

## ESSAY—AN ORIGINALIST CASE FOR CIVIC EDUCATION AS A CONSTITUTIONAL RIGHT

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### *Abstract*

In *A.C. v. McKee* (2022), the U.S. Court of Appeals for the First Circuit rejected Rhode Island students' claims that they had a constitutional right to civic education. Instead of appealing to the U.S. Supreme Court, the students reached a settlement agreement that required the Rhode Island Department of Education to create a civic-education task force. This Essay provides an originalist argument for how the Supreme Court could and should have ruled for the students if they had heard the case. First, a state-counting methodology shows that at least one semester of civic education is a privilege or immunity of U.S. citizens. Second, a structural examination of the Constitution demonstrates that civic education flows from ideas of popular sovereignty and individual rights. Third, civic education is consistent with the vision of the first and second founding generations. Thus, this Essay provides a legal foundation for ensuring that every public-school student receives civic-education instruction that is critical for the health of our democracy.

### I. INTRODUCTION

In November of 2018, Rhode Island public-school students sued the State for insufficiently preparing them for the responsibilities of citizenship.<sup>1</sup> At the time, Rhode Island did not require classes dedicated to civics, tests for high school civics knowledge, or reports of students' performance in civics.<sup>2</sup> Thus, the students asserted that they had been denied "an education that is adequate to prepare them to function productively as civic participants capable of voting, serving on a jury, understanding economic, social, and political systems sufficiently to make informed choices, and to participate effectively in civic activities."<sup>3</sup> As a remedy, the students asked the

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<sup>1</sup> Dana Goldstein, *Are Civics Lessons a Constitutional Right? This Student Is Suing for Them*, N.Y. TIMES (Nov. 28, 2018), <https://www.nytimes.com/2018/11/28/us/civics-rhode-island-schools.html> [<https://perma.cc/98MZ-TQ39>].

<sup>2</sup> *A.C. v. McKee*, 23 F.4th 37, 41 (1st Cir. 2022).

<sup>3</sup> Complaint at 3-4, *A.C. v. Raimondo*, 494 F. Supp. 3d 170 (D.R.I. October 13, 2020), *aff'd sub nom.* 23 F.4th 37 (1st Cir. 2022).

U.S. District Court for the District of Rhode Island to declare a constitutional right to education that sufficiently prepares students to vote, serve on juries, exercise other constitutional rights, and become “civic participants in a democratic society[.]”<sup>4</sup> In other words, they were asserting a constitutional right to civic education.

Constrained by precedent, the District Court granted the defendants’ motion to dismiss in October of 2020, a decision affirmed in January of 2022 by the First Circuit.<sup>5</sup> Nevertheless, both the lower court and the First Circuit were sympathetic to the students’ claims, with the latter noting that “the Students have called attention to critical issues of declining civic engagement and inadequate preparation for participation in civic life at a time when many are concerned about the future of American democracy.”<sup>6</sup> Instead of appealing to the United States Supreme Court, the students reached a settlement with the Rhode Island Department of Education, which agreed to create a civic-education task force.<sup>7</sup> Thus, the Supreme Court never had the opportunity to address whether civic education is a constitutional right. This Essay seeks to fill the gap through an originalist approach embraced by today’s Court.<sup>8</sup> Specifically, the text, structure, and history of the Constitution show that public-school students have a right to at least one semester of civic education.

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<sup>4</sup> *Raimondo*, 494 F. Supp. 3d at 174-75.

<sup>5</sup> *See generally McKee*, 23 F.4th 37.

<sup>6</sup> *Id.* at 48 (citing *Raimondo*, 494 F. Supp. 3d at 175-76, 181, 197). “Plaintiffs should be commended for bringing this case. It highlights a deep flaw in our national education priorities and policies. The Court cannot provide the remedy Plaintiffs seek, but in denying that relief, the Court adds its voice to Plaintiffs’ in calling attention to their plea. Hopefully, others who have the power to address this need will respond appropriately.” *Raimondo*, 494 F. Supp. 3d at 197.

<sup>7</sup> *See* Patricia Lamiell, *Rhode Island Lawsuit, Filed by the Center for Educational Equity at TC, Ends with Agreement to Improve Civic Education*, TCHRS. COLL. COLUM. UNIV. (June 10, 2022), <https://www.tc.columbia.edu/articles/2022/june/rhode-island-lawsuit-ends-with-agreement-to-improve-civics-education/> [<https://perma.cc/3QWL-Q9GS>].

<sup>8</sup> *See* Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953, 1965 (2021). Admittedly, there exist various strains of originalism, emphasizing in varying degrees original intent, original public meaning, textual literalism, and history. Thus, one could likely find originalists on both sides of this Essay’s question. For one summary of various forms of originalism, see *id.* The focus on text, structure, and history in this essay is an approach prominently used by Akhil Reed Amar. *See, e.g.,* Akhil Reed Amar, *An Open Letter to Professors Paulsen and Powell*, 115 YALE L.J. 2101, 2103 (2006) (“Generally, I seek to braid together arguments from text, (enactment) history, and structure into a satisfying account of the document itself. . . .”).

The following three Parts of this Essay focus on each of these modes of constitutional interpretation in turn. Part II uses a state-counting methodology to demonstrate textually that civic education is a privilege or immunity of U.S. citizens; Part III structurally analyzes various principles and rights within the U.S. Constitution that rely on civic education to have effect; and Part IV analyzes key statements by Founding- and Reconstruction-era figures to provide a historical basis for civic education as a constitutional right. Part V concludes with a brief summary, followed by a discussion on the right to public education more broadly and the policy implications of civic education as a constitutional right. Ultimately, this Essay serves as a legal basis for the mandatory instruction of civic education that is critical for the health of our democracy.

## **II. TEXTUAL ARGUMENT: CIVIC EDUCATION AS A PRIVILEGE OR IMMUNITY OF U.S. CITIZENS**

The U.S. Constitution—unlike those of Brazil<sup>9</sup> and South Africa,<sup>10</sup> for example—does not explicitly guarantee a right to education, much less one to civic education. However, the Court has frequently recognized unenumerated rights (those not textually laid out but rather inferred), including rights to travel, privacy, interracial marriage, and same-sex marriage.<sup>11</sup> An inquiry into unenumerated rights starts with the Fourteenth Amendment’s Privileges or Immunities Clause: “No State shall make or enforce any law which shall abridge the privileges or immunities of citi-

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<sup>9</sup> See BRAZ. CONST. ch. III, § I, art. 205.

<sup>10</sup> See S. AFR. CONST. ch. 29.

<sup>11</sup> See *generally* Kent v. Dulles, 357 U.S. 116 (1958) (establishing right to travel “liberty” protected by Fifth Amendment); Griswold v. Connecticut, 381 U.S. 479 (1965) (upholding right to contraception for married couples via broader right to privacy); Loving v. Virginia, 388 U.S. 1 (1967) (striking down state statutes banning interracial marriages); Obergefell v. Hodges, 576 U.S. 644 (2015) (protecting right to same-sex marriage).

zens of the United States. . . .”<sup>12</sup> Thus, if civic education is a “privilege or immunity,” the Amendment requires all states to provide it to students.<sup>13</sup>

One way to determine whether a right deserves such a special distinction is by looking at existing state practices. For example, in holding that there was no right to assisted suicide, the Supreme Court noted that “[i]n almost every State . . . it is a crime to assist a suicide. The States’ assisted-suicide bans are not innovations. Rather, they are longstanding expressions of the States’ commitment to the protection and preservation of all human life.”<sup>14</sup> However, in *Lawrence v. Texas*,<sup>15</sup> the Court noted that only thirteen states had sodomy laws and within those states, “there [was] a pattern of nonenforcement with respect to consenting adults acting in private.”<sup>16</sup> Thus, the Court struck down existing sodomy laws because the right to engage in the sexual activities Texas ostensibly forbade was, in reality, enjoyed in almost every state.

A survey of existing state practices with respect to civic education demonstrates that these practices likewise fall under the Privileges or Immunities Clause’s protections.<sup>17</sup> According to the 2018 report, thirty-one states require one semester of civic education, nine require a full year, and

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<sup>12</sup> U.S. CONST. amend. XIV, § 1, cl. 2. The Court has instead used the Fourteenth Amendment’s Due Process Clause to incorporate the Bill of Rights and require state protection of unenumerated rights. *See, e.g.,* *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019) (noting Court has incorporated almost entire Bill of Rights via Fourteenth Amendment’s Due Process Clause); *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (describing Court’s criteria for assessing whether unenumerated rights protected under Clause). Some scholars argue against the use of the Due Process Clause and in favor of the Privileges or Immunities Clause. *See* AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 119-21 (2012). Others have efficiently summarized the Court’s usage of the Due Process Clause instead of the Privileges or Immunities Clause. *See* DANIEL A. FARBER, *RETAINED BY THE PEOPLE: THE “SILENT” NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON’T KNOW THEY HAVE* 73-83 (2007). Still, the analysis remains the same regardless of the chosen clause, as the Court noted in *Dobbs v. Jackson Women’s Health Organization*. *See* 142 S. Ct. 2228, 2248 n.22 (2022).

<sup>13</sup> *See* U.S. CONST. amend. XIV, § 1, cl. 2. Although the text only applies to U.S. citizens, the Court has struck down policies that deny education funds to unauthorized immigrant children in public schools. *See generally* *Plyler v. Doe*, 457 U.S. 202 (1982). Thus, this essay proceeds without distinguishing between citizens’ and noncitizens’ rights to civic education. For an originalist argument in support of *Plyler*, see Steven G. Calabresi & Lena M. Barsky, *An Originalist Defense of Plyler v. Doe*, 2017 BYU L. REV. 225 (2017).

<sup>14</sup> *Glucksberg*, 521 U.S. at 710 (1997) (internal citations omitted).

<sup>15</sup> 539 U.S. 558 (2003).

<sup>16</sup> *Id.* at 573.

<sup>17</sup> *See* Sarah Shapiro & Catherine Brown, *The State of Civics Education*, CTR. FOR AM. PROG. (Feb. 21, 2018), <https://www.americanprogress.org/article/state-civics-education/> [<https://perma.cc/BV8E-Y9VD>].

ten require none.<sup>18</sup> Given that Article V of the U.S. Constitution requires three-fourths of states to ratify amendments,<sup>19</sup> a practice in at least thirty-eight out of fifty states deserves constitutional protection under the Privileges or Immunities Clause.<sup>20</sup> Because the 2018 data show that forty states require at least one semester of civic education, it follows that every state must meet that minimum requirement—as it is a privilege or immunity of U.S. citizens.<sup>21</sup>

The assessment of these data implies several relevant points. First, one semester of civic education is only the minimum requirement; states are certainly permitted to require a full year, as nine have. Indeed, should thirty-eight states (constituting an Article V three-fourths supermajority) eventually require a year of civic education, that would become the national standard. Second, from a policy perspective, establishing semester requirements for civic education is the appropriate level of generality. Courts should not dictate specific curricula requirements; states, school districts, and even individual teachers should have the discretion to implement civic-education programs as they see fit.

For example, in *Controversy in the Classroom*, Diane Hess discusses her 2006 visit to a charter school classroom where a teacher regularly facilitated discussions about contentious issues of the day like abortion, affirmative action, and the Iraq War.<sup>22</sup> While it would be unreasonable for courts to require all students to engage in such dialogue, courts should also not stand in the way of such valuable classroom discourse. Providing flexibility to schools can also help them

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<sup>18</sup> See *id.*

<sup>19</sup> U.S. CONST. art. V.

<sup>20</sup> See STEVEN GOW CALABRESI ET AL., THE U.S. CONSTITUTION AND COMPARATIVE CONSTITUTIONAL LAW: TEXTS, CASES, AND MATERIALS 1509 (2016) (applying Article V three-fourths threshold to argue in favor of right to public-school education). Amar engages in a broader discussion of how state practices can inform the identification of unenumerated rights under the Privileges or Immunities Clause and Ninth Amendment. See AMAR, *supra* note 12, at 108-24.

<sup>21</sup> See Shapiro & Brown, *supra* note 17.

<sup>22</sup> See DIANA E. HESS, *CONTROVERSY IN THE CLASSROOM: THE DEMOCRATIC POWER OF DISCUSSION* 1 (2009).

implement curricula without the indoctrination and partisanship that civic-education opponents such as James Bernard Murphy fear.<sup>23</sup>

Thus, a state-counting methodology establishes that students have a constitutional right to at least one semester of civic education in public schools. While courts should enforce this requirement, they should avoid prescribing the exact curricula, given the unique needs and resources of each school and district. Still, one could justifiably worry that school authorities might avoid a civic-education requirement through inefficacious or insincere courses.<sup>24</sup> Fortunately, structural and historical analyses of the Constitution can provide guidance for courts to assess the legitimacy of civic-education curricula.

### III. STRUCTURAL ARGUMENT: CIVIC EDUCATION'S CENTRAL ROLE IN EFFECTUATING OTHER CONSTITUTIONAL RIGHTS AND PROVISIONS

Although the Privileges or Immunities Clause provides the most straightforward textual support for civic education as a constitutional guarantee, other provisions and principles in the Constitution also imply this right. In constitutional interpretation, such reasoning is a structural argument—one that draws “inferences from the existence of constitutional structures and the relationships which the Constitution ordains among these structures.”<sup>25</sup> Numerous aspects of the Constitution buttress the establishment of civic education as a constitutional right, ranging from broad

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<sup>23</sup> See James Bernard Murphy, *Against Civic Education in Public Schools*, 30 INT'L J. PUB. ADMIN. 651, 664-66 (2007). See also Meira Levinson, *Democracy, Accountability, and Education*, 9 THEORY & RES. IN EDUC. 125, 136-37 (noting importance of “significant contextual flexibility and variation” to best practices in civic education based on political, geographical, cultural, and socioeconomic differences).

<sup>24</sup> For example, after the Supreme Court forbade the reading of a voluntary, nondenominational prayer in public schools, some states attempted to “return[] prayer to the schools” via moments of silence to start school days. See *Engel v. Vitale*, 370 U.S. 421, 425 (1962); DEREK W. BLACK, *EDUCATION LAW: EQUALITY, FAIRNESS, AND REFORM* 716 (3d ed. 2021). The Court struck down a moment-of-silence law in Alabama in part due to the bill’s “prime sponsor” explicitly stating his aim of “return[ing] voluntary prayer to our public schools.” *Wallace v. Jaffree*, 472 U.S. 38, 43 (1985). Because the decision emphasized the bill’s unique legislative history, some federal courts have subsequently upheld moment-of-silence laws. BLACK, *supra*, at 723. Although school prayer and civic education are distinct issues, the history of school prayer shows that states have sought to undermine the Court’s imposition of constitutional mandates in schools—and thus may do so in response to a civic-education requirement as well.

<sup>25</sup> PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 74 (1982).

principles like popular sovereignty to the responsibilities of citizenship and individual rights like the freedom of speech.

Popular sovereignty is one of the Constitution's central themes. Its preamble states that "We the People . . . do ordain and establish this Constitution," a declaration that manifested in popular ratification of the document in state conventions.<sup>26</sup> Half of the Bill of Rights references in some manner the rights of the People,<sup>27</sup> and relatedly, Article IV guarantees to each state "a Republican Form of Government."<sup>28</sup> To realize the Framers' vision of popular sovereignty, the People must be able to exercise our authority to rule. As legal scholars Akhil Reed Amar and Alan Hirsch note, "our schools must teach students to be sovereign, responsible citizens in a heterogeneous democracy."<sup>29</sup> Civic education fulfills this aim. In a groundbreaking 1998 study, Richard G. Niemi and Jane Junn established empirically that high school civics courses increase students' knowledge about politics and government.<sup>30</sup> Such knowledge, in turn, is critical for the People to effectively wield our sovereignty.

The Constitution also provides a template for some objectives of civics instruction. Amar and Hirsch single out the Constitution's discussion of the People voting in elections, serving on juries, and bearing arms in the military as part of their argument for a constitutional right to education in general.<sup>31</sup> Educating students about our governmental structures, legal systems, and history through civics lessons is crucial for citizens to fulfill these duties responsibly.

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<sup>26</sup> U.S. CONST. pmbl., art. VII.

<sup>27</sup> *See id.* amends. I, II, IV, IX, X.

<sup>28</sup> *Id.* art. IV, § 4.

<sup>29</sup> AKHIL REED AMAR & ALAN HIRSCH, FOR THE PEOPLE: WHAT THE CONSTITUTION REALLY SAYS ABOUT YOUR RIGHTS 198 (1998).

<sup>30</sup> RICHARD G. NIEMI & JANE JUNN, CIVIC EDUCATION: WHAT MAKES STUDENTS LEARN 147 (1998).

<sup>31</sup> AMAR & HIRSCH, *supra* note 29, at 199.

Civic education can also empower citizens to exercise their individual rights. Dissenting in *San Antonio v. Rodriguez*<sup>32</sup>—in which the Court held, among other things, that there is no constitutional right to education—Justice Thurgood Marshall argued that “[e]ducation directly affects the ability of a child to exercise his First Amendment rights, both as a source and as a receiver of information and ideas.”<sup>33</sup> While some aspects of education are debatably relevant to freedom of expression, civic education clearly is. Central to freedom of speech is the ability to criticize one’s government. Yet, without the ability to understand the government’s actions and the mechanisms for affecting change, citizens’ free-speech rights are severely hampered. To borrow the language of an earlier Supreme Court decision, civic education can ensure that rights declared in words are not lost in reality.<sup>34</sup> Indeed, just as the Court recognized in *Miranda v. Arizona*<sup>35</sup> that the government must inform suspects of their rights before a custodial interrogation,<sup>36</sup> one could view civic education as a *Miranda* warning for the exercise of individual rights and the responsibilities of citizenship.

In summary, a structural analysis of various constitutional guarantees, principles, and rights not only strengthens the case for civic education as a constitutional right, but also provides guidance for evaluating whether states are effectively teaching civic education. For example, if a state’s curriculum cannot reasonably be connected to the People’s role as sovereign (such as teaching about governmental structures, current events, and voting) or the exercise of individual rights, then courts should be skeptical of whether the state is really upholding the right to civic educa-

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<sup>32</sup> 411 U.S. 1 (1973).

<sup>33</sup> *Id.* at 112 (Marshall, J., dissenting). As discussed in Part V, I believe that this case incorrectly declared that there is no constitutional right to education. *See infra*, Part V.

<sup>34</sup> *See Weems v. United States*, 217 U.S. 349, 373 (1910) (“Rights declared in words might be lost in reality”).

<sup>35</sup> 384 U.S. 436 (1966).

<sup>36</sup> *See generally id.*



tion.<sup>37</sup> Indeed, federal courts ensuring that states respect the fundamental rights of citizenship would be entirely consistent with the historical context behind the Fourteenth Amendment—namely, the need for federal supervision of states distrusted following the Civil War.<sup>38</sup>

#### IV. HISTORICAL ARGUMENT: THE FIRST AND SECOND FOUNDING GENERATIONS’ LINKING OF EDUCATION WITH DEMOCRACY AND CITIZENSHIP

While some originalists might worry that the above reasoning strays too far from the Constitution’s original meaning, a historical analysis solidifies the textual and structural arguments in favor of civic education as a constitutional right. Strong historical evidence exists not just at the time of the country’s founding, but also in the post-Civil War context of the Reconstruction Amendments—a period historian Eric Foner has described as “The Second Founding.”<sup>39</sup>

The Founding Fathers strongly supported civic education. As Lorraine Smith Pangle and Thomas L. Pangle summarize, “many of the leading Founders agreed that universal, publicly funded civic education was an urgent national priority.”<sup>40</sup> In line with that argument, President George Washington’s First Annual Address to Congress asserted that “the security of a free constitution” depended on “teaching the people themselves to know and to value their own rights; to discern and provide against invasions of them; to distinguish between oppression and the necessary

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<sup>37</sup> One might argue that courts are ill-equipped to assess school curricula and performance. Nevertheless, all fifty states have constitutional guarantees to public-school education, and there have been numerous state court decisions relating to the sufficiency of education systems. *See* FARBER, *supra* note 12, at 145-53. There is no reason that federal courts could not perform similar analyses, especially aided by the standards outlined in Parts III and IV. *See infra* Parts III, IV. Using its “power to enforce, by appropriate legislation, the provisions of” the Fourteenth Amendment, such as the Privileges or Immunities Clause, Congress could also provide guidelines for civic education requirements in terms of curricular content, length, age, and more. *See* U.S. CONST. amend. XIV, § 5.

<sup>38</sup> *See, e.g.,* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1217 (1992) (noting while pre-Fourteenth-Amendment Bill of Rights focused on preventing tyrannical federal government, “the Civil War era demonstrated that states required constitutional restraints as well”).

<sup>39</sup> *See* ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* (2019).

<sup>40</sup> Lorraine Smith Pangle & Thomas Pangle, *What the American Founders Have to Teach Us About Schooling for Democratic Citizenship*, in *REDISCOVERING THE DEMOCRATIC PURPOSES OF EDUCATION* 21, 37 (Lorraine McDonnell et al., eds., 2000).

exercise of lawful authority.”<sup>41</sup> Thomas Jefferson similarly wrote about empowering citizens to “exercise [their rights] with order and justice,” while Benjamin Franklin envisaged educational institutions that produced “men qualified to serve the Publick with Honour to themselves, and their Country.”<sup>42</sup> Indeed, Franklin went further by encouraging students to keep up with current events by regularly reading newspapers and other political commentary.<sup>43</sup>

Notably, these sentiments are consistent with the structural analysis in Part III of this Essay. Not only do Washington and Jefferson both discuss informing individuals of their rights, but Washington’s language about “teaching the people . . . to provide against invasions of them” aligns with the conception of civic education as a *Miranda* warning for citizenship.<sup>44</sup> Meanwhile, Franklin’s vision of education addresses both individual rights and the idea of popular sovereignty. His exhortation for students to stay abreast of contemporary issues would enable citizens to more effectively exercise their rights to criticize the government and make informed voting decisions.<sup>45</sup> Furthermore, his desire for schools to create “men qualified to serve the Publick with Honour”<sup>46</sup> fits snugly with the Constitution’s overarching idea of popular sovereignty and the responsibilities of jury and military service that Amar and Hirsch note (not to mention political service in public office).<sup>47</sup>

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<sup>41</sup> George Washington, *First Annual Address to Congress*, AM. PRESIDENCY PROJECT (Jan. 8, 1790), <https://www.presidency.ucsb.edu/documents/first-annual-address-congress-0> [<https://perma.cc/ZP6S-SPWV>].

<sup>42</sup> Pangle & Pangle, *supra* note 40, at 25, 28.

<sup>43</sup> *Id.* at 29.

<sup>44</sup> Washington, *supra* note 41.

<sup>45</sup> Pangle & Pangle, *supra* note 40, at 29.

<sup>46</sup> *Id.* at 28.

<sup>47</sup> A couple of caveats are in order. First, many of the Founding Fathers saw civic education as having moral aims, specifically “the formation of character.” *Id.* at 24. However, this moral component is not a constitutional requirement, as the Constitution’s text and structure do not compel it. For example, in his originalist defense of a constitutional right to education, Derek W. Black does not include morality, virtue, or character formation within the right’s scope. See Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. 1059, 1109 (2019) (“[A] fundamental right to education requires the state to provide individuals with the skills to comprehend the political discourse of the day, evaluate its merits, and then act thoughtfully through the ballot and other means of accountability.”). Indeed, the issue of morality and virtue illustrates why a holistic interpretation encompassing the text, structure, and history of the Constitution is required. Second, I endorse as a matter of public policy Franklin’s ideas about

Education is also a prominent theme in the history behind the Reconstruction Amendments. From a big-picture perspective, these Amendments were a direct repudiation of the South's slavery and an attempt to empower former slaves to participate as full citizens in American society.<sup>48</sup> As discussed above, civic education is central to citizenship: it pertains to voting, serving on juries, joining the armed forces, and protesting against the government, among other rights and responsibilities.<sup>49</sup> Given that the practice of slavery was at its core the denial of fundamental human rights, equipping former slaves to defend their rights would also be paramount.

More concretely, substantial historical evidence suggests that education occupied an important position in the historical backdrop of the Thirteenth and Fourteenth Amendments. Having "hitched their politics to black citizenship," to quote historian Manisha Sinha, abolitionists had amongst their foremost priorities securing publicly funded education for Black Americans.<sup>50</sup> The link between citizenship and education reinforces how civic education was central to a post-slavery vision of schooling. This link persisted after the Civil War; as Foner describes, "Black leaders pressed an expansive understanding of civil rights," including "jury service, access to public schools . . . even the right to vote and hold office."<sup>51</sup> Again, the inclusion of education along with the benefits and duties of citizenship highlights the civic-driven motivations of advocates for educational equality. Finally, as part of what Foner describes as "attempt[s] to create the framework

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discussing current events in schools, just as the teacher in Hess's example did. *See* HESS, *supra* note 22, at 1. Franklin's vision for education might even impart critical-thinking skills that would create more effective democratic citizens. The contours of the right to civic education, however, should not be defined by the visions of just one Founding Father, as brilliant as Franklin was. Rather, when courts look to enforce this right, they should focus on the objectives espoused by Washington, Jefferson, and Franklin collectively: teaching students about their individual rights, empowering them to defend these rights, and preparing them to serve their communities and country in some capacity. *See supra* text accompanying notes 40-43.

<sup>48</sup> Consider the first sentence of the Fourteenth Amendment: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are *citizens of the United States and of the State wherein they reside*." U.S. CONST. amend. XIV, § 1, cl. 1 (emphasis added). These citizens included, of course, former slaves formally emancipated by the Thirteenth Amendment.

<sup>49</sup> *See supra* text accompanying note 31.

<sup>50</sup> *See* FONER, *supra* note 39, at 11.

<sup>51</sup> *Id.* at 65.

for democratic, egalitarian societies,” every Confederate state adopted a new constitution that included public schools for both white and Black students.<sup>52</sup>

In short, the first and so-called second founding generations closely connected education to citizenship and democracy. Several Founding Fathers pushed for civic education that would enable citizens to know and defend their rights, as well as exercise popular sovereignty. Reconstruction-era thinking furthered this vision, viewing education as a means for Black Americans to fully enjoy the rights and responsibilities of citizenship—an aim that civic education squarely and uniquely addresses.

## V. CONCLUSION

An analysis of the text, structure, and history of the Constitution establishes that it guarantees a right to civic education in public schools, for at least one semester. A survey of state practices shows that civic education is a privilege or immunity of U.S. citizens, while a structural examination of the Constitution demonstrates that civic education furthers constitutional principles and gives teeth to the rights and duties of citizens. Finally, the historical record of the Founding and Reconstruction eras confirms that the drafters of both the original U.S. Constitution and the Reconstruction Amendments strongly supported the ideas about civic education seen in the document’s text and structure.

Beyond answering the academic question of how the Rhode Island lawsuit would (or should) have been resolved, two important implications of this Essay’s conclusion remain. First, it strongly suggests that the Court erred when it found no constitutional right to education in *San Antonio v. Rodriguez*. All fifty state constitutions require free public-school education today and thirty-one of thirty-seven (over the Article V three-fourths threshold) did when the Fourteenth

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<sup>52</sup> *Id.* at 90.

Amendment was adopted in 1868.<sup>53</sup> Thus, free education is a privilege or immunity of U.S. citizens. The structural and historical arguments about civic education presented above also apply to public education more broadly. Despite a heavy focus on citizenship and democracy, Amar and Hirsch, the Founding Fathers, and key figures in the Reconstruction era all spoke about the benefits of education in general to our nation and society.<sup>54</sup> However, if the Court were reluctant to overturn its precedent against a right to education, it could still carve out civic education as an area with constitutional guarantees. After all, one might view civic education as having a stronger connection to individual rights than, say, science or mathematics.<sup>55</sup>

A second consequence of this Essay's findings is that it provides a solid legal foundation for the proliferation of civic-education instruction that can strengthen our democracy. As Niemi and Junn summarize, "political knowledge helps citizens operate effectively in a democracy, heightens their awareness of the limits of both governmental and citizen behavior, increases attainment of democratic goals . . . and contributes to the extent to which citizens regard their government with confidence and satisfaction."<sup>56</sup> Ellen Quintelier has also found that student discussions on contemporary political issues are linked with higher rates of political participation.<sup>57</sup>

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<sup>53</sup> See CALABRESI ET AL., *supra* note 20, at 1508-09.

<sup>54</sup> See AMAR & HIRSCH, *supra* note 29, at 195-99 (highlighting connection between education and democracy and noting how Framers and Thaddeus Stevens—influential figure in Fourteenth Amendment's approval—similarly stressed centrality of education to successful self-government).

<sup>55</sup> I express no view on the democratic or educational value of these subjects. Rather, I aim to show that there exist subjects commonly taught in schools that one could argue have a weaker connection to constitutional rights than civic education, providing a means for the Court to uphold civic education as a constitutional right without overturning *Rodriguez*. See also Black, *supra* note 47, at 1111 (noting his concentration on literacy and civics part of constitutional right to education and acknowledging his lack of emphasis on computer, math, and language skills). But see AMAR & HIRSCH, *supra* note 29, at 199 (noting in reference to Second Amendment's discussion of "the security of a free State" that today "citizens need guns less than they need to be armed with some command of history, science, math, and language").

<sup>56</sup> NIEMI & JUNN, *supra* note 30, at 11.

<sup>57</sup> Ellen Quintelier, *Engaging Adolescents in Politics: The Longitudinal Effect of Political Socialization Agents*, 47 YOUTH & SOC'Y 51, 62 (2015).

Thus, all roads lead to civic education. Textual, structural, and historical interpretations of the U.S. Constitution neatly cohere to support its mandatory instruction in public schools. Civic education also has the distinction of being both a constitutional requirement and sound public policy. At a time when attempts to overturn the 2020 election still loom large and only 21% of Americans trust the federal government to act correctly at least most of the time, we need civic education more than ever.<sup>58</sup> It is time for courts to do their part to make this vision a reality.

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<sup>58</sup> See *Public Trust in Government: 1958-2022*, PEW RESEARCH CENTER (June 6, 2022), <https://www.pewresearch.org/politics/2022/06/06/public-trust-in-government-1958-2022/> [https://perma.cc/QL4Q-HPGE].