173] Gwilym David Blunt, *On the Source, Site and Modes of Domination*, 8 J. POL. POWER 3–4 (2015), https://openaccess.city.ac.uk/id/eprint/20216/ [https://perma.cc/J8JK-XWS7]; *see* TENBROEK, *supra* note 34, at 149.

[174] ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY 13 (1982) (emphasis omitted).

[175] *Id.* at 1.

[176] *See* LOVETT, DOMINATION AND JUSTICE, *supra* note 153, at 3 ("[T]he Romans came to understand domination generally as the opposite of freedom—a free person (*liber*) was someone not subject to the domination (*dominatio*) of another, and vice versa."); *see also* HADFIELD, *supra* note 157, at 146–47 ("[In *The Rape of Lucrece*,] Tarquin has overridden the Roman rule of law and introduced the condition of slavery, reducing his subjects to this lowest of all human conditions[.] The republican political vision of free citizens making free choices . . . stands as a laudable ideal in contrast. Liberty and slavery are incompatible states."); PATTERSON, *supra* note 174, at 27–34 (discussing the Roman conception of slavery among other peoples' conceptions not oriented around the liberty-slavery dichotomy); PETTIT, ON THE PEOPLE'S TERMS, *supra* note 23, at 5–8; PETTIT, REPUBLICANISM, *supra* note 151, at 31–35.

[177] *See* BAILYN, *supra* note 139, at 235, 232–46 (describing how the gap between the liberty that framers' sought for themselves but denied to those whom they enslaved "became too glaring to be ignored" and how the convergence of Black liberation and the colonies' independence became "inescapable").

[178] Rogers, *Race, Domination, and Republicanism*, *supra* note 156, at 79.

[179] *See* PETTIT, REPUBLICANISM, *supra* note 151, at 35–41.

[180] *E.g.*, Ian Shapiro, *On Non-Domination*, 62 U. TORONTO L.J. 293, 307 (2012).

similarities end. Whereas noninterference is agnostic as to political system, as mentioned above,[181] nondomination is integral to republican government, and it is through law that nondomination comes into being.[182] "[F]ar from abrogating freedom, public interference—exercised under democratic control—in fact *constitutes* freedom as distinct from *causing* it, because it secures citizens against private domination."[183]

Although "nondomination" is newer to the lexicon, this conception of freedom through law has a rich history in our legal tradition, often contrasted with slavery, arbitrariness, or improper dependence.[184] As mentioned above, the classical paradigm of domination was the enslaver-enslaved relationship. Algernon Sidney, whose *Discourses Concerning Government* greatly influenced our framers,[185] wrote:

> The weight of Chains, number of Stripes, hardness of labour, and other effects of a Master's cruelty, may make one servitude more miserable than another: but he is a slave who serves the best and

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[181] *See supra* note 171 and accompanying text.

[182] *See* JAMES HARRINGTON, *The Commonwealth of Oceana*, *in* THE COMMONWEALTH OF OCEANA AND A SYSTEM OF POLITICS 1, 20 (J.G.A. Pocock ed., 1992) (distinguishing freedom *from* law and freedom *by* law); HINCHLIFFE, *supra* note 158, at 12 ("Harrington is making both an adversarial point . . . and a deeper one: that it is by the laws that we are free. Our freedom is created and maintained through the law.").

[183] *See* Eoin Daly, *Freedom as Non-Domination in the Jurisprudence of Constitutional Rights*, 28 CANADIAN J.L. & JURIS. 289, 291 (2015) [hereinafter Daly, *Freedom as Non-Domination in Jurisprudence*] (citing Philip Pettit, *Law and Liberty*, *in* LEGAL REPUBLICANISM, *supra* note 154); *see also* Johann N. Neem, *Developing Freedom: Thomas Jefferson, the State, and Human Capability*, 27 STUD. AM. POL. DEV. 36, 38 (2013) [hereinafter Neem, *Developing Freedom*] ("Jefferson believed that to enjoy the freedoms that rights protected required constant government intervention in society and the economy. Otherwise, economic, political, and religious liberty would be empty promises.").

[184] *E.g.*, Marbury v. Madison, 5 U.S. 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men."); WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 132 (Univ. of Chi. Press, 1979) (1765) ("[L]aws, when prudently framed, are by no means subversive but rather introductive of liberty; for . . . where there is no law, there is no freedom."); BARBARA FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT 29–70 (2001) (discussing Robert Hale's critique of market coercion and the role of law in freeing individuals from abuses of private power, even if liberty had value only "as a rhetorical stand-in for material wealth"); PAUL GOWDER, THE RULE OF LAW IN THE REAL WORLD 70–71 (2016); GREENE, HOW RIGHTS WENT WRONG, *supra* note 119, at 8–10 (discussing John Joachim Zubly's 1775 sermon, "The Law of Liberty"); HALE, *supra* note 110, at 381 ("Legislation which alters the relative economic powers of different classes in the community may often be accurately characterized as protecting the liberty, or property, or equality of some individuals against the actions of others."); John Paul Stevens, *The Third Branch of Liberty*, 41 U. MIAMI L. REV. 277, 280–81 (1986) (providing examples, like the Sherman Act, *Robert's Rules of Order*, and traffic laws, of regulations that expand rather than contract liberty).

[185] *See* CAROLINE ROBBINS, *Algernon Sidney's* Discourses Concerning Government: *Textbook of Revolution*, *in* ROBBINS, *supra* note 139, at 267–91.

> gentlest man in the world, as well as he who serves the worst; and he does serve him if he must obey his commands, and depends upon his will.[186]

Within Sidney's abstract invocation of slavery, unfreedom is subjection to another's will, the focus of Commonwealthmen and Dissenter critiques. Richard Price, for example, wrote that "[i]ndividuals in private life, while held under the power of masters, cannot be denominated free, however equitably and kindly they may be treated."[187] The problem is that powerful individuals or entities, when insufficiently regulated, can deny us opportunities to act, and the potential for this denial is enough to make us unfree.[188] The influential founders of the eighteenth-century journal *Le Républicain*, including Sophie de Grouchy, Nicolas de Condorcet, and Thomas Paine, shared this critique. "To be free [was] not . . . merely to be free of interference—as the subject of a benign monarch might be—but to be free of the potential interference of one who has absolute power over us and may choose to exert it at any point in time."[189] A benign monarch will die, and her heir might not be benign.[190]

Moreover, insufficient democratic control enables would-be dominators to create relationships of improper dependence.[191] Price's colleague Joseph Priestley noted that "by the same power, by which the people of England can compel [the Americans] to pay one penny, they may compel them to pay the last penny they have."[192] In his

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[186] ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT III.21, at 349–50 (Thomas G. West ed., 1996) (1698).

[187] RICHARD PRICE, *Additional Observations on Nature and Value of Civil Liberty, and the War with America*, *in* RICHARD PRICE: POLITICAL WRITINGS 76, 77 (D.O. Thomas ed., 1991); *cf.* Alan Coffee, *Mary Wollstonecraft, Public Reason, and the Virtuous Republic*, *in* THE SOCIAL AND POLITICAL PHILOSOPHY OF MARY WOLLSTONECRAFT 183, 185 (Sandrine Bergès & Alan Coffee eds., 2016) ("A distinguishing feature of the classical or Commonwealthman conception of freedom, upon which Wollstonecraft drew, is that two forms of freedom are always invoked simultaneously, the free man and the free state.").

[188] *See* PETTIT, ON THE PEOPLE'S TERMS, *supra* note 23, at 58–59 (construing invocations of "arbitrariness" as uncontrolled capacity for interference rather than as unpredictability); *see also* Tom O'Shea, *Disability and Domination: Lessons from Republican Political Philosophy*, 35 J. APPLIED PHIL. 133, 139 (2018) (underscoring that nondomination is not only opportunity to act but also "freedom as a social status").

[189] Sandrine Bergès, *Sophie de Grouchy on the Cost of Domination in the* Letters on Sympathy *and Two Anonymous Articles in* LE RÉPUBLICAIN, 98 MONIST 102, 103 (2015).

[190] *Id.* Moreover, "as Paine and Condorcet both point[ed] out, a people who know that their children will not be free cannot call themselves free." *Id.*

[191] *E.g.*, MERCY OTIS WARREN, *83: To John Adams, December 1786*, *in* WARREN: SELECTED LETTERS, *supra* note 152, at 210, 212 ("Dependence is a word not very pleasing to an American ear: but though we have broken the yoke of Britain, and defied the potentates of the earth, we cannot expunge it from our vocabulary.").

[192] JOSEPH PRIESTLEY, *The Present State of Liberty*, *in* JOSEPH PRIESTLEY: POLITICAL WRITINGS 129, 140 (Peter N. Miller ed., 1993).

widely read pamphlet, *Common Sense*, Paine too identified freedom as independence.[193] The authors of our Declaration of Independence in turn complained not just of the British crown's vindictiveness, but more fundamentally of insufficient control, "a long train of *abuses* and *usurpations*, pursuing invariably the same Object[:] . . . to reduce them under absolute Despotism."[194]

It is important to distinguish domination from how we understand dependence today. Dependence is an inescapable part of the human condition, including "[t]he immaturity of infancy and early childhood, illness and disability that render[] one nonfunctional even in the most accommodating surroundings, and the fragility of advanced old age . . . ."[195] And although power inequalities are endemic to relationships of care and dependence, "not every such inequality amounts to domination."[196] At the same time, the experiences of disability, love, child-rearing, elder care, and medicine remind us that law does not inevitably create freedom; nondomination exists insofar as law constrains the use of power against people's avowed interests.[197]

2. Nondomination as Materialist Freedom

Nondomination also "presupposes the resources required to make it effective."[198] This presumption—that social, economic, and political circumstances shape how we experience freedom—reflects a materialism derived from Renaissance thought and kept alive by later republican thinkers.[199] For Mary Wollstonecraft, for

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[193] *See* THOMAS PAINE, *Common Sense*, *in* THOMAS PAINE: COLLECTED WRITINGS 5, 43 (Eric Foner ed., 1995) (arguing that, unless America's "seat of government" is occupied independent of the British Empire, "we shall be in danger of having it filled by some fortunate ruffian . . . and then, where will be our freedom?").

[194] THE DECLARATION OF INDEPENDENCE para. 30 (U.S. 1776) (emphases added).

[195] EVA FEDER KITTAY, LOVE'S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY 29 (1999); *cf.* O'Shea, *supra* note 188, at 133–34; Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 8–15 (2008).

[196] KITTAY, *supra* note 195, at 34; *accord* Christopher McCammon, *Domination: A Rethinking*, 125 ETHICS 1028, 1031 n.13 (2015).

[197] *See, e.g.*, PETTIT, ON THE PEOPLE'S TERMS, *supra* note 23, at 58–59; O'Shea, *supra* note 188, at 135–36, 144.

[198] PETTIT, JUST FREEDOM, *supra* note 153, at 103 (citing JOHN RAWLS, A THEORY OF JUSTICE 204–05 (1971)) (contrasting republicanism with Rawlsian justice, "under which people's equal freedom, as prescribed in [Rawls's] first principle, does not require them to have the resources needed to exercise and value that freedom"); *cf.* CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED 131 (1997) [hereinafter BLACK, NEW BIRTH OF FREEDOM] ("'Liberty' is pervasively deadened by poverty into a dumb simulacrum, clean-shorn of 'the *blessings* of liberty.'").

[199] *See, e.g.*, BOBBITT, *supra* note 140, at 70 (describing ideological and linguistic similarities across Machiavelli's *Discourses*, book I, chapter 3; Madison's *The Federalist No. 51*; and Oliver Wendell Holmes, Jr.'s 1897 speech, "The Path of the Law"); *cf.* ATHANASIOS MOULAKIS,

example, "the situation of [eighteenth-century British] women—in private and in public life—illustrated perfectly what a denial of personal freedom *is* and what it *does* to a person's mind and life."[200] Material inequalities and economic relationships centered around the decisions of propertied White men constrained the choices of "constitutional outsiders" like women, Black people, and Native Americans.[201]

Our framers too understood how material circumstances influence choice, especially at the polls, though many advocated for restricting suffrage rather than improving would-be voters' circumstances.[202] Gouverneur Morris, for example, argued that those who were not educated and propertied should not vote, because they were like children; they "could not consent," and "their consent was in fact irrelevant, since they [had] no will of their own."[203] John Adams, Thomas Jefferson, and others also linked the exercise of independent judgment to material circumstances, uncharitably extending the children analogy to low-income men, women, enslaved Americans, and colonized Native peoples.[204] Jefferson's general materialism could have led him to advocate for improved circumstances for all, but he infamously (and illogically) attributed African Americans' more limited educational opportunity at the time to innate rather than circumstantial difference.[205]

REPUBLICAN REALISM IN RENAISSANCE FLORENCE: FRANCESCO GUICCIARDINI'S *DISCORSO DI LOGROGNO* 41–67 (1998) (describing social, economic, and political changes that influenced "realist" Florentine thinkers); POCOCK, *supra* note 138, at 208 (describing Machiavelli's view that corruption and loss of liberty arise from social conditions and inequality).

[200] Lena Halldenius, *Mary Wollstonecraft and Freedom as Independence*, *in* WOMEN AND LIBERTY, 1600–1800: PHILOSOPHICAL ESSAYS 95, 99 (Jacqueline Broad & Karen Detlefsen eds., 2017) (emphases added); *cf.* VIRGINIA WOOLF, *A Room of One's Own*, *in* A ROOM OF ONE'S OWN AND THREE GUINEAS 1, 81–86 (Anna Snaith ed., 2015); *cf.* Jurgen De Wispelaere & David Casassas, *A Life of One's Own: Republican Freedom and Disability*, 29 DISABILITY & SOC'Y 402, 406–08 (2014) (describing the disadvantages that disabled individuals experience and their effects on republican freedom).

[201] *See* GERALD LEONARD & SAUL CORNELL, THE PARTISAN REPUBLIC: DEMOCRACY, EXCLUSION, AND THE FALL OF THE FOUNDERS' CONSTITUTION, 1780S–1830S 60–71 (2019); *see also* HALLDENIUS, MARY WOLLSTONECRAFT, *supra* note 24, at 28 ("Republican liberty . . . is institution-dependent.").

[202] *See, e.g.*, ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 54–65 (2000) (describing late eighteenth and early nineteenth century restrictions on the right to vote grounded in beliefs about the insufficient independence of women, Black people, Native Americans, and low-income men).

[203] HOLLY BREWER, BY BIRTH OR CONSENT: CHILDREN, LAW, AND THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY 42–43 (2012) (citation and internal quotation marks omitted).

[204] *Id.* at 43, 356; CLAUDIO SAUNT, UNWORTHY REPUBLIC: THE DISPOSSESSION OF NATIVE AMERICANS AND THE ROAD TO INDIAN TERRITORY 267–68 (2020).

[205] Neem, *Developing Freedom*, *supra* note 183, at 46; *see id.* at 44–45. For trenchant critiques of—and appeals against—Jefferson's misattribution, see DAVID WALKER, APPEAL TO THE COLOURED CITIZENS OF THE WORLD 12–18, 27–30 (Peter P. Hinks ed., 2000); Rogers, *David Walker*, *supra* note 157, at 61–62, 69.

But beyond giving rise to cynicism or regressive views, materialism more productively undergirded fears of power, corruption, and domination, whether by an entrenched few of an ineffectual many or by a capricious many of a vulnerable few.[206] James Madison, for example, argued for sufficient democratic controls on grounds that humans are hardly angels.[207] Madison wrote:

> [Even] a minority may in an appeal to force, be an overmatch for the majority[:] 1. if the minority happen to include all such as possess the skill and habits of military life, [and] such as possess the great pecuniary resources, one-third only may conquer the remaining two-thirds[;] 2. one-third of those who [vote] may be rendered a majority by the accession of those whose poverty excludes them from a right of suffrage . . . [; and] 3. where slavery exists the republican [t]heory becomes still more fallacious.[208]

In other words, a republic cannot (and does not) exist where a wealthy few with control over military force can oppress the many; the many lack the resources and capacities to vote, or could even be bought off by the few; or the many include those enslaved by the few. Even Alexander Hamilton recognized the threat of economic domination, writing that "*a power over a man's subsistence amounts to a power over his will*."[209] This materialism carries through to current accounts of domination, recognizing the need for certain social goods and institutions in curbing its effects.[210] Moreover, it underscores how domination can vary both in source—not only individual

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[206] *See, e.g.*, BAILYN, *supra* note 139, at 330; PAINE, *supra* note 193, at 43–44 (discussing the danger of "undue authority" among a small number of representatives); TEACHOUT, CORRUPTION IN AMERICA, *supra* note 143, at 289–90 (interpreting the framers' theory of corruption as in part the use of public power to advance private interests); *see also* POCOCK, *supra* note 138, at 93 (discussing fifteenth-century Florentine Giovanni Cavalcanti's theory of corruption as the replacement of public governance by private governance); VERGARA, *supra* note 155, at 39 (theorizing *systemic* corruption as "the gradual decay of 'representativeness' and the increasing oligarchization of government and society within a general respect for the rule of law").

[207] *See* THE FEDERALIST NO. 51 (James Madison); *cf.* ROBINSON JEFFERS, *Shine, Perishing Republic*, *in* THE SELECTED POETRY OF ROBINSON JEFFERS 23, 23 (Tim Hunt ed., 2001) ("[B]e in nothing so moderate as in love of man, a clever servant, insufferable master.").

[208] James Madison, *Vices of the Political System of the United States* (May 7, 1787), The James Madison Papers at the Library of Congress, https://www.loc.gov/item/mjm012727/ [https://perma.cc/HGB6-8EYR].

[209] THE FEDERALIST NO. 79 (Alexander Hamilton) (emphasis added).

[210] *E.g.*, PETTIT, JUST FREEDOM, *supra* note 153, at xix (citing MARTHA NUSSBAUM, FRONTIERS OF JUSTICE (2006); Philip Pettit, *A Definition of Physicalism*, 53 ANALYSIS 213 (1993); AMARTYA SEN, COMMODITIES AND CAPABILITIES (1985)); *see also* IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 66–95 (1990) (describing, among other things, how a consumerist society and a bureaucratic state supporting it can facilitate domination).

agents but also plural agents and institutions[211]—and in degree—depending on the power differential between source and subject.[212]

3. Nondomination as Freedom Among Equals

Finally, for now, nondomination presumes the equal status of all people who live within the would-be republic, a point that has been at the heart of our struggles to make good on republican freedom. As Cicero said: "Nothing can be sweeter than liberty. Yet if it isn't equal throughout, it isn't liberty at all."[213]

Our framers' asserted republicanism reflected fundamental contradictions and failings, most obviously the perpetuation of chattel slavery and the decimation of Native nations and expropriation of their land. Privately, even some framers who enslaved others acknowledged that chattel slavery more truly epitomized unfreedom than their own ties to the British Empire.[214] Publicly, however, Americans could not reconcile their asserted republican values with the United States' racial hierarchy.[215] Norms of settler empire took freedom "as an exclusivist ideal, accessible only to

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[211] Blunt, *supra* note 173, at 5; *see* RAHMAN, DEMOCRACY AGAINST DOMINATION, *supra* note 158, at 81–86 (describing Progressive Era critiques, like Louis Brandeis's, of agent-based as well as structural domination); Victoria Costa, *Freedom as Non-Domination and Civic Education: Legalistic or Virtue Centered?*, *in* PHILOSOPHICAL PERSPECTIVES ON MORAL AND CIVIC EDUCATION: SHAPING CITIZENS AND THEIR SCHOOLS 156, 163–68 (Christine Tappolet & Colin Macleod eds., 2019) [hereinafter PHILOSOPHICAL PERSPECTIVES ON MORAL AND CIVIC EDUCATION] (arguing that widespread prejudice hinders freedom, even if more a device of domination than an instance of domination); Rogers, *David Walker*, *supra* note 157, at 74 ("Racial domination limits us even where there is no obvious person acting in the role of a master.").

[212] McCammon, *supra* note 196, at 1041–43, 1046–47; *see* HAMILTON, *supra* note 155, at 81–82, 88–90.

[213] PETTIT, ON THE PEOPLE'S TERMS, *supra* note 23, at 88 (quoting CICERO, THE REPUBLIC AND THE LAWS 21 (Niall Rudd trans., 1998)) (internal quotation marks omitted); *cf.* Elizabeth Anderson, *Fair Opportunity in Education: A Democratic Equality Perspective*, 117 ETHICS 595, 615 (2007) [hereinafter Anderson, *Fair Opportunity*] ("[Democratic] [e]quality refers fundamentally to an ideal of social relations, in which people from all walks of life enjoy equal dignity, interact with one another on terms of equality and respect, and are not vulnerable to oppression by others."); Atiba R. Ellis, *Reviving the Dream: Equality and the Democratic Promise in the Post–Civil Rights Era*, 2014 MICH. ST. L. REV. 789, 799 (2014) (linking all persons' equal status to democratic rule); Martin Luther King, Jr., Letter from a Birmingham Jail (Apr. 16, 1963), https://kinginstitute.stanford.edu/sites/mlk/files/letterfrombirmingham_wwcw_0.pdf [https://perma.cc/ZQ8F-SK7J] ("Injustice anywhere is a threat to justice everywhere.").

[214] ERIC FONER, THE STORY OF AMERICAN FREEDOM 33 (1998) [hereinafter FONER, AMERICAN FREEDOM]. Thomas Jefferson, for example, conceded that "one hour of [chattel slavery] is fraught with more misery than ages of [dependence on the British Empire] which he rose in rebellion to oppose." THOMAS JEFFERSON, *Answers and Observations for Démeunier's Article on the United States in the* Encyclopédie Methodique*, 1786*, *in* THOMAS JEFFERSON: WRITINGS 575, 592 (Merrill D. Peterson ed., 2011).

[215] *See* SAUNT, *supra* note 204, at 80.

Anglo-Saxons and select Europeans," where "exclusivism presupposed that settler security . . . required the subordination of internal and external enemies . . . ."[216] Students of the Supreme Court can readily spot domination overshadowing liberty for all in decisions restricting who counts as citizens,[217] who can vote,[218] who deserves equal opportunity,[219] and whose privacy and bodily autonomy matter,[220] among others. Facing down contradictions "too obvious to ignore," American social movements began to ask "whether and how republican liberty might be universalized,"[221] imagining "a republicanism that was both inclusive and disconnected from territorial conquest."[222]

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[216] RANA, *supra* note 156, at 97; *see* ADAM DAHL, EMPIRE OF THE PEOPLE: SETTLER COLONIALISM AND THE FOUNDATIONS OF MODERN DEMOCRATIC THOUGHT 17 (2018) ("Despite the central principles of equality at the center of this new notion of empire, the [Northwest Ordinance of 1787] allowed for the further dispossession of indigenous communities as a necessary feature of republican expansionism."); Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1800 (2019) ("The word 'slavery,' like the word 'colonialism,' appears nowhere in the Constitution. Yet, like America's other original sin, traces of America's history with colonialism are woven in like threads to the fabric of the document." (citing FREDERICK DOUGLASS, *The Meaning of July Fourth for the Negro* (July 5, 1852), *in* FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS 188, 204 (Philip S. Foner ed., 1999))); Melody Kapilialoha MacKenzie, *Historical Background*, *in* NATIVE HAWAIIAN LAW: A TREATISE 2, 19–32 (Melody Kapilialoha MacKenzie et al. eds., 2015) (recounting the subversion and overthrow in 1893 of Hawai'i's government by lawyers and businessmen supported by American troops and the United States' annexation of the inaptly called "Republic of Hawai'i" that they set up in its place); William Wood, *It Wasn't an Accident: The Tribal Sovereign Immunity Story*, 62 AM. U. L. REV. 1587, 1623–31 (2013) (recounting the history of states' encroachment into Indian Country and assertions of jurisdiction there, culminating in the Indian Removal Act of 1830 and Supreme Court cases like *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)).

[217] *See generally, e.g.*, Chae Chan Ping v. United States, 130 U.S. 581 (1889); Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857); *cf.* Lone Wolf v. Hitchcock, 187 U.S. 553, 564–66 (1903) (contending that American Indians were entirely under Congress's plenary power and had no treaty rights that Congress was bound to respect).

[218] *See generally, e.g.*, Williams v. Mississippi, 170 U.S. 213, 221–25 (1898) (contending that literacy tests and poll taxes that disenfranchised African American voters did not violate the Fourteenth Amendment); Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874).

[219] *See generally, e.g.*, Milliken v. Bradley, 418 U.S. 717 (1974); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); Lum v. Rice, 275 U.S. 78 (1927); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 139–42 (1872) (Bradley, J., concurring) (contending that Illinois law barring women from practicing law did not violate the Fourteenth Amendment).

[220] *See generally, e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986); Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943); Yasui v. United States, 320 U.S. 115 (1943); Buck v. Bell, 274 U.S. 200 (1927).

[221] *See* Frank Lovett, *The Labour Republicans and the Classical Republican Tradition: Alex Gourevitch's* From Slavery to the Cooperative Commonwealth, 17 EUR. J. POL. THEORY 244, 245 (2018).

[222] RANA, *supra* note 156, at 14.

Black republicans and abolitionists bore early witness to the nation's failure to secure true nondomination. In the 1830s, for example, abolitionist and minister Hosea Easton "illustrate[d] the state of a people with a good government and laws, and with *a disposition to explain away all their meaning*."[223] Through chattel slavery, directly at odds with nondomination, Anglo-American elites could "carry out their [asserted] republicanism into the most fatal despotism."[224] David Walker too, like Cicero, insisted that republican liberty pertained to all people, without "distinction."[225] "Can there be a greater absurdity," he asked, than domination based on differences arising in nature, "and particularly in a free republican country?"[226] And although some abolitionists resisted comparing chattel slavery with "wage slavery" and other labor exploitation,[227] others saw intersecting struggles as illuminating how nondomination must reach everyone.[228] Maria Stewart, for example, explicitly linked the nominally free servant and hard labor systems of the northern United States with "*southern* slavery," acknowledging the difference but admonishing her audience that "continual hard labor deadens the energies of the soul, and benumbs the faculties of the mind," that the *legal* line between the enslavement and emancipation of Black people was not always the *lived* line.[229]

The American labor movements of the nineteenth and early twentieth centuries also reconfigured the framers' reliance on "political slavery" as republicanism's paradigm.[230] Labor republicans like Thomas Skidmore, Orestes Brownson, and Langdon Byllesby shared Black republicans' assessments that freedom is universalizable.[231] Skidmore argued, in fact, "that rather than being political enemies, poor whites shared fundamental interests with black slaves and dispossessed Indians,

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[223] HOSEA EASTON, *A Treatise on the Intellectual Character, and the Civil and Political Condition of the Colored People of the United States; and the Prejudice Exercised Towards Them*, *in* TO HEAL THE SCOURGE OF PREJUDICE: THE LIFE AND WRITINGS OF HOSEA EASTON 63, 91 (George R. Price & James Brewer Stewart eds., 1999) (1837) (emphasis added); *see generally* Rogers, *Race, Domination, and Republicanism*, *supra* note 156, at 59–76, 79–83 (discussing the republican thought of David Walker, Hosea Easton, Martin Delany, and Frederick Douglass).

[224] EASTON, *supra* note 223, at 92.

[225] *See* WALKER, *supra* note 205, at 43–45.

[226] *See id.* at 45.

[227] *See* GOUREVITCH, *supra* note 156, at 41–46.

[228] *E.g.*, WALKER, *supra* note 205, at 31–32; Maria Stewart, *Lecture Delivered at the Franklin Hall*, *in* WORDS OF FIRE: AN ANTHOLOGY OF AFRICAN-AMERICAN FEMINIST THOUGHT 30, 30–33 (Beverly Guy-Sheftall ed., 2011) [hereinafter WORDS OF FIRE].

[229] Stewart, *supra* note 228, at 30–32; *cf.* PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 27 (2d ed., 2000) (identifying Stewart's perspective on intersecting struggles as a core theme advanced by some Black feminist intellectual traditions).

[230] *See* GOUREVITCH, *supra* note 156, at 8–9.

[231] *See* RANA, *supra* note 156, at 153–62.

as each group was confined by existing economic hierarchies to poverty and dependence."[232] In their analyses, labor republicans drew from earlier thinkers like Paine and William Manning, who paid particular attention to the ways in which the "few" use their wealth to keep the "many" in subservience.[233] As "industrial wage labor became more commonplace," replacing artisanal production, so too did "increasingly entrenched oppressive work relations."[234]

To be sure, groups experiencing domination did not always work together, perhaps keeping their causes separate for strategic reasons, perhaps not at first perceiving their commonality, or perhaps wedged apart by elites seeking to shore up their power.[235] Yet these social movements' advocacy laid bare both the materialist and egalitarian presumptions of freedom as nondomination, universalizing the republican polity and overcoming the stale enslaver-enslaved dichotomy to critique other, layered forms of exploitation.[236] Because these Americans "fought such a vigorous and intellectually productive battle over the relationship between slavery

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[232] *See id.* at 159.

[233] *See, e.g.*, BREWER, *supra* note 203, at 366; GOUREVITCH, *supra* note 156, at 73.

[234] RANA, *supra* note 156, at 148; *accord* ANDERSON, PRIVATE GOVERNMENT, *supra* note 158, at 35 (discussing the nineteenth-century rise of "free labor" and "wage slavery" ideologies); RAHMAN, DEMOCRACY AGAINST DOMINATION, *supra* note 158, at 64–68.

[235] *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 20–26 (2010) (recounting the planter class's development of the "racial bribe" as a way to "drive a wedge" between Black people and low-income White people); FONER, AMERICAN FREEDOM, *supra* note 214, at 58–68 (describing nineteenth-century contestation between "free labor" and "wage slavery" ideologies and abolitionist goals); ANDRÉS RESÉNDEZ, THE OTHER SLAVERY: THE UNCOVERED STORY OF INDIAN ENSLAVEMENT IN AMERICA 296 (2016) (observing that nineteenth-century Americans tended to see different groups, like Black people and American Indians, as "afflicted by different problems," despite "common threads of labor oppression"); *cf.* Salvador E. Pérez, *Section 2 Zero-Sums: How the Supreme Court Misconstrued the Voting Rights Act, Limits Minority Representation, and Dangerously Pits Minorities Against Each Other*, 67 STAN. L. REV. ONLINE 111, 113, 117–18, 120 (2015) (describing intergroup competition caused by decisions under section 2 of the Voting Rights Act that require one minority group alone, rather than in coalition with others, to comprise more than fifty-percent citizen voting age population (CVAP) of a possible remedial district in order to prove vote dilution).

[236] *See* GOUREVITCH, *supra* note 156, at 109; *see also* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II 155–232, 310–23 (2008) (describing Jim Crow debt peonage and convict leasing systems); CAREY MCWILLIAMS, FACTORIES IN THE FIELD: THE STORY OF MIGRATORY FARM LABOR IN CALIFORNIA 3–10, 103–33, 196–99 (1939) (describing California farm industrialists' "easy business of exploiting competing racial groups" through ruthless labor practices); MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 56–90 (2004) (describing how deportation policy created and enabled the exploitation of undocumented Americans by agribusiness and other industries); RESÉNDEZ, *supra* note 235, at 10 ("[A]fter the Spanish crown prohibited the enslavement of Indians, owners resorted to a variety of labor arrangements, terms, and subterfuges—such as encomiendas, repartimientos, convict leasing, and debt peonage—to get around the law.").

and freedom," they began to understand, and to resolve, the "paradoxes" of the framers' asserted republicanism.[237] In doing so, they also began to change who counted as the nation's "paradigmatic legal individuals."[238]

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The view of nondomination that I have presented in this Part—universal, materialist freedom through law—is the core of republicanism and thus of the republican guarantee. This view, under which the guarantee imposes an antidomination duty on the federal government, derives its contours largely from the recent instrumental turn in republican thought.[239] That turn has drawn attention off of a litany of governance norms and onto the experience of domination, in particular its experience by those not historically counted as citizens.[240] The value of a nondomination guarantee need not depend on its having been always understood in this way.[241] Nondomination is, after all, republicanism's organizing principle; it is what makes republicanism make sense.

Yet I have tried to show how freedom as nondomination fits into our constitutional tradition nonetheless. A "strong strand of antislavery constitutionalism" emerged in the years between the nation's founding and refounding, challenging established views of what it means to become a republic.[242] Black, feminist, and labor republicans, among others, posited that their perspectives be placed on equal footing with those perspectives that had always been prioritized, and they struggled to make it so.[243] Thus, there are resonances between a nondomination-oriented republican guarantee and what Paul Gowder has called "liberation constitutionalism"[244] as well as readings of the Reconstruction Amendments as serving anti-"group-disadvantaging," antisubordination, or even antisubjugation purposes.[245] In the next Part, I turn

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[237] GOUREVITCH, *supra* note 156, at 8.

[238] *See* LAURA F. EDWARDS, A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION: A NATION OF RIGHTS 124 (2015).

[239] *See* Dawood, *Antidomination Model*, *supra* note 159, at 1429–33.

[240] *See id.* at 1432–33.

[241] *Cf.* Eavan Boland, *Eviction*, NEW YORKER (Apr. 27, 2020), https://www.newyorker.com/magazine/2020/05/04/eviction [https://perma.cc/S9AR-BQQA] (delineating the limits of history).

[242] EDWARDS, *supra* note 238, at 68.

[243] *See id.* at 124 (discussing restrictions imposed on women and racial minorities in free soil states).

[244] *See* Paul Gowder, *Big 10 Law School Speaker Series: Liberation Constitutionalism*, IND. UNIV. SCH. OF LAW (Apr. 6, 2021), https://iu.mediaspace.kaltura.com/media/t/1_8b7ylx25 [https://perma.cc/EZN4-YF7M] (proffering a constitutional theory rooted in Black intellectual traditions that is reconstructive, inclusive, and ongoing); *see generally* Paul Gowder, *Reconstituting We the People: Frederick Douglass and Jürgen Habermas in Conversation*, 114 NW. U. L. REV. 335 (2019).

[245] Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107,

to education's essential role in achieving nondomination and bring into focus the challenge at the republican guarantee's core.

III. A NEW BIRTH OF EDUCATION

Education, "the main effect" of which is "the achieving of a life of rich significance," is a powerful mechanism for antidomination.[246] And in a would-be republic, it is not only powerful but necessary. In this Part, I continue to focus on the republican guarantee as a nondomination guarantee, and I describe education's indispensable role in minimizing domination. But I also underscore the genuine challenge in understanding the republican guarantee this way: the guarantee, by imposing an antidomination duty on the federal government, is an ongoing constitutional obligation. It is this conceptual challenge that has motivated our smaller, more superficial concerns with courts answering "political" questions or lacking expertise to adjudicate education cases. And it is to this challenge that, in closing, I propose a few responses and paths forward.

A. Education as Antidomination

On countless occasions, lawmakers and educators have declared that a republic will not exist where there is anything less than good education.[247] Indeed, this was the central perspective of Horace Mann, a leader in the nineteenth-century common schools movement, and other reformers.[248] Mann tended to characterize republican government as a fantastical beast that must be tamed, arguing that unless we cultivate

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108 (1976); *see* Evan D. Bernick, *Antisubjugation and the Equal Protection of the Laws*, GEO. L.J. (forthcoming 2021); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007–10 (1986).

[246] *See* DEWEY, DEMOCRACY AND EDUCATION, *supra* note 105, at 277. Even "education skeptic[s]" acknowledge that the nineteenth-century common schools movement's creation of a public education system where none existed before represented a great success in educating outside of a narrow elite. *See* DAVID F. LABAREE, SOMEONE HAS TO FAIL: THE ZERO-SUM GAME OF PUBLIC SCHOOLING 245 (2010); *see also id.* at 42–79, 243.

[247] *See, e.g.*, HORACE MANN, TWELFTH ANNUAL REPORT 76–90 (1849) ("[T]he necessity of general intelligence, under a republican form of government, like most other very important truths, has become a very trite one."); BOB PEPPERMAN TAYLOR, HORACE MANN'S TROUBLING LEGACY: THE EDUCATION OF DEMOCRATIC CITIZENS 25–37 (2010) [hereinafter TAYLOR, HORACE MANN'S TROUBLING LEGACY]; JAMES WILSON, *Of the Judicial Department*, *in* 2 WORKS OF JAMES WILSON, *supra* note 109, at 101–02 ("Among the ancients, those who studied and practised the sciences of jurisprudence and government with the greatest success, were convinced . . . that the fate of states depends on the education of youth."); WOOD, *supra* note 139, at 426–27.

[248] *See, e.g.*, CARL F. KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780–1860, 3–12 (1983); JOHANN N. NEEM, DEMOCRACY'S SCHOOLS: THE RISE OF PUBLIC EDUCATION IN AMERICA 5–30 (2017).

our "new and unheard-of powers" of democracy, "we shall perish by the very instruments prepared for our happiness."[249] Scholars ever since have agreed on education's unavoidable import for self-government. Public schools "play an integral role in the nation-building process" and "in socializing children for work and citizenship."[250] At the same time, their purpose is greater than "preparing . . . youth to govern," encompassing also the development of capabilities and "intellectual tools" for pursuing individual and collective happiness.[251]

But education's role as a dynamo of nondomination remains underdiscussed. Therefore, I do not belabor broader discussions of the values of education, focusing instead on two important kinds of domination costs—psychological and material—and the need for education in negating them or, better, preventing them. Psychological costs include insufficient understanding of and fellowship with co-citizens as well as a kind of nihilism regarding democracy as "a way of life."[252] Material costs include undeveloped capabilities for effectuating individual goals and democratic participation, specifically in order to resist domination by the state and by private individuals or corporations.[253] Just because education is necessary does not, of course, mean that it is sufficient.[254] But although institutions other than schools have roles in minimizing domination,[255] no other government bodies equip us to the same degree with

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[249] HORACE MANN, *The Necessity of Education in a Republican Government*, *in* 2 LIFE AND WORKS OF HORACE MANN 143, 151 (Mary Mann ed., 1867); *see* HORACE MANN, EIGHTH ANNUAL REPORT 99 (1845) ("[T]he summit of social happiness can never be reached except under republican constitutions; and no chimera more absurd ever entered the brain of the wildest dreamer, than that republican constitutions can long exist without intelligence and morality.").

[250] Rachel F. Moran, *Let Freedom Ring: Making* Grutter *Matter in School Desegregation Cases*, 63 U. MIAMI L. REV. 475, 502–03 (2009) [hereinafter Moran, *Let Freedom Ring*].

[251] Areto A. Imoukhuede, *The Fifth Freedom: The Constitutional Duty to Provide Public Education*, 22 U. FLA. J.L. & PUB. POL'Y 45, 90 (2011) [hereinafter Imoukhuede, *Fifth Freedom*]; *accord* Neem, *Developing Freedom*, *supra* note 183, at 37, 44–45 (describing Jefferson's belief that education is instrumental to the pursuit of happiness).

[252] *See* JOHN DEWEY, *Creative Democracy—The Task Before Us*, *in* 14 JOHN DEWEY: THE LATER WORKS, 1925–1953, at 224–26 (Jo Ann Boydston ed., 1988) [hereinafter DEWEY, *Creative Democracy*].

[253] *See* HINCHLIFFE, *supra* note 158, at 64 ("[T]he aims of education are . . . related to the development of those human powers that enable agents to exercise their freedoms and to resist potential and actual invasions of liberty.").

[254] *See* LABAREE, *supra* note 246, at 246–47, 250–51; 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, 1116–17 (1989) (noting the agreement that schools "are not the only parties responsible" for widespread educational failures and acknowledging that "schools cannot and should not be expected to be guarantors of success," given life's complexity and unpredictability).

[255] *See, e.g.*, ANDERSON, PRIVATE GOVERNMENT, *supra* note 158, at 65–71 (discussing reforms that might make workplaces more accountable to their workers); Dawood, *Antidomination Model*, *supra* note 159, at 1478–82 (discussing "elements of current court doctrine and practice" that reflect an antidomination approach in election law).

intellectual tools for resisting domination. Insofar as the republican guarantee is concerned, education is fundamental to nondomination, and we therefore have fundamental rights to it.

After discussing the costs of domination that are negated by excellent, equitable public education, I briefly discuss antidomination's relationship to calls for civic virtue or virtuous citizenship, and to the long-standing equity-adequacy debate. Whereas education as antidomination might create civic virtue, that is not its primary purpose. And whereas the principle of nondomination demands more than either equity or adequacy, the convergence of equity and adequacy in theory and in school reform litigation seems itself to converge on nondomination's more forceful demands.

1. Negating Domination's Psychological Costs

Freedom, as John Dewey argued, "designates a mental attitude rather than external unconstraint of movements, but . . . this quality of mind cannot develop without a fair leeway of movements in exploration, experimentation, application, etc."[256] Education and schools, therefore, can have a profound effect on our psychological experience of freedom.

Domination's psychological costs include the misperception of character, whether seeing fellowship where there is none or not seeing fellowship where it is. In her *Letters on Sympathy*, de Grouchy saw this "as a sort of immaturity, an inability to judge for oneself what is right and what is just, a tendency to look to one's superior always," even "to childishly attach to one's oppressor."[257] We begin life "in a particular dependence on many others."[258] Through these relationships, we see that "when we suffer, others can relieve our pain," and our first lesson is "not how to look after ourselves but, rather, *how* to be dependent on one another."[259] But without "reflection," bearing witness to others' experiences, and "exercis[ing] [our] sensitivity to the point where it will continue to develop as much as it is capable," we will not gain the requisite sympathy to distinguish dependence from domination.[260] "Sympathy is the disposition we have to feel in a way similar to others."[261] It is not mere civility or toleration but rather understanding one another as equals, what we might

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[256] DEWEY, DEMOCRACY AND EDUCATION, *supra* note 105, at 357.

[257] Bergès, *supra* note 189, at 107; *accord* HALLDENIUS, MARY WOLLSTONECRAFT, *supra* note 24, at 31.

[258] SOPHIE DE GROUCHY'S *LETTERS ON SYMPATHY*: A CRITICAL ENGAGEMENT WITH ADAM SMITH'S *THE THEORY OF MORAL SENTIMENTS* 1, 70 (Sandrine Bergès trans., 2019) [hereinafter DE GROUCHY, *LETTERS ON SYMPATHY*].

[259] Sandrine Bergès & Eric Schliesser, *Introduction to* DE GROUCHY, *LETTERS ON SYMPATHY*, *supra* note 258, at 31 (emphasis added).

[260] DE GROUCHY, *LETTERS ON SYMPATHY*, *supra* note 258, at 63, 65–67, 90; *see also supra* notes 201–03 and accompanying text.

[261] DE GROUCHY, *LETTERS ON SYMPATHY*, *supra* note 258, at 59; *see generally id.* at 72–103.

also call "mutual empathy" or "mutual respect."[262] Domination, meanwhile, diminishes our capabilities "to look upon each other as equals."[263]

In his *Appeal to the Coloured Citizens of the World*, Walker demonstrated these psychological costs at work. Analyzing an 1829 news report about roughly sixty enslaved African-American men and women rebelling against slavers transporting them, Walker focused on the tragic decision of one of the enslaved women to help a slaver to escape.[264] To Walker, the woman's story was tragic and all too common: hearing any whisper of "the melioration of their dreadful condition, they run and tell tyrants, that they may be enabled to keep them the longer in wretchedness and miseries."[265] In this instance, the woman's domination inhibited her full perception of her own and others' interests, needs, and motivations. "[B]ound by an expectation she [did] not see and therefore bound by a betrayal she [did] not acknowledge," the woman became "a coparticipant in her own domination and in the domination of others without recognizing it."[266] Because hardship activates our survival instincts, we more readily turn on each other, as if competitors for scarce resources, and further enable elite domination.[267]

The psychological costs of domination affect not only those without power but also those in power, albeit with different results.[268] Republican thinkers have long considered the role of ambition; while the state should encourage skilled and energetic citizens to pursue public service, excessive ambition leads to elites' political or economic

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[262] *See* LABORDE, *supra* note 154, at 178; Martha Minow, *Just Education: An Essay for Frank Michelman*, 39 TULSA L. REV. 547, 556 (2004); Blain Neufeld, *Non-Domination and Political Liberal Citizenship Education*, *in* PHILOSOPHICAL PERSPECTIVES ON MORAL AND CIVIC EDUCATION, *supra* note 211, at 135, 137; *see also* JOHN DEWEY, THE SCHOOL AND SOCIETY 28–29 (1900); TAYLOR, HORACE MANN'S TROUBLING LEGACY, *supra* note 247, at 118 (citing Amy Gutmann, *Civic Education and Social Diversity*, 105 ETHICS 557, 557–79 (1995)); *id.* at 121 (citing KWAME ANTHONY APPIAH, COSMOPOLITANISM 85 (2006)). For an argument that "preventing domination requires moral education in the practice and value of *care*," which I understand as even more demanding than sympathy, mutual empathy, or mutual respect, see Shawn Fraistat, *Domination and Care in Rousseau's* Emile, 110 AM. POL. SCI. REV. 889, 889 (2016) (emphasis added).

[263] Sandrine Bergès & Eric Schliesser, *Introduction to* DE GROUCHY, *LETTERS ON SYMPATHY*, *supra* note 258, at 43; *cf.* Bergès, *supra* note 189, at 110 ("[E]xtreme inequality leads distant social classes no longer to regard each other as part of the same humanity.").

[264] WALKER, *supra* note 205, at 25–28. The slaver, Walker noted, returned with reinforcements and reenslaved those who had rebelled. *Id.* at 26.

[265] *Id.* at 28.

[266] Rogers, *David Walker*, *supra* note 157, at 71.

[267] *See, e.g.*, ALEXANDER, *supra* note 235, at 20–26; BLACK, SCHOOLHOUSE BURNING, *supra* note 19, at 98 (explaining how Southern elites "objected to the symbolic message public education would send" and how, if they were to concede that education is important, "the normative lines separating poor, uneducated whites from [enslaved people] would thin," as would their "stranglehold on power"); *id.* at 111; SAUNT, *supra* note 204, at 243–44.

[268] *See* Fraistat, *supra* note 262, at 894.

domination of the people.[269] In *Common Sense*, Paine critiqued the habits that heritable power inculcates in its wielder:

> Men who look upon themselves born to reign, and others to obey, soon grow insolent; . . . their minds are early poisoned by importance; and the world they act in differs so materially from the world at large, that they have but little opportunity of knowing its true interests, and when they succeed to the government are frequently the most ignorant and unfit of any . . . .[270]

Over time, those doing the dominating come to see those they dominate as inferior and thus deserving of further domination.[271] But this can also lead elites to lose faith in democratic practice, reinforcing beliefs that rules are meant to be bent, if not broken.[272] Thus, philosophers like Elizabeth Anderson have emphasized the importance of channeling striving citizens' efforts into the productive and responsive exercise of power.[273] Education, especially of those who might become elites, must cultivate: "awareness of the interests and problems of people from all sectors," "a disposition to serve those interests," "technical knowledge of how to advance these interests," and "respectful interaction with people from all sectors."[274]

Related to these psychological costs is yet another, manifesting in a kind of democratic nihilism. Domination can make us feel powerless, especially to undertake political or social action, and "leads to a sense that the law does not matter."[275] Inculcating citizens' equal dignity or standing is thus essential,[276] especially where elites have stigmatized groups by denying them opportunity on the basis of race,

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[269] *See, e.g.*, DE GROUCHY, *LETTERS ON SYMPATHY*, *supra* note 258, at 114, 138–39; FELIX GILBERT, MACHIAVELLI AND GUICCIARDINI: POLITICS AND HISTORY IN SIXTEENTH-CENTURY FLORENCE 187–92 (1965).

[270] PAINE, *supra* note 193, at 18.

[271] *See, e.g.*, SAUNT, *supra* note 204, at 274–75 (describing Jefferson's recognition, perhaps from his own experience, that slave-owning "turned planters into despots who were habituated to ruling but not being ruled").

[272] *See* DEWEY, DEMOCRACY AND EDUCATION, *supra* note 105, at 84–85; *cf.* Imoukhuede, *Fifth Freedom*, *supra* note 251, at 77–81 (discussing how the decision in Milliken v. Bradley, 418 U.S. 717 (1974), privileged White suburbanites' local control "over the rights of minority children to receive a racially integrated, quality education" and thus perpetuated inequities).

[273] *See* Anderson, *Fair Opportunity*, *supra* note 213, at 596.

[274] *Id.*

[275] Bergès, *supra* note 189, at 108; *see* WALKER, *supra* note 205, at 54, 65 (warning of the "death-like apathy" induced by chattel slavery and identifying education as its antidote).

[276] *See* Areto A. Imoukhuede, *Education Rights and the New Due Process*, 47 IND. L. REV. 467, 476–91 (2014) (arguing that education is essential to developing human dignity); *see also* Anderson, *Fair Opportunity*, *supra* note 213, at 615; Biegel, *supra* note 254, at 1106–08 (discussing the loss of dignity that young people can experience when deprived of good education and especially literacy).

gender, class, etc.[277] Equal standing "requires that each person have sufficient internal capacities and external resources" not only to resist domination but also "to function as an equal in society—to fulfill a respected role in the division of labor, participate in democratic discussion, appear in public without shame, and enjoy equal moral standing to make claims on others."[278] Indeed, it was in part to deepen their own sense of "autonomy and dignity," alongside skills for resisting and escaping from slavery, that many enslaved Black people worked hard to acquire literacy, often in secret and at great risk.[279] As Heather Williams has noted, "literacy had the potential to help enslaved people articulate intellectual objections to the very existence of the institution of slavery."[280]

In the end, domination is harmful psychologically because it "prevents people from developing sympathy towards each other, and therefore from developing moral judgment."[281] Sympathy "is a complex emotion that requires intellectual input and, in turn, knowledge about people and the ways they suffer, as well as the ability to think rapidly and abstractly about the complexity of human life."[282]

> As the first cause of this feeling of humanity, [sympathy's] effects are so precious that it can in part repair the suffering caused by personal interest in large societies; it counters the power of might that we encounter at each step and that centuries of enlightenment can only extinguish through the vices that produced it.[283]

Therefore, public education, through which we encounter and come to understand fellow citizens whose experiences differ from ours, provides a uniquely powerful

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[277] *See* HINCHLIFFE, *supra* note 158, at 74 ("Even if the process of education takes place in a political environment that is oppressive or not conducive to liberty there may be something about that process itself that does at least promote the experience of what it is to be liberty-bearing."); Anna Marie Smith, *Reading Thurgood Marshall as a Liberal Democratic Theorist: Race, School Finance, and the Courts*, *in* EDUCATION, JUSTICE, AND DEMOCRACY, *supra* note 19, at 243, 264 (interpreting Justice Marshall's education jurisprudence as aimed at addressing inequity as "a kind of hidden curriculum" that generates stigmatic injuries, marking groups given inferior education as inferior themselves).

[278] Anderson, *Fair Opportunity*, *supra* note 213, at 620.

[279] *See* HEATHER ANDREA WILLIAMS, SELF-TAUGHT: AFRICAN AMERICAN EDUCATION IN SLAVERY AND FREEDOM 5 (2005); *see also* BLACK, SCHOOLHOUSE BURNING, *supra* note 19, at 92–94 (recounting Frederick Douglass's efforts, among others', to learn to read, despite Southern prohibitions on teaching and learning among enslaved African Americans, and sometimes even among White people); Davis, *Education for Sovereign People*, *supra* note 17, at 168–71 (describing widespread literacy efforts among enslaved African Americans prior to the Civil War).

[280] WILLIAMS, *supra* note 279, at 23 (2005); *see id.* at 7–29, 67–79.

[281] Bergès, *supra* note 189, at 104.

[282] DE GROUCHY, *LETTERS ON SYMPATHY*, *supra* note 258, at 1, 30–31.

[283] *Id.* at 66.

corrective. "While some aspects of citizens' competence (e.g., numeracy, literacy, knowledge of history) can be achieved by individuals alone, other competencies (e.g., mutual understanding, mutual respect, tolerance) are group achievements, best accomplished through the presence of diverse individuals."[284]

2. Negating Domination's Material Costs

Whether in filing court claims or filling out mail-in ballots, cooking healthy meals for family or applying for a promotion or a new job, education shapes our individual opportunities. On that ground alone, education would be "of prime importance to the happiness of the state."[285] Education further equips individuals with capabilities necessary to resist domination. When we lack access to facts or those facts have been suppressed, when we lack analytical skills to discern those facts' import or to suspect their suppression, then we will not be able to see through the scheming of well-heeled and ambitious politicians or tycoons.[286] Indeed, nineteenth-century labor republicans saw that the industrial system "not only stunted needs but also produced ignorance and prejudice," depriving workers of information and time to read, "producing an 'aristocracy of intellect' appropriate to 'monarchical governments[,]' not republican ones."[287]

Republican education must develop capabilities so as to reinforce all people's equal status, which nondomination presumes,[288] or disarm threats to that equal status. "Each student must receive an education of a certain level of quality if she or he is to be able to exercise his or her constitutional rights and to have the real (not merely theoretical) freedom to make choices about the direction of her or his life."[289]

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[284] Debra Satz, *Equality, Adequacy, and Education for Citizenship*, 117 ETHICS 623, 637 (2007); *see* Moran, *Let Freedom Ring*, *supra* note 250, at 489 ("[T]he [Supreme Court's] higher education cases explored the collective implications of race. Producing knowledge and promoting democratic legitimacy required interaction among people from different backgrounds.").

[285] *See* JAMES WILSON, *Of the Law of Nations*, *in* 1 WORKS OF JAMES WILSON, *supra* note 109, at 146 (arguing that education is indispensable because it is a source of both public and private happiness).

[286] *See* HINCHLIFFE, *supra* note 158, at 55 ("Learning does not merely consist of the mastery of concepts and information: what we are looking for is the ability to make judgements."); *id.* at 64; *see also* PETTIT, JUST FREEDOM, *supra* note 153, at 191 ("In the most advanced democracies, there is a host of special interest groups poised to impose their particular will on government by recourse to backroom pressure, financial threat, fraudulent analysis, shameless misinformation, manufactured outrage, drummed-up hysteria . . . ."); Maria Stewart, *Religion and the Pure Principles of Morality, the Sure Foundation on Which We Must Build*, *in* WORDS OF FIRE, *supra* note 228, at 26, 27–28 ("Knowledge would begin to flow, and the chains of slavery and ignorance would melt like wax before the flames.").

[287] GOUREVITCH, *supra* note 156, at 156 (citation omitted); *cf.* Stewart, *supra* note 228, at 32.

[288] *See supra* Section II.B.3.

[289] Bowman, *supra* note 19, at 14 (citing AMY GUTMANN, DEMOCRATIC EDUCATION (1987));

Although education-as-antidomination is dynamic and does not amount simply to equalization, either of resources or of outcomes, closing gaps is essential, given that great inequalities invariably lead to domination.[290] Moreover, limitations on our opportunities to develop competencies can in turn feed domination's psychological costs. In his *Appeal*, for example, Walker also recounted his encounter with an African-American man working as a bootblack who claimed to "'never want to live any better or happier than when [he] can get a plenty of boots and shoes to clean!!!'"[291] Although Walker could not fault the man for shining shoes to eke out a living, he lamented the man's "*glorying* and being *happy*" in the mean self-worth and livelihood that others created for him and that he uncritically accepted.[292]

Turning our attention from resistive individual to contestatory society, our framers and reframers considered public education functionally "critical to citizenship: it enables a republic."[293] "In proportion as the structure of a government gives force to

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see BREWER, *supra* note 203, at 111 (interpreting a 1744 sermon by Elisha Williams and based on John Locke's *Second Treatise on Government*, in which Williams argued that freedom in choices depends on the development of reasoning capabilities); HINCHLIFFE, *supra* note 158, at 67 (relying on John Stuart Mill's *On Liberty* to argue that "liberty requires both the exercise of choice and free deliberation so that an individual is able to think and act with independence of thought and action"); *see also* ADRIAN O'CONNOR, IN PURSUIT OF POLITICS: EDUCATION AND REVOLUTION IN EIGHTEENTH-CENTURY FRANCE 115 (2017) ("Emphasizing the role of people's 'independence' and 'competence' in determining their collective capacity to make good decisions, [de Condorcet] seemed *primarily* concerned with giving people knowledge and skills, *less* with the cultivation of civic sentiment or political virtues." (emphases added)).

[290] *See* NICOLAS DE CONDORCET, *The Nature and Purpose of Public Instruction (1791)*, *in* CONDORCET: SELECTED WRITINGS 105, 108 (Keith Michael Baker ed., 1976) ("The son of a rich man will not belong to the same class as the son of a poor man unless there is a system of public instruction to close the gap between them."); DE GROUCHY, *LETTERS ON SYMPATHY*, *supra* note 258, at 68–70, 98, 136–37, 147–48; POCOCK, *supra* note 138, at 208.

[291] WALKER, *supra* note 205, at 31.

[292] *Id.* at 31–32; *see* Rogers, *David Walker*, *supra* note 157, at 74–75 (noting that the bootblack "confuses the fact that he cleans shoes because he has no choice with the idea that he cleans shoes because he has freely chosen that profession"); *cf.* GOUREVITCH, *supra* note 156, at 157 (citation omitted) (noting Ira Steward's belief that inadequate mainstream education meant that workers "'will be found, every election day, in company with master Capitalists, voting down schemes for their own emancipation!'").

[293] *See* BREWER, *supra* note 203, at 126; *see also* BLACK, SCHOOLHOUSE BURNING, *supra* note 19, at 100–01 (recounting arguments by Reconstruction senators like Charles Sumner and Oliver Morton for the indispensability of universal education in a republic); MICHAEL A. REBELL, FLUNKING DEMOCRACY: SCHOOLS, COURTS, AND CIVIC PARTICIPATION 2 (2018) [hereinafter REBELL, FLUNKING DEMOCRACY] ("For America's founders, [like Benjamin Rush and Thomas Jefferson,] preparing young people to be capable citizens was the primary reason to establish a public school system."); WOOD, *supra* note 139, at 397 (describing Benjamin Rush's insistence on instituting a robust public education system lest the United States cease to be self-governing for long); Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92, 113 (2013) ("[M]any of the intellectual and political

public opinion," George Washington argued (prefiguring Mann), "it is essential that public opinion should be enlightened[.]"[294] The right to vote, often considered our most fundamental, has thus figured prominently into justifications for robust public education.[295] In one sense, education is technically necessary to exercise our right to vote, but in another, education actually "enhance[s] . . . the value of that right."[296] In *The Nature and Purpose of Public Instruction*, de Condorcet wrote:

> Public instruction is an obligation of society toward its citizens. It would be vain to declare that all men enjoy equal rights, vain for the laws to respect the first principle of eternal justice, if the inequality in men's mental faculties were to prevent the greatest number from enjoying these rights to their fullest extent.[297]

It could not be that liberty and equality are only "words [that the people] hear read in their codes and not rights [that] they *know how* to enjoy."[298] We must first understand our rights in order to love them and to feel empowered to enforce them.[299] Public education provides the requisite skills and common understandings with which we can do so, enabling us to author, edit, and contest law as politically mature citizens.[300]

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heavyweights of the Framing era championed education not just as an instrument for righteous living, but as a building block of democratic society. For Noah Webster, Thomas Jefferson, Benjamin Rush, and John Adams, government had a duty to make education widely available to safeguard the democratic order.").

[294] GEORGE WASHINGTON, *Farewell Address, September 19, 1796*, *in* GEORGE WASHINGTON: SELECTED WRITINGS 364, 374 (Ron Chernow ed., 2011).

[295] *E.g.*, HORACE MANN, *Means and Objects of Common-School Education*, *in* 2 LIFE AND WORKS OF HORACE MANN, *supra* note 249, at 39, 83 ("The theory of our government is,—not that all men, however unfit, shall be voters,—but that every man, by the power of reason and the sense of duty, shall become fit to be a voter.").

[296] JAMES WILSON, *Of the Legislative Department*, *in* 1 WORKS OF JAMES WILSON, *supra* note 109, at 403.

[297] DE CONDORCET, *supra* note 290, at 105; *see* O'CONNOR, *supra* note 289, at 118 (discussing how de Condorcet "thought education necessary for the establishment of 'equality' because it offered the means by which to abolish relationships of 'dependence' between individuals").

[298] *See* DE CONDORCET, *supra* note 290, at 107 (emphasis added).

[299] *See id.* at 105–07; *accord* George Washington, *First Annual Address to Congress*, WASHINGTON LIBRARY, https://www.mountvernon.org/education/primary-sources/state-of-the-union-address [https://perma.cc/XBS8-DC6K] (arguing that education protects the people's "enlightened confidence," enabling them to discern when they are being oppressed and when they are not).

[300] *See* PETTIT, ON THE PEOPLE'S TERMS, *supra* note 23, at 217–18 (identifying the people's "authorial" and "editorial" roles under republicanism); *cf.* O'CONNOR, *supra* note 289, at 81 (noting the new, fundamental challenge for revolutionary France to develop educational institutions that could "maintain[ ] social cohesion amid interpersonal competition and contestation").

Lastly, republican education demands that all students be able to acquire and refine skills and learning that in fact enable them to reach their full potential, regardless of where they began.[301] Antidomination rejects consigning students to educational tracks, whether vocational or liberal arts, absent their avowed, informed interest in a given path.[302] Antidomination prioritizes social mobility and dissolves entrenched hierarchies and exploitable relationships.[303]

> The price that democratic societies will have to pay for their continuing health is the elimination of an oligarchy . . . that attempts to monopolize the benefits of intelligence and of the best methods for the profit of a few privileged ones, while practical labor, requiring less spiritual effort and less initiative, remains the lot of the great majority.[304]

Even in a society that at any given time has elites, meaning citizens closer to social and political centers of power, students becoming elites must be trained against dominating others and, more importantly, trained to protect and promote institutions that eliminate domination where it exists.[305]

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[301] *See, e.g.*, DEWEY, DEMOCRACY AND EDUCATION, *supra* note 105, at 226 ("Democracy cannot flourish where the chief influences in selecting subject matter of instruction are utilitarian ends narrowly conceived for the masses, and, for the higher education of the few, the traditions of a specialized cultivated class. The notion that the 'essentials' of elementary education are the three R's mechanically treated, is based upon ignorance of the essentials needed for realization of democratic ideals."); K. TSIANINA LOMAWAIMA & TERESA L. MCCARTY, "TO REMAIN AN INDIAN": LESSONS IN DEMOCRACY FROM A CENTURY OF NATIVE AMERICAN EDUCATION 169–70 (2006) ("Danger lies not in diversity, but in attempts to standardize and homogenize the linguistically and culturally diverse peoples who comprise the nation's citizenry. Disguised as an equalizing force, standardization in fact stratifies, segregates, and undercuts human potential, denying equality of opportunity for all. We have only to consider the history of Native American education to see the standardizing juggernaut in its true form.").

[302] *See, e.g.*, Viona J. Miller, *Access Denied: Tracking as a Modern Roadblock to Equal Educational Opportunity*, 93 N.Y.U. L. REV. 903, 906–07, 938–40 (2018) (arguing that educational tracking "is inequitable since it disadvantages *all* students in lower tracks by denying them access to the educational opportunities necessary to succeed").

[303] *See* HINCHLIFFE, *supra* note 158, at 153 (quoting ANTONIO GRAMSCI, SELECTIONS FROM PRISON NOTEBOOKS 41 (Quintin Hoare & Geoffrey Nowell-Smith trans., 1971)) ("[T]he move away from a common school to a variety of provision with a more vocational orientation would lead back 'to a division into juridicially fixed and crystallised estates rather than moving towards the transcendence of class divisions.'").

[304] JOHN DEWEY, *Education from a Social Perspective*, *in* 7 JOHN DEWEY: THE MIDDLE WORKS, 1899–1924, at 113, 127 (Jo Ann Boydston ed., 1979); *see generally* Fishkin & Forbath, *supra* note 159.

[305] *See* JAMES WILSON, *Of the Study of Law in the United States*, *in* 1 WORKS OF JAMES WILSON, *supra* note 109, at 23 ("Of no class of citizens can the education be of more publick consequence, than that of those, who are destined to take an active part in publick affairs.");

3. Educating for More Than Civic Virtue

When we think about education in the republican project, we often turn to "civic education" and nurturing "virtuous citizens."[306] Although the need for schools to provide more practice in democratic participation is real,[307] republican education need not—and should not—be mere civics or values inculcation as traditionally understood.[308] Education-as-antidomination might generate "virtuous citizens," but that is not its primary purpose.[309] As suggested above, nondomination is a useful, protective principle in part because it presumes that we are not virtuous and will not necessarily be virtuous.[310]

Education is "preparation for living in the space of reasons."[311] Because "those [dominated] do not ask for reasons and those [dominating] do not feel obliged to give them," the asking and giving of reasons "exemplifies, in practice, how people recognise each other as free beings."[312] But although republicanism entails citizens seeing each other as political equals, it does not demand either loyalty to a particular

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see also DRIVER, SCHOOLHOUSE GATE, *supra* note 134, at 22 ("[I]t is impossible to disregard the constitutional rights of students without ultimately damaging the republic to which students pledge allegiance."); Anderson, *Fair Opportunity*, *supra* note 213, at 596 (arguing that, given the inevitable rise of elites, elites must possess the skills to serve others effectively and the interest to do so in the first place); Smith, *supra* note 277, at 248 (citation omitted) ("[I]t is only by ensuring that the testimonies of the least advantaged are given adequate attention in our deliberations that we can hope to progress toward fulfilling our liberal democratic ideals.").

[306] *E.g.*, DALY & HICKEY, *supra* note 154, at 169–96; LABAREE, *supra* note 246, at 13–15, 18–19, 40–41, 49–52; TAYLOR, HORACE MANN'S TROUBLING LEGACY, *supra* note 247, at 1–7, 13–16; Friedman & Solow, *supra* note 293, at 121–27 (recounting the common schools movement's multiple goals, among them shaping citizens' values and identities); Sherry, *supra* note 146, at 156–82; Joshua E. Weishart, *Democratizing Education Rights*, 29 WM. & MARY BILL RTS. J. 1, 47–52 (2020) [hereinafter Weishart, *Democratizing Education Rights*].

[307] *See, e.g.*, MEIRA LEVINSON, NO CITIZEN LEFT BEHIND 32–50 (2012); REBELL, FLUNKING DEMOCRACY, *supra* note 293, at 17–23.

[308] *See* Costa, *supra* note 211, at 159–62 (arguing that while some skills-based civics education is important, much broader learning is needed).

[309] Indeed, some scholars have defined civic virtue in terms of capability to resist domination. *E.g.*, DALY & HICKEY, *supra* note 154, at 169 ("Realising the ideal of freedom as non-domination will require not only well-designed institutions and laws, but also virtuous citizens, sensitive and resistive to arbitrary power."); VERGARA, *supra* note 155, at 130–31 (explaining Machiavelli's view that nondomination does not entail "active engagement in politics [as] an end in itself" and that civic participation "is functional, a necessary means for maintaining a republican structure conducive to liberty"); Bergès, *supra* note 189, at 107 (explaining de Grouchy's view that "civic education begins at the cradle, and is not merely a question of imparting values but of developing the right kind of psychological habits").

[310] *See supra* notes 212–19 and accompanying text.

[311] HINCHLIFFE, *supra* note 158, at 45.

[312] *Id.*; *cf.* McCammon, *supra* note 196, at 1046–47 (describing dominators' "deliberative isolation," the degree to which they are "accountable to [others] when it comes to how they use their power").

moral creed or lessons in "civic virtue."[313] "Democratic society is peculiarly dependent," Dewey wrote, "for its maintenance upon the use in forming a course of study of criteria which are *broadly human*."[314] Democracy cannot flourish where public instruction serves merely "utilitarian ends narrowly conceived for the masses, and, for the higher education of the few, the traditions of a specialized cultivated class."[315] "An important aim of [republican] education, then, is to liberate children from the perils of epistemic dependency or to ensure as far as possible that children can avoid this when they are adults."[316]

One further caution, however, against fixating on civics or civic virtue: we should be wary of schools as purely preparatory. We accept that "education should facilitate access to what might be called the three C's: college, careers[,] and citizenship."[317] But focusing too much on preparing children to be adults "neglects the important possibility" that childhood, "the stage of life before we become capable of rational planning," offers "opportunities for flourishing [valuable] in their own right."[318] Indeed, we recognize that children are different and have different needs than adults,[319] and that when schooling includes play, "going to school is a joy, management is less of a burden, and learning is easier."[320] To the extent, moreover, that schools must model democracy—"more than a form of government[,] . . . primarily a mode of associated living"—that will inevitably entail enjoyment as much as practice.[321]

4. At the Convergence of Equity and Adequacy

We can gain a better sense of what nondomination demands—and what education-as-antidomination looks like—by considering the long-standing debate between

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[313] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) (overruling Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940)) ("[Boards of Education] have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."); *see* DRIVER, SCHOOLHOUSE GATE, *supra* note 134, at 62–71 (discussing the history and impact of *West Virginia State Board of Education v. Barnette*).

[314] DEWEY, DEMOCRACY AND EDUCATION, *supra* note 105, at 225–26 (emphasis added).

[315] *Id.* at 226.

[316] HINCHLIFFE, *supra* note 158, at 90.

[317] Macleod, *supra* note 19, at 82.

[318] *Id.* at 78.

[319] *See* Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1879 (1987) [hereinafter Minow, *Interpreting Rights*].

[320] DEWEY, DEMOCRACY AND EDUCATION, *supra* note 105, at 228. That said, play and work are "not matters of temporary expediency and momentary agreeableness" but are themselves "intellectual and social." *Id.* at 229; *accord* DE GROUCHY, *LETTERS ON SYMPATHY*, *supra* note 258, at 116–17 (criticizing teaching methods that strip out enjoyment, fun, and aesthetic meaning).

[321] *See* DEWEY, DEMOCRACY AND EDUCATION, *supra* note 105, at 101.

educational equity and educational adequacy. Lawyers and scholars generally recount the history of school finance litigation in "waves."[322] In the first wave (1971–73), advocates relied on the United States Constitution to argue "that equal protection guaranteed a right to substantially equal funding among school districts."[323] In the second wave (1973–89), advocates relied on state constitutions to achieve equity either through roughly equalizing per-pupil funding or through minimizing school funding reliance on district property wealth.[324] In the third wave (1989 onward), advocates continued to rely on state constitutions but instead to argue for baselines of educational adequacy.[325]

Alongside this progression, scholars and advocates have debated whether educational equity or educational adequacy is the worthier goal. Whereas adequacy "aims to combat *absolute* deprivation" of educational resources or opportunities, equity "aims to combat [their] relative deprivation."[326] Equity entails some kind of equalization, whether of school resources or of opportunities more broadly,[327] and equity proponents generally argue that it demands more of us than adequacy does.[328] In contrast, adequacy (or sufficiency) "can be understood as an expression of two theses, one positive and one negative."[329] Whereas the positive "'stresses the importance of people living above a certain threshold, free from deprivation,'" the negative "'denies the relevance of certain additional distributive requirements.'"[330]

In recent years, advocates on each side of the equity-adequacy debate have conceded the value of the other ideal, and the sides have steadily converged.[331] Still

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[322] *See, e.g.*, David G. Hinojosa, *"Race-Conscious" School Finance Litigation: Is a Fourth Wave Emerging?*, 50 U. RICH. L. REV. 869, 871–73 (2016); Koski, *supra* note 129, at 1188–94; William S. Koski & Rob Reich, *When "Adequate" Isn't: The Retreat From Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 556–62 (2006).

[323] Koski & Reich, *supra* note 322, at 557.

[324] *Id.* at 557–59.

[325] *Id.* at 559–62.

[326] *See* Rob Reich, *Equality, Adequacy, and K–12 Education* [hereinafter Reich, *Equality, Adequacy, and K–12 Education*], *in* EDUCATION, JUSTICE, AND DEMOCRACY, *supra* note 19, at 43, 48.

[327] *See* Joshua E. Weishart, *Transcending Equality* Versus *Adequacy*, 66 STAN. L. REV. 477, 486 (2014) [hereinafter Weishart, *Transcending Equality* Versus *Adequacy*] (offering "a general account that features three views traditionally associated with the principle—nondiscrimination, meritocracy, and equal life chances").

[328] *See, e.g.*, Reich, *Equality, Adequacy, and K–12 Education*, *supra* note 326, at 51–52.

[329] Weishart, *Transcending Equality* Versus *Adequacy*, *supra* note 327, at 512.

[330] *Id.* (quoting Paula Casal, *Why Sufficiency Is Not Enough*, 117 ETHICS 296, 297–98 (2007)).

[331] *Compare* Reich, *Equality, Adequacy, and K–12 Education*, *supra* note 326, at 55 ("Defining the equal standing of citizens in a robust manner, such that opportunities to participate in civic life are roughly equal, will bring the adequacy orientation much closer to the equality orientation in practice."), *with* Anderson, *Fair Opportunity*, *supra* note 213, at 618 ("[T]he proper egalitarian aim is to ensure, to the extent feasible, that everyone has sufficient human

others have observed how the two ideals are inextricable. Joshua Weishart has argued, for example, that equity and adequacy "are not mutually exclusive" but rather "mutually reinforcing."[332] They are relative to one another and dynamic, accommodating each other where a claim for one might be stronger than a claim for the other.[333] Kristine Bowman has argued similarly that "liberty and equality claims form a double helix in education reform litigation."[334] Liberty and equality claims are necessarily "entwined" in any lawsuit seeking to remedy education inequities or inadequacies.[335] The debate's convergence is appropriate, timely, and reflects Dewey's own rejection of dualism.[336]

As it turns out, the convergence of equity and adequacy reveals aspects of what nondomination demands, and education as antidomination should assuage equity and adequacy partisans.[337] Critics of equity point out that, in equalizing opportunities, there is always risk of "leveling down" what resources we provide to students.[338] Antidomination is a commitment not to do so. Because the republican project is one of liberation and because to level down is to induce scarcity and to invite domination, nondomination demands high levels of educational opportunity.[339] Given changing needs, especially during crisis, nondomination requires that resources spent on education increase, presumably until returns are so marginal as to disappear.[340]

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capital to function as an equal in civil society—to avoid oppression by others, to enjoy standing as an equal, to participate in productive life, and so forth. This sometimes requires more intensive investment in the disadvantaged than an equality of resources standard would allow.").

[332] Weishart, *Transcending Equality* Versus *Adequacy*, *supra* note 327, at 480.

[333] *See id.* at 525–42; *see also* Joshua E. Weishart, *Equal Liberty in Proportion*, 59 WM. & MARY L. REV. 215, 224 (2017) [hereinafter Weishart, *Equal Liberty*]; Joshua E. Weishart, *Protecting a Federal Right to Educational Equality and Adequacy* [hereinafter Weishart, *Protecting a Federal Right*], *in* FEDERAL RIGHT TO EDUCATION, *supra* note 17, at 303, 365 (describing "the dual nature of the right to education as both a positive claim to an adequate education (compelling state action) and negative immunity against inequitable distributions of educational opportunity (blocking state action)").

[334] Bowman, *supra* note 19, at 16.

[335] *Id.* at 45–52.

[336] *See, e.g.*, DEWEY, DEMOCRACY AND EDUCATION, *supra* note 105, at 141–44 (rejecting dualism between developing the mind and developing the body through education); *id.* at 228–30, 277–90 (rejecting dualism between "naturalism and humanism in education").

[337] There is an important conceptual difference here: equity and adequacy refer to resources and opportunities provided to students, whereas nondomination refers to students' experience as "liberty-bearing" agents. *See* HINCHLIFFE, *supra* note 158, at 74.

[338] *See* Anderson, *Fair Opportunity*, *supra* note 213, at 615; Weishart, *Equal Liberty*, *supra* note 333, at 226–29 (discussing the flaws of formal equality in the context of first- and second-wave school finance equalization).

[339] Equalization runs the risk also of leaving stigmatic or "[i]ntangible harms" in place even while progress appears to be made. Moran, *Let Freedom Ring*, *supra* note 250, at 484. This was the lesson of *Brown v. Board of Education*: that separate is "inherently unequal." 347 U.S. 483, 495 (1954).

[340] *See* Moran, *Let Freedom Ring*, *supra* note 250, at 484.

Critics of adequacy, meanwhile, point out that mere resource baselines do not constrain what families might spend privately on their own children's education. In failing to do so, baselines lead to inequities, which then ripple out into society and reinforce themselves, entrenching power and privilege.[341] Even worse, merely ensuring a baseline while permitting private spending above it effectively conscripts the government into perpetuating these inequities, thus contravening the equal standing of citizens.[342] Antidomination, however, is a commitment to eliminate inequities that result in domination. Although antidomination does not necessarily equalize—nondomination does not mean the absence of difference—it does require constant attention to potentially harmful effects of disparities and disparate practices.[343]

Thus, an antidomination approach would meet both equity and adequacy needs. And whereas the eventual goal of republican education is liberation, it can be more useful to think of its immediate role as "the development of those human powers that enable agents to exercise their freedoms and to resist potential and actual invasions of liberty."[344] Because education is necessary and uniquely disposed to mend domination's costs and to equip us to resist further domination, it forms an essential part of our constitutional commitment to republicanism.

B. The Republican Guarantee as an Ongoing Obligation

As a guarantee of nondomination and thus of a fundamental right to education, the republican guarantee presents a deep conceptual challenge: the antidomination duty that the guarantee imposes on the federal legislative, executive, and judicial branches is an ongoing one. Some violations of, or failures to fulfill, the obligation will likely persist even after others have been redressed. With respect to education, moreover, fulfilling the obligation will likely require complex solutions developed by all three branches, and likely other actors too.

By "ongoing," therefore, I mean persistent and complex, but not necessarily indeterminate.[345] When it comes to persistence, we should understand the antidomination duty as a duty to minimize domination, that is to eradicate it as best as we can.[346]

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[341] *See* Reich, *Equality, Adequacy, and K–12 Education*, *supra* note 326, at 60.

[342] *Id.* at 57; *accord* Koski & Reich, *supra* note 322, at 595, 606.

[343] *See, e.g.*, Anderson, *Fair Opportunity*, *supra* note 213, at 615 (citation omitted); PETTIT, JUST FREEDOM, *supra* note 153, at xxvi (offering an "eyeball test" for nondomination, under which individuals "can look others in the eye without reason for fear or deference of the kind that a power of interference might inspire").

[344] HINCHLIFFE, *supra* note 158, at 64.

[345] I have seen no evidence suggesting that the requirements of nondomination are unknowable, even if they are not yet entirely known.

[346] *See* LEMIEUX & WATKINS, *supra* note 120, at 106; LOVETT, DOMINATION AND JUSTICE, *supra* note 153, at 159–65.

Because society is not static, however, we likely cannot minimize domination through one set of statutes, regulations, and rulings.[347] "New forms of domination will inevitably arise from changing patterns in human social relations, even when the old forms have been successfully addressed with law."[348] In other words, even after a legislature enacts a law, an executive administers it, or a court remedies its violation, the demands of nondomination almost certainly have yet to be met and violations of the republican guarantee persist. This is especially true for institutions with ever-changing needs, like schools, a fact that has not gone unnoticed.[349] That said, believing that there is "a destination, an attainable, fixed point of constitutional compliance, merely dooms courts and legislatures to failure in [education] cases."[350] This belief is especially misguided when adjudicating such values as equity and adequacy, which are "comparative, dynamic, and interminable constitutional ends."[351]

When it comes to complexity, "social problems that have multiple causes require far-reaching, complex, and cumbersome institutional reform and choices among controversial alternative policies."[352] In other words, it will not be easy to resolve claims of domination in one area (e.g., education) when domination in other areas (e.g., employment, housing, and health) contribute substantially or exacerbate the problem. In the educational context, it might be impossible for our governments "to neutralize all of the differential effects of social circumstances (e.g., race, class, and gender) and natural endowments (innate talents and (dis)abilities) on every child's chances for educational achievement."[353] To do so might be to create "a tapline into the state treasury that could drain it of every last dollar."[354] Moreover, judicial review itself has limits. Without coordinated (or contested) efforts among branches

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[347] Costa, *supra* note 211, at 170 ("Legal instruments are often inadequate to check power in civil society, and often leave important forms of domination in place.").

[348] LEMIEUX & WATKINS, *supra* note 120, at 106; *accord* LOVETT, REPUBLIC OF LAW, *supra* note 119, at 193.

[349] *See supra* notes 134–37 and accompanying text.

[350] Joshua E. Weishart, *Rethinking Constitutionality in Education Rights Cases*, 72 ARK. L. REV. 491, 518 (2019).

[351] *See id.* at 508; *accord* Satz, *supra* note 284, at 636 (arguing that what constitutes a sufficient education will depend "on the distribution of skills and knowledge in the population as a whole"). Moreover, because nondomination is materialist, and thus context-dependent, its achievement will depend on the needs of people living at a given time. *See supra* Section II.B.2.

[352] FORD, *supra* note 117, at 21; *accord* Biegel, *supra* note 254, at 1116–17.

[353] *See* Weishart, *Protecting a Federal Right*, *supra* note 333, at 361; *see also* Patrick McGuinn, *The Federal Role in Educational Equity: The Two Narratives of School Reform and the Debate over Accountability*, *in* EDUCATION, JUSTICE, AND DEMOCRACY, *supra* note 19, at 221 ("Two crucial facts drive the school reform debate in America today: the enormous impact of poverty on educational opportunity and student achievement, and the inability to date of our public schools to compensate for the educational disadvantages stemming from poverty.").

[354] *See* Reich, *Equality, Adequacy, and K–12 Education*, *supra* note 326, at 53–54; *see also* GREENE, HOW RIGHTS WENT WRONG, *supra* note 119, at 99.

of government, state as well as federal, courts likely cannot eliminate domination in education,[355] much less everywhere that it exists.[356]

Consider, as an illustration of this problem, the Land Ordinance of 1785 and the Northwest Ordinance of 1787, which "reserved sections of public lands for the support of common schools" and prohibited slavery in the Northwest Territory, then occupied by the Potawatomi, Shawnee, and other Native nations and comprising the present states around the Great Lakes.[357] On the one hand, the ordinances "laid the groundwork" for the development of our public education system.[358] On the other hand, they "envisioned a process for newly acquired lands that eventually became the basic principle of all territorial acquisition and governance," extending settler colonialism at the United States' borders.[359] Although the ordinances increased federal (and state) priority on education and established a model for local education, their legacy included the displacement and domination of Native peoples, thus necessitating further antidomination efforts.

Or consider, as another illustration, the Federal Aid Highway Act of 1956, also known as the Interstate Highway Act.[360] The Act allocated billions of dollars for constructing much of our current interstate system, "fundamentally restructur[ing] urban America."[361] As the expansion of highways opened up regional and cross-country travel to those with a car, "the ability to drive on the interstate highways offered Black people a certain amount of freedom from the oppression they experienced on public transportation" and more broadly across the Jim Crow South.[362] At the same time, however, highways split up or encircled communities, overwhelmingly Black and low-income communities in particular, often purposefully disrupting, hollowing out, and segregating them.[363] As with settler colonialism, the lasting effects of these decisions necessitate further redress.

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[355] *See, e.g.*, FORD, *supra* note 117, at 238 ("[T]oo many public schools fail all but the most talented and self-sufficient students; new administrative and pedagogical approaches are desperately needed.").

[356] LEMIEUX & WATKINS, *supra* note 120, at 30–31, 133 ("One of the key insights we take from the democracy-against-domination school of democratic thought is that domination comes from many sources . . . .").

[357] Liu, *supra* note 31, at 370 n.165; *see* NORTHWEST ORDINANCE OF 1787, *reprinted at* 1 U.S.C., art. III, art. VI; TENBROEK, *supra* note 34, at 137–38; Black, *Fundamental Right*, *supra* note 17, at 1083; Friedman & Solow, *supra* note 293, at 114–16; Weishart, *Democratizing Education Rights*, *supra* note 306, at 48–49.

[358] Friedman & Solow, *supra* note 293, at 115; *accord* Weishart, *Democratizing Education Rights*, *supra* note 306, at 48–49.

[359] *See* RANA, *supra* note 156, at 109; *see also* DAHL, *supra* note 216, at 34–46; NGAI, *supra* note 236, at 97.

[360] Federal-Aid Highway Act of 1956, Pub. L. No. 627, 70 Stat. 374 (1956).

[361] Deborah N. Archer, *"White Men's Roads Through Black Men's Homes": Advancing Racial Equity Through Highway Reconstruction*, 73 VAND. L. REV. 1259, 1273–74 (2020).

[362] *Id.* at 1262.

[363] *See id.* at 1273–85; *see also* Rebecca Retzlaff, *The Montgomery Bus Boycott and the Racial Basis for Interstate Highways and Urban Renewal*, J. URBAN HIST. 1, 28–30 (2020).

The gravity of the challenge underlying an ongoing obligation explains our resistance to adjudicating—and to legislating—the republican guarantee, especially as a source for education rights. The political question doctrine is superficial in comparison, concealing this deeper but unarticulated unease. To begin—only to begin—to address this challenge, I raise three responses. First, concerns about the persistence or complexity of domination cannot overcome the necessity, even inevitability, of an antidomination ratchet. Better to get to work on the problem than to bemoan its difficulty. Second, with respect to courts, the creativity in common law adjudication is actually a uniquely powerful problem-solving tool. As long as courts are candid in trying, failing, and refining standards, the organic, case-by-case approach of American courts affords flexibility in minimizing domination. Third, interbranch coordination and contestation are key, and we can address judicial capacity concerns by expanding the Article III bench, Article II adjudication capabilities (to support Article III courts), and even Article I oversight and hearings.

1. The Necessity of Minimizing Domination

Regardless of how challenging this ongoing obligation seems to be, it is ultimately necessary. In one sense of "necessary," I mean that meeting this challenge is worthy. If we do not commit to replacing domination with liberation, "then we will have set up nothing but a beeswax simulacrum of a free nation."[364] Despite the often taken-for-granted work that educators put in, for example, public schools remain inadequate and inequitable, and we remain susceptible to social fracture and extremism.[365] "The present state of the world is more than a reminder that we have now to put forth every energy of our own to prove worthy of our heritage."[366]

In another sense of "necessary," I mean that the challenge is unavoidable. Consider, for example, the concern mentioned above that merely ensuring a baseline of educational adequacy makes government complicit in perpetuating inequities that arise from private dollars spent above that baseline.[367] One realist response is that government "is already complicit in inequality of educational opportunities."[368] Despite refusing to recognize a fundamental right to education, "the judiciary has continued

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[364] *See* BLACK, NEW BIRTH OF FREEDOM, *supra* note 198, at 33.

[365] *See supra* notes 19–20 and accompanying text. Consider, for example, the role that worldviews rejecting facts, conspiracy thinking, and echo chambers played in the January 6, 2021 insurrection at the United States Capitol. *See, e.g.*, Marc-André Argentino, *QAnon and the storm of the U.S. Capitol: The offline effect of online conspiracy theories*, THE CONVERSATION (Jan. 7, 2021, 12:39 AM EST), https://theconversation.com/qanon-and-the-storm-of-the-u-s-capitol-the-offline-effect-of-online-conspiracy-theories-152815 [https://perma.cc/A44V-V6MZ]; Michael Kunzelman, Amanda Seitz, & David Klepper, *Inauguration Sows Doubt Among QAnon Conspiracy Theorists*, A.P. (Jan. 20, 2021), https://apnews.com/article/biden-inauguration-qanon-79dd03a6dc497d6157304f8045f12cef [https://perma.cc/TB33-Z3AE].

[366] *See* DEWEY, *Creative Democracy*, *supra* note 252, at 225.

[367] *See supra* notes 335–41 and accompanying text.

[368] Satz, *supra* note 284, at 646.

to shape educational policy simply by reviewing the practices of school districts and states."[369] Indeed, government is complicit in protecting institutions that perpetuate racial, gender, and other hierarchies on the basis of status differentials, whether it had a hand in creating them or not.[370] "[J]udicial violence," which includes inaction just the same as action, "may reinforce patterns of domination and exclusion otherwise persisting in society."[371] Given the ubiquity of domination in our world, "no matter what mechanisms of contestation exist, individuals will not be very likely to contest laws and policies successfully unless others [like legal institutions] are properly responsive to their arguments and perspectives."[372]

Because the challenge of antidomination is worthy and unavoidable, what matters will not be *whether* we articulate and then resolve it but *how*. As Charles Black wrote: "There is a myth that lawyers must think small, even meanly, or lose the aura of professionalism. As in all other matters, we should think at the level of magnitude proportioned to the problem."[373]

As with lawyering, a key component for republican judging is candor. Courts "need not pretend that the law is always determinate or that some issues are not genuinely political."[374] Judicial decisions, especially those that introduce domination, will always be contestable.[375] But we are not new to hard cases, there will always be hard cases, and governance (collective or otherwise) is often discretionary.

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[369] Biegel, *supra* note 254, at 1099.

[370] *See* Romer v. Evans, 517 U.S. 620, 633–36 (1996) (holding that a Colorado law barring claims of discrimination on the basis of sexual orientation, and thereby legalizing acts driven by animus toward LGBTQ persons, violated the Fourteenth Amendment); Plyler v. Doe, 457 U.S. 202, 218–19 (1982) (recognizing the federal government's role "in the creation of a substantial 'shadow population'" of undocumented Americans against whom, absent federal oversight, states could discriminate with impunity); Shelley v. Kraemer, 334 U.S. 1, 18–23 (1948) (holding that the Fourteenth Amendment prohibits states, including state courts, from enforcing racially restrictive covenants); Smith v. Allwright, 321 U.S. 649, 663–66 (1944) (holding that a Texas political party's exclusion of Black people from membership violated the Fifteenth Amendment, because the party's control over primaries directly affected the right to vote in the state's elections); Rachel F. Moran, *The Elusive Nature of Discrimination*, 55 STAN. L. REV. 2365, 2411–13 (2003) (discussing legal theories of status production and status disestablishment).

[371] Minow, *Interpreting Rights*, *supra* note 319, at 1898.

[372] Costa, *supra* note 211, at 169.

[373] BLACK, NEW BIRTH OF FREEDOM, *supra* note 198, at 36; *cf.* GILBERT, *supra* note 269, at 94 ("[A]lthough political utopias might be impossible to realize, the concepts which underlie utopian political thinking have their practical value. Since a political utopia outlines a political order in its totality, the mind is forced to see beyond single issues and institutions and to view the organization of government as a coherent whole.").

[374] *See* LOVETT, REPUBLIC OF LAW, *supra* note 119, at 171.

[375] *See* LEMIEUX & WATKINS, *supra* note 120, at 149 (citing ELY, *supra* note 66; IAN SHAPIRO, THE STATE OF DEMOCRATIC THEORY (2006)) ("Even if representation-reinforcement is understood as the primary goal of judicial review, such reinforcement inevitably involves making contestable judgments about what groups have been unfairly unrepresented or excluded."); *see also* Dawood, *Antidomination Model*, *supra* note 159, at 1449–50.

2. Legal Creativity in Minimizing Domination

Antidomination is not only a necessary endeavor, to the extent that we want to become a republic, but also one amenable to creative approaches already available. Courts, for example, regularly engage in common law adjudication, notwithstanding the steady rise of statutory law. Claim-by-claim lawmaking can be "the perfect vehicle for deriving content" from broad constitutional provisions.[376] As Yasmin Dawood has argued, moreover, antidomination favors a harm minimization approach that "takes into account the institutional capacities [or competencies] of courts."[377] In the elections context, "instances of domination" include "malfunctions, stoppages, self-entrenching tactics, [and] majorities disadvantaging minorities," which are discrete matters that are easy for judicial consideration.[378] We can readily analogize to other areas of law.[379]

In contrast, the Supreme Court's decision in *San Antonio Independent School District v. Rodriguez* exemplifies obstruction of, rather than openness to, common law adjudication.[380] In that case, the Court overturned a district court's decision that a Texas school finance system based on local property taxes violated equal protection.[381] The Court denied that the district court opinion "reflect[ed] the [issue's] novelty and complexity" but acknowledged that the court "relied on decisions dealing with the rights of indigents to equal treatment in the criminal trial and appellate processes, and on cases disapproving wealth restrictions on the right to vote."[382] Rather than accept the district court's creative, analogic reasoning, the Court took a less common law–friendly approach, declaring that the case "in significant aspects is *sui generis*" and could not be considered within the "mosaic of constitutional [equal protection analysis]."[383]

Rights thinking offers solutions too, especially where broad constitutional provisions can give way to reframed rights. The *Gary B.* complaint's focus on a right to literacy exemplifies this.[384] Scholars have disagreed about how well this seemingly minimal right encapsulates the importance of education.[385] However, focusing on

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[376] *See* Scott R. Bauries, *A Common Law Constitutionalism for the Right to Education*, 48 GA. L. REV. 949, 991 (2014); *see also* Bitensky, *supra* note 36, at 638.

[377] Dawood, *Antidomination Model*, *supra* note 159, at 1447–48 (arguing that courts are "better suited to preventing or minimizing domination than they are to maximizing or optimizing democratic goods").

[378] *Id.* at 1432.

[379] Broad legal protections abound in areas of law otherwise concerned with discrete instances of power, duty, and abuses of either: antitrust and market power; criminal procedure and the reasonable expectation of privacy; and tort and the duty of care.

[380] *See* 411 U.S. 1, 17–18 (1973).

[381] *Id.* at 4–6, 17–18, 58–59.

[382] *Id.* at 17–18.

[383] *Id.* at 18.

[384] *See Gary B. I*, 957 F.3d 616, 620–21, 624–28 (6th Cir. 2020).

[385] *Compare* Black, *Constitutional Compromise*, *supra* note 35, at 762 (interpreting the

literacy "as a *specific manifestation* of a right to education" could, and for a time appeared to, overcome concerns of novelty, partisanship, inefficacy, and unmanageability.[386] By reframing the right, advocates gained an audience and left some elaboration for later.

At the same time, rights thinking can obscure the subtleties of needs, dependence, and power, "crowding out alternative ways of thinking and new solutions."[387] Alternatives even to rights thinking can be needed. Consider *Plyler v. Doe*, in which the Supreme Court held that a Texas statute withholding state funds from school districts educating undocumented children violated the Fourteenth Amendment.[388] Ostensibly, the Court's decision was based on protecting the children's rights. But what "right" did the statute violate? The Court seemed to agree with its prior decisions that "public education is not a 'right' granted to individuals by the Constitution."[389] If not a right to education, then perhaps a right of undocumented persons "to the equal protection of Texas law"?[390] But the Court equivocated on this point as well.[391] "[M]ore is involved," the Court reasoned, "than the abstract question whether [the Texas statute] discriminate[d] against a suspect class, or whether education is a fundamental right."[392]

The "more" involved was domination. The statute "impose[d] a lifetime hardship on a discrete class of children," the "stigma of illiteracy [would] mark them for the rest of their lives," and denying them education would "deny them the ability to live" as equals.[393] More broadly, the statute would create and perpetuate a "subclass" of illiterate individuals, perhaps a "permanent caste" of undocumented persons, "encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available" to others.[394] Although the Court in *Plyler* did not use the language of freedom as nondomination, its attention to the harms of domination bespeaks concern for a problem that "rights" might not have

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Gary B. lawsuit as an antisubordination lawsuit), *with* Imoukhuede, *Fifth Freedom*, *supra* note 251, at 86–87 (arguing that minimally adequate education approaches do "not sufficiently reflect the significance of education" in our society).

386 *See* Bowman, *supra* note 19, at 48–49 (emphasis added).

387 FORD, *supra* note 117, at 24–25; *see* Daly, *Freedom as Non-Domination in Jurisprudence*, *supra* note 183, at 316 (acknowledging that constitutional rights "may occupy a relatively modest role as instruments of republican freedom," but concluding that there might be certain contexts in which rights ably address power differentials).

388 457 U.S. 202, 205, 230 (1982).

389 *Id.* at 221 (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973)).

390 *Id.* at 210.

391 *See id.* at 223 ("Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.' Nor is education a fundamental right . . . .").

392 *Id.*

393 *Id.*

394 *Id.* at 218–19, 230.

encapsulated.[395] A justiciable, nondomination-centered republican guarantee would have been an apt device with which to strike down Texas's statute.

3. Collaborating On and Contesting Antidomination Approaches

It almost goes without saying that antidomination, not least through education, will require the actions of more than just courts. To be sure, courts can be very effective in minimizing domination in certain circumstances.[396] But "we do not need judicial review to serve as a 'silver bullet' solution to the problem of domination," especially when other institutions apply themselves to antidomination.[397] Indeed, it is because other institutions sometimes lack incentives to pursue nondomination that we have conventionally expected courts to intercede,[398] especially on behalf of "discrete and insular minorities."[399] Hence courts' ubiquitous involvement in "drawing school district lines, administering prisons, supervising railroads, prescribing personnel procedures for police departments, [etc.]"[400] Because it seems "quicker and cheaper" to assign tasks to an existing government body than to create a new one, "courts will pick up many lawmaking and administrative tasks simply because they are there."[401]

There is no shortage, however, of solutions for the accretion of judicial power or for courts being stretched too thin. Courts themselves can compel other branches, as best as they can, to act.[402] In *McCleary v. State*, for example, the Supreme Court of Washington issued a contempt order against the state legislature for failing to make sufficient progress on fully funding state education.[403] The court acknowledged its long-standing cooperation with the legislature to vindicate education rights.[404] But

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[395] *See id.* at 230.

[396] *See* Daly, *Freedom as Non-Domination in Jurisprudence*, *supra* note 183, at 300–01, 316; Dawood, *Antidomination Model*, *supra* note 159, at 1443–49.

[397] LEMIEUX & WATKINS, *supra* note 120, at 21–22.

[398] *See id.* at 32 (observing that the Reapportionment Revolution cases exemplify those "in which the vicissitudes of electoral coalitions might make legislative action unlikely, even though the normative end of reducing domination requires action").

[399] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

[400] SHAPIRO, *supra* note 103, at 30.

[401] *Id.* at 31.

[402] *See* Hinojosa, *supra* note 322, at 891 ("The court need not control the purse strings, but it can . . . scrutiniz[e] the actions the legislature may take in responding to an injunction."); *see also* GREENE, HOW RIGHTS WENT WRONG, *supra* note 119, at 187–94 (recounting a strategic choice by the Supreme Court of Canada, after issuing an expansive disability rights decision, *Eldridge v. British Columbia (AG)*, [1997] 3 S.C.R. 624 (Can.), to refrain from ordering more coercive remedies until other branches "got to take their own shot at a solution").

[403] McCleary v. State, No. 84362-7 (Wash. Sept. 11, 2014) (order of contempt).

[404] Case Comment, *Education Law—Washington Supreme Court Holds Legislature in Contempt for Failing to Make Adequate Progress Toward Remedying Unconstitutional Education Funding Scheme—*McCleary v. State*, No. 84362-7 (Wash. Sept. 11, 2014) (Order of Contempt)*, 128 HARV. L. REV. 2048, 2052 (citing Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 86–87 (Wash. 1978)).

the court also clarified its twofold role: "first, the court draws a baseline to ensure that the legislature has 'done enough' to fulfill its constitutional duty; and second, once the legislature has defined the specifics of its duty through education policies, the court enforces the legislature's self-drawn standards."[405]

Courts can also permit state and local governments to undertake bona fide anti-domination efforts. This might seem like a banal point, but the Supreme Court has failed to do this in the past. In *Parents Involved in Community Schools v. Seattle School District No. 1*, a fractured Court held that two school districts' race-conscious desegregation plans were unconstitutional.[406] Curiously, the Court majority that struck down the plans conceded that "racially identifiable *housing* patterns" have lasting effects on school assignments, effects that might justify taking action, but then also contended that the school districts in question could not point to the effects of racially identifiable *school assignment* patterns to justify voluntary desegregation.[407] "[A] majority of the Justices were so concerned with limiting remedies for past discrimination that they largely overlooked the problem of constraining a community's capacity to imagine its racial future."[408] Indeed, the Court's distaste for race-conscious remedies, like voluntary desegregation and affirmative action, is a problem of its own making. The Court could "examine and remedy the root causes" of the need for such policies, for example opportunity gaps and other systemic failures, or it could let institutions willing to do this work do so.[409] But to bar both options is only to invite domination.

To the extent that the federal courts continue to keep education in particular at arm's length, Congress and the federal executive could expand the authority of federal education administration, even devise and delegate power to a more substantial administrative judiciary. Congress could staff such a division with judges experienced in education policy and pedagogy and better able to handle an increased or specialized caseload; it could convene education researchers and practitioners; it could study and more aggressively fill funding, best practice, or other gaps between schools nationwide. Given the scope of the challenge, none of this need be off the table.

CONCLUSION

In this Article, I have made both descriptive and normative claims. As a descriptive matter, I have tried to illuminate the real reason that we have so far declined to

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[405] *Id.* at 2052–53.

[406] *See* 551 U.S. 701, 709–11 (2007); *see also* Moran, *Let Freedom Ring*, *supra* note 250, at 476 (noting propositions accepted by different majorities of the Court: "that strict scrutiny should apply to voluntary desegregation plans"; "that promoting diversity and preventing racial isolation are compelling interests that can justify such plans"; and "that the plans were not narrowly tailored to promote these interests").

[407] *See Parents Involved*, 551 U.S. at 712, 721, 747–48 (emphasis added).

[408] Moran, *Let Freedom Ring*, *supra* note 250, at 477; *accord* GREENE, HOW RIGHTS WENT WRONG, *supra* note 119, at 216–17.

[409] Robinson, Fisher*'s Cautionary Tale*, *supra* note 19, at 239.

interpret the United States Constitution's republican guarantee as protecting a fundamental right to education, and that we have only rarely relied on the guarantee for other matters. It is not that the guarantee is unfit for judicial consideration, though that has been the conventional view. The real reason is instead that the guarantee is more consequential, if more focused, than we have led ourselves to believe, and it seems at first glance to require more of us than we have so far been prepared to give, especially with respect to education.

As a normative matter, I have tried to explain what I think the best interpretation of the republican guarantee is: an antidomination duty on the federal government. Understanding the guarantee to demand nondomination of course raises challenging conceptual and implementation questions, but I believe that they are well worth the effort. In the educational context, an antidomination approach goes beyond traditional interests in creating virtuous citizens and instead focuses attention and resources on training students to distinguish dependence from domination, helping them to see each other as equals, and providing them with knowledge and know-how to resist the atomizing effects of domination. An effective pursuit of nondomination "does not require heroes so much as it requires tools for resistance to and insulation from domination."[410] Thus, although the republican guarantee as a nondomination guarantee entails an ongoing project, I have tried to show that with candor and ingenuity, we (and our institutions) should be able to rise to this challenge.

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[410] Watkins, *supra* note 151, at 534.