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ARTICLE

The Constitutional Compromise to Guarantee Education

Derek W. Black*

Abstract. Although the U.S. Supreme Court refused to recognize education as a fundamental right in *San Antonio Independent School District v. Rodriguez*, the Court in several other cases has emphasized the possibility that the Constitution might afford some protection for education. New litigation is attempting to fill that void. This litigation comes at a perfect time. Segregation, poverty, and achievement gaps are all rising, while state courts and federal agencies have recently retreated from enforcing educational equity.

New litigation, however, has yet to offer a theory of why the Constitution should protect students' educational rights, relying instead on the fact that the Court has consistently emphasized the importance of education. Prompting a significant doctrinal shift to protect education will require more than laudatory dicta. It will require a compelling affirmative constitutional theory.

This Article offers that theory. It demonstrates that the Framers of the Fourteenth Amendment specifically intended to guarantee education as a right of state citizenship. This simple concept was obscured by the unusually complex ratification of the Amendment. First, the Amendment required the assent of Confederate states that were no longer part of the Union. Second, Congress expressly indicated that it would not readmit those states to the Union until they ratified the Fourteenth Amendment and rewrote their state constitutions. Third, education was part of the deal: Congress permitted states to retain discretion over education but expected state constitutions to affirmatively guarantee education.

Through this process, education became an implicit right of the Fourteenth Amendment's Citizenship Clause. As a right of state citizenship and consistent with historical practices

* Professor of Law, University of South Carolina School of Law. I would like to thank Josh Eagle, Ben Means, Ned Snow, Josh Weishart, and my anonymous peer reviewers for their thoughtful comments and suggestions. I would also like to thank Susan DeJarnatt for allowing me to present my arguments to two different audiences at Temple University. The feedback I received was invaluable to both this project and a future one. Additionally, I would like to thank Daniel Farbman for suggestions on source materials. And I would like to thank Robert Wilcox for supporting my research and all the editors of the *Stanford Law Review* for their careful attention to detail and substance.

and goals, this Article argues that the Fourteenth Amendment prohibits states from partisan and other illegitimate manipulations of educational opportunity.

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Introduction

While desegregation,[1] school funding litigation,[2] and federal policy[3] significantly reduced educational inequality during the second half of the twentieth century, that inequality has steadily increased ever since. The percentage of intensely racially segregated nonwhite schools, for instance, has more than tripled over the last twenty-five years.[4] In 2013, low-income students became a majority in public schools for the first time in history.[5] The average black student now attends a school where nearly 70% of her peers are poor—almost double the percentage from 1993.[6] To make matters worse, in the past decade, states have drastically cut education funding—by more than 20% in some states.[7] State supreme courts that previously intervened to block egregious cuts of this sort have largely disengaged in recent years.[8] Even the

1. *See* Rucker C. Johnson, *Long-Run Impacts of School Desegregation & School Quality on Adult Attainments* 2, 15-33 (Nat'l Bureau of Econ. Research, Working Paper No. 16664, 2011), https://perma.cc/QWV7-36TY (identifying the positive effects of school desegregation).

2. *See* C. Kirabo Jackson et al., *The Effect of School Finance Reforms on the Distribution of Spending, Academic Achievement, and Adult Outcomes* 15-17 (Nat'l Bureau of Econ. Research, Working Paper No. 20118, 2014), https://perma.cc/2DWF-V5QF (finding that school funding litigation resulting in court-mandated reforms reduced school funding inequity).

3. *See* Derek W. Black, *The Congressional Failure to Enforce Equal Protection Through the Elementary and Secondary Education Act*, 90 B.U. L. REV. 313, 336-40 (2010) (recounting how the federal government originally used the Elementary and Secondary Education Act to promote additional resources for low-income students, school funding equity, and school desegregation); *see also* Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.).

4. *See, e.g.*, Gary Orfield et al., Civil Rights Project, UCLA, *Brown* at 62: School Segregation by Race, Poverty and State 3 & fig.2 (2016), https://perma.cc/R6DQ-EQAB ("African American and Latino students are increasingly isolated, often severely so.").

5. S. Educ. Found., A New Majority: Low Income Students Now a Majority in the Nation's Public Schools 2-3 (2015), https://perma.cc/BTQ5-ZD9H.

6. *See* Orfield et al., *supra* note 4, at 7 fig.3.

7. *See* Derek W. Black, *Averting Educational Crisis: Funding Cuts, Teacher Shortages, and the Dwindling Commitment to Public Education*, 94 WASH. U. L. REV. 423, 432-33 (2016) (analyzing the sharp shift in education policy during and following the Great Recession). Those states, moreover, have refused to replenish education budgets even after their tax revenues began to exceed prerecession levels. *See* Michael Leachman et al., Ctr. on Budget & Policy Priorities, Most States Have Cut School Funding, and Some Continue Cutting 1, 7 (2016), https://perma.cc/UMT8-B4XH. For an updated version of the report, see Michael Leachman et al., Ctr. on Budget & Policy Priorities, A Punishing Decade for School Funding (2017), https://perma.cc/5U4A-YD8P.

8. *See* Black, *supra* note 7, at 451-59 (detailing a shift in several states). *Compare, e.g.*, Morath v. Tex. Taxpayer & Student Fairness Coal., 490 S.W.3d 826, 833, 886 (Tex. 2016) (rejecting a school finance claim, even after calling the state's funding "system" "Byzantine," and holding that the funding scheme "satisfies minimum constitutional requirements"), *with, e.g.*, Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist., 176

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U.S. Department of Education, once a consistent check on educational inequality, is retreating from its historical role.[9]

Without legal intervention, educational opportunities in disadvantaged communities appear increasingly subject to the whims of political majorities. Political majorities are enacting education policies that serve the interests of some communities while seriously disadvantaging others.[10] Over time, educational disadvantage can become intractable. Some communities are deprived of the education they need to exert themselves in the political process, and others with vested interests have no desire to change the system.[11]

The Supreme Court is not oblivious to these types of problems. Although the Court rejected education as a fundamental right in *San Antonio Independent School District v. Rodriguez*,[12] in nearly every other case, the Court has gone out

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S.W.3d 746, 794-98 (Tex. 2005) (striking down Texas's school funding approach under the state constitution).

9. *See* Derek W. Black, *Abandoning the Federal Role in Education: The Every Student Succeeds Act*, 105 CALIF. L. REV. 1309, 1312-14 (2017) (explaining how recent federal legislation "reverse[d] the federal role in education and return[ed] nearly full discretion to the states").

10. *See, e.g.*, Joshua J. Cauhorn, *The Search for the Magic Formula: History of Illinois School Funding Reform*, 18 U. PA. J.L. & SOC. CHANGE 209, 213 (2015) (finding that Illinois's public school system was "one of the most regressively funded school systems in the country," in that "as a district's rate of low-income students increase[d], the district receive[d] less money per pupil"); James W. Guthrie & Kenneth K. Wong, *The Continually Evolving Political Context of Education Finance*, *in* HANDBOOK OF RESEARCH IN EDUCATION FINANCE AND POLICY 60, 71 (Helen F. Ladd & Margaret E. Goertz eds., 2d ed. 2015) (explaining that problems with Illinois's school finance system are due, at least in part, to suburban and rural districts' refusing to fund the needs of Chicago); *see also* Valerie Strauss, *North Carolina's Step-by-Step War on Public Education*, WASH. POST: ANSWER SHEET (Aug. 7, 2015), https://perma.cc/GA5L-JHKS (reprinting a blog post by James Hogan discussing "sweeping" changes to education policy enacted by North Carolina Republicans in 2012 that severely disadvantaged poor families and reduced taxes on wealthier ones).

11. *See* ANNE NEWMAN, REALIZING EDUCATIONAL RIGHTS: ADVANCING SCHOOL REFORM THROUGH COURTS AND COMMUNITIES 15 (2013) ("Deferring to deliberative bodies to decide what constitutes an adequate education, then, renders those citizens most in need of the social good at stake disadvantaged in the very process that should improve their lot."); Lauren Camera & Lindsey Cook, *Title I: Rich School Districts Get Millions Meant for Poor Kids*, U.S. NEWS & WORLD REP. (June 1, 2016, 12:01 AM), https://perma.cc/4RB2-XP52 (discussing the political opposition to a flawed federal funding formula that drives money to wealthy districts that may not need it); *cf.* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 103 (1980) (analyzing the role of constitutional adjudication in preventing legislation that "chok[es] off the channels of political change," particularly with respect to vulnerable minority groups).

12. *See* 411 U.S. 1, 18, 30-39 (1973) (holding that education is not a constitutionally protected fundamental right the infringement of which would trigger strict scrutiny).

of its way to emphasize the importance of education.[13] This emphasis suggests an openness to extending some level of constitutional protection to education or, at least, an unwillingness to foreclose the possibility.[14]

Two new lower court cases may offer the Court a perfect opportunity to finally turn innuendo into doctrine. In the summer of 2016, two different groups filed federal lawsuits, each claiming that the educational inequalities in its state violate the federal Constitution.[15] Both lawsuits emphasize various factual and doctrinal developments since *Rodriguez* that could provide a basis for recognizing a federal right to education, albeit a more modest educational right than the one the Court rejected in *Rodriguez*.[16]

To recognize a right of education would represent a significant doctrinal shift from the precedent of the last half-century. Such a shift requires a compelling affirmative constitutional theory. Thus far, that theory is nowhere to be found.[17] Scholars have made modest forays but, for the most part, have

13. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 222 (1982) ("[E]ducation prepares individuals to be self-reliant and self-sufficient participants in society." (quoting Wisconsin v. Yoder, 406 U.S. 205, 221 (1972))); Ambach v. Norwick, 441 U.S. 68, 76 (1979) ("Public education, like the police function, 'fulfills a most fundamental obligation of government to its constituency.'" (quoting Foley v. Connelie, 435 U.S. 291, 297 (1978))); *Yoder*, 406 U.S. at 221 (accepting Wisconsin's proposition "that some degree of education is necessary . . . if we are to preserve freedom and independence"); Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (stating that education "is the very foundation of good citizenship"); Meyer v. Nebraska, 262 U.S. 390, 400 (1923) ("The American people have always regarded education and acquisition of knowledge as matters of supreme importance . . . .").

14. For instance, a decade after *Rodriguez*, the Court in *Plyler v. Doe* held that without some substantial government interest (which the Court did not identify), the state could not enact a statute purporting to deny education to undocumented immigrants. *See* 457 U.S. at 205, 230. The two cases are difficult to reconcile, but through a strained application of rational basis review, the *Plyler* Court struck down the statute anyway. *See id.* at 218-24, 230 (holding that imposing upon undocumented children the "lifetime hardship" of lack of education "can hardly be considered rational").

15. *See* Class Action Complaint, Gary B. v. Snyder, No. 2:16-cv-13292-SJM-APP (E.D. Mich. Sept. 13, 2016), 2016 WL 4775474 [hereinafter *Gary B.* Complaint]; Complaint, Martinez v. Malloy, No. 3:16-cv-01439-AWT (D. Conn. Aug. 23, 2016) [hereinafter *Martinez* Complaint].

16. *See Gary B.* Complaint, *supra* note 15, ¶¶ 20-22, 35-60 (arguing that the plaintiffs are entitled to an education that gives them literacy skills and that literacy is a fundamental right for Fourteenth Amendment purposes); *Martinez* Complaint, *supra* note 15, ¶¶ 141-48, 161-70 (claiming a right to a minimally adequate education).

17. The primary strategy of both complaints is to weave the Court's favorable education dicta into an unwavering line of support for a right rather than an affirmative constitutional theory. *See Gary B.* Complaint, *supra* note 15, ¶¶ 20-22, 35, 44-48, 57-60; *Martinez* Complaint, *supra* note 15, ¶¶ 139-48, 172-87. The most the Court has done is to recognize that the possibility of a minimally adequate education being a fundamental right remains open. *See, e.g.*, Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 466 n.1 (1988) (Marshall, J., dissenting) ("The Court . . . does not address the question whether a State constitutionally could deny a child access to a minimally adequate education."); Papasan v. Allain, 478 U.S. 265, 284 (1986) ("The [*Rodriguez*] Court did not . . . foreclose

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made policy-based pleas to overturn *Rodriguez*.[18] Goodwin Liu offered the most progressive theory, positing that education is a privilege or immunity of national citizenship guaranteed by the Fourteenth Amendment, but acknowledging that the right primarily rests on the good-faith efforts of Congress, not the courts, to support education.[19]

This Article demonstrates that the original intent behind the Fourteenth Amendment included a commitment to guarantee education as a core aspect of state citizenship. This conclusion is grounded in the Amendment's explicit guarantee of state citizenship and the twin pillars of state citizenship at the time: education and voting.[20] Indeed, extensive evidence establishes that education was just as important to securing full citizenship as voting.[21] Simply put, the Fourteenth Amendment guaranteed citizenship, and citizenship required education.

This basic concept has gone unnoticed because of the unusually complex ratification of the Fourteenth Amendment.[22] A full understanding of the ratification process reveals how securing public education for all was part of the original intent underlying the Amendment.[23] The Fourteenth Amendment

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the possibility 'that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either [the right to speak or the right to vote].'" (last alteration in original) (quoting *Rodriguez*, 411 U.S. at 36)); *see also Plyler*, 457 U.S at 221 (writing that education may not be a fundamental right but that "education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all" and "has a fundamental role in maintaining the fabric of our society").

18. These scholars, of course, engage in doctrinal analysis, but their claims are largely based on the application of old doctrine to newly developed facts and policy implications. *See, e.g.*, Stuart Biegel, *Reassessing the Applicability of Fundamental Rights Analysis: The Fourteenth Amendment and the Shaping of Educational Policy After* Kadrmas v. Dickinson Public Schools, 74 CORNELL L. REV. 1078, 1100-16 (1989) (focusing on the grievous injuries students suffer as a justification for judicial intervention "[u]nder the *Plyler* framework"); 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, 631-42 (1992) (focusing on the positive potential policy effects of recognizing a right to education); Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92, 121-50 (2013) (focusing on state and the federal governments' historical commitment to education as a basis for recognizing it as a fundamental right).

19. *See* Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 334-35 (2006).

20. *See infra* Part III.B.

21. *See infra* Part III.B.

22. *Cf.* John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 380-409 (2001) (describing the historical events that led to ratification of the Thirteenth and Fourteenth Amendments).

23. *See infra* Part III.C.

required assent from both Southern and Northern states, but most Southern states had yet to rejoin the Union when the ratification process began. To rejoin the Union, Southern states needed to meet the terms Congress stipulated in the Reconstruction Act of 1867.[24] And those terms included ratifying the Fourteenth Amendment.[25] Thus, Southern readmission and the ratification of the Fourteenth Amendment were deeply intertwined.

This matters because the other terms and processes of Southern readmission came to define the very meaning of the citizenship the Fourteenth Amendment secured.[26] Three particular pieces of evidence support the conclusion that education was part of the Fourteenth Amendment's citizenship guarantee. First, the legislative history of the Reconstruction Act reveals that as a condition of readmission to the Union, Congress expected states to provide for education in their constitutions. Congress considered and nearly included explicit language to that effect in the Reconstruction Act,[27] but an explicit education condition proved unnecessary given that other constitutional and statutory provisions already required the provision of public education. In particular, both the Reconstruction Act and Article IV of the federal Constitution required states to adopt republican forms of government.[28] This meant that Southern states had to rewrite their constitutions and present them to Congress for approval.[29] Members of Congress believed that education was inherent in a republican form of government.[30] Without public education, the

24. *See* Reconstruction Act of 1867, ch. 153, § 5, 14 Stat. 428, 429.

25. *See id.*

26. *See* U.S. CONST. amend. XIV, § 1 (providing in part that "[a]ll 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" and entitled to "the privileges or immunities of citizens of the United States").

27. *See* CONG. GLOBE, 40th Cong., 1st Sess. 165-70 (1867) (indicating a vote of 20 yeas and 20 nays on the question whether to explicitly condition readmission of Southern states on their "establish[ing] and sustain[ing] a system of public schools open to all, without distinction of race or color").

28. *See* U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . . ."); Reconstruction Act of 1867, pmbl., 14 Stat. at 428 (requiring a republican form of government as a condition of readmission to the Union).

29. Reconstruction Act of 1867, § 5, 14 Stat. at 429.

30. *See, e.g.*, CONG. GLOBE, 40th Cong., 1st Sess. 169 (1867) (statement of Sen. Cole) (urging adoption of the education amendment, *see supra* note 27 and accompanying text, based in part on "the difficulties that result in a republican Government from the want of education"); *see also id.* (statement of Sen. Sumner) (urging Congress to adopt the amendment); *cf., e.g.*, Steven G. Calabresi & Michael W. Perl, *Originalism and* Brown v. Board of Education, 2014 MICH. ST. L. REV. 429, 461 (noting that education clauses in the Louisiana and South Carolina state constitutions prohibiting segregation in public schools "undoubtedly reflect[] the pressure brought to bear on those states by the Reconstruction Congress, which imposed stern conditions").

masses would lack the capacity to engage in democratic self-government and would instead be subject to domination by the elite class.[31] Thus, any state constitution failing to provide for public education would have been subject to congressional disapproval.

Second, all Southern states seeking readmission took decisive action to comply with Congress's terms and expectations. All of those states changed their constitutions from ones that ignored or merely encouraged education to ones that mandated it. In 1860, not a single Southern state constitution required the provision of education.[32] By 1870, every Southern state that went through Reconstruction made that requirement explicit in its constitution.[33] Importantly, these states implemented education mandates not just because Congress demanded that they do so but also because they too saw education as a pillar of citizenship in a republican form of government.[34] Representatives at state constitutional conventions emphasized that they could not break from the continuing effects of slavery and poverty to operate as functioning democracies unless their new and former citizens received education.[35]

31. *See infra* Part III.C.3.

32. *See infra* text accompanying note 283; *infra* Figure 1. *See generally* JOHN MATHIASON MATZEN, STATE CONSTITUTIONAL PROVISIONS FOR EDUCATION: FUNDAMENTAL ATTITUDE OF THE AMERICAN PEOPLE REGARDING EDUCATION AS REVEALED BY STATE CONSTITUTIONAL PROVISIONS, 1776-1929, at 4-12, 36-52, 118 (1931) (cataloging state constitutional provisions establishing state boards of education, state superintendents, and common school funds).

33. *See* Calabresi & Perl, *supra* note 30, at 459-60; *see also infra* text accompanying notes 284-86.

34. *See, e.g.*, JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NORTH-CAROLINA 486-87 (Raleigh, Joseph W. Holden 1868) [hereinafter CONSTITUTIONAL CONVENTION OF NORTH CAROLINA] (providing, along with education, for county legislatures to carry out the "Republican principle of local self-government" and serve as "schools" in the lessons of "statesmanship" and participatory government); 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA 264-66 (Charleston, Denny & Perry 1868) [hereinafter CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA] (reproducing a report of the convention's Committee on Education arguing that education is "the surest guarantee of . . . republican liberty" and thus that the "duty of the General Assemblies, in all future periods," would be "to establish, provide for, and perpetuate a liberal system of free public schools").

35. *See, e.g.*, JOURNAL OF THE MISSOURI STATE CONVENTION 196-98 (St. Louis, Missouri Democrat 1865) [hereinafter CONSTITUTIONAL CONVENTION OF MISSOURI] (statement of Mr. Strong) (discussing the importance of education in "throwing off the shackles of a system of domestic slavery"); 2 CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA, *supra* note 34, at 694-95 (statement of R.B. Elliott) (contending that education will eliminate the "danger of . . . a second secession of South Carolina from the Union" and ensure that people can be "good citizen[s]").

Third and perhaps most telling is Congress's action following the Fourteenth Amendment's ratification in 1868.[36] At that point, three Southern states had yet to rewrite their constitutions and regain admission to the Union: Mississippi, Texas, and Virginia.[37] As to those states, Congress passed new legislation explicitly conditioning their readmission on the equal provision of education to their citizens.[38] In other words, what had all along been implicit in citizenship and readmission became explicit once the Fourteenth Amendment was finally ratified.

These events reveal that at the point in time the Fourteenth Amendment was ratified, education was a right of state citizenship in the constitution of every readmitted state and was thus implicit in the state citizenship requirement set forth in the Fourteenth Amendment. Congress expected education. States responded by providing education. And it was only Congress's and the states' combined action that made the ratification of the Fourteenth Amendment possible. Had states failed to guarantee education in their state constitutions, they would not have been readmitted, and the Fourteenth Amendment would not have been ratified. That states acceded to or agreed with Congress's demands reveals that both Congress and the ratifying states originally understood education to be a right of state citizens in a republican form of government—and the right of state citizenship was one the Fourteenth Amendment, upon ratification, would henceforth protect. In short, although the federal Constitution does not specifically mention education, education as a right of state citizenship is implicit in the Fourteenth Amendment's guarantee of citizenship.

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36. Proclamation No. 13, 15 Stat. app. at 708, 710 (1868) (Secretary of State William H. Seward's proclamation that the Fourteenth Amendment had become "a part of the Constitution of the United States").

37. *See* MARY BETH NORTON ET AL., A PEOPLE AND A NATION: A HISTORY OF THE UNITED STATES 416 map 14.1 (brief 10th ed. 2015) (providing the dates of readmission for each Southern state). Georgia had also yet to be readmitted as of July 1868, *see id.*, but it had already enacted a new constitution providing for education, *see* GA. CONST. of 1868, art. VI, § 1. Georgia's readmission was slowed on other grounds; after passing its 1868 constitution, the state had expelled all newly elected black representatives from public office. *See* Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 230-31 (1995).

38. Act of Mar. 30, 1870, ch. 39, 16 Stat. 80, 81 (providing that Texas would be admitted to the Union so long as its constitution "shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the [state] constitution"); Act of Feb. 23, 1870, ch. 19, 16 Stat. 67, 68 (same for Mississippi); Act of Jan. 26, 1870, ch. 10, 16 Stat. 62, 63 (same for Virginia); *see also* Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119, 143-44 (2004). Interestingly, new and existing states also began including affirmative education mandates in their constitutions, creating a new national norm. *See* Calabresi & Perl, *supra* note 30, at 471-83.

The particular way in which the Fourteenth Amendment guaranteed education is also significant. By situating education within state citizenship—as opposed to national citizenship or the traditional parlance of fundamental rights[39]—the Amendment secured a sort of constitutional compromise. The Constitution would obligate states to provide education as a fundamental aspect of state citizenship but preserve for states the primary responsibility for and discretion over education. Hence, states could adopt any number of education policies and structures without raising constitutional concerns. Under this compromise, then, the Fourteenth Amendment would not dictate the minutiae of education or strictly scrutinize every educational inequality.

State discretion in providing education, however, was not to be without limits. Through its protection of rights of citizenship, the Amendment precluded states from providing education in a way that would subvert the overall democratic process or the citizenship of particular groups.[40] A state could not, for instance, provide minority groups educational opportunities so inadequate that the practical result would be to undermine or preclude their ability to exercise their rights of citizenship or participate in the democratic process. This interpretation draws support from the legislative history that links education, voting, and full citizenship.[41] Prior to the Civil War, adult literacy rates were extremely low among poor Southern whites, and educating blacks was in most Southern states a criminal act.[42] So long as the masses remained uneducated, elites recognized that they could maintain political power and, as a practical matter, deny others the basic privileges of citizenship.[43]

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39. *Cf., e.g.*, Bitensky, *supra* note 18, at 579-96 (relying on fundamental rights analysis asking whether education was rooted in history and tradition); Liu, *supra* note 19, at 367-99 (situating education within national citizenship).

40. *See infra* Part III.C.

41. *See, e.g.*, CONG. GLOBE, 40th Cong., 1st Sess. 168 (1867) (statement of Sen. Morton) ("Republican government may go on for awhile with half the voters unable to read or write, but it cannot long continue.").

42. *See id.* at 167 (statement of Sen. Sumner) (recounting calculations of literacy for whites based on census data and explaining that "[a] population that could not read and write naturally failed to comprehend and appreciate a republican government"); Jenny Bourne Wahl, *Legal Constraints on Slave Masters: The Problem of Social Cost*, 41 AM. J. LEGAL HIST. 1, 17 n.51 (1997).

43. *See* HEATHER ANDREA WILLIAMS, SELF-TAUGHT: AFRICAN AMERICAN EDUCATION IN SLAVERY AND FREEDOM 7 (2005) (arguing that allowing the education of slaves would have undermined the dehumanizing rationale for and practice of slavery); Susan P. Leviton & Matthew H. Joseph, *An Adequate Education for All Maryland's Children: Morally Right, Economically Necessary, and Constitutionally Required*, 52 MD. L. REV. 1137, 1155 (1993) (indicating that elites, "principally wealthy property and slave owners," had blocked public education prior to the Civil War).

After the war, it was inevitable that powerful factions might attempt to do the same.[44] Hence, one of the points of ensuring education as a basic right of citizenship was to place it beyond manipulation.[45] Failure to do so would jeopardize the republican form of government itself.[46] Thus, while the Fourteenth Amendment did not require any specific type or level of education, it did require that states provide education and that their processes of delivering it not be subject to political or other manipulations.

This concept of the right to education finds strong support in the way state constitutions structured education during Reconstruction. The Southern constitutional conventions took specific steps to protect against the manipulation of educational opportunity. State constitutions, for instance, created permanent common school funds[47] and mandated uniform education systems.[48] They also created state superintendents and state boards of education to oversee these systems rather than leaving responsibility for education to typical legislators.[49] Such measures were intended to stabilize educational opportunity and place certain decisions outside the purview of the normal political process. Collectively, these steps reinforce the conclusion that citizenship-based education was to be exempt from political manipulations.

Today, the effect of this theory is to focus attention on procedural safeguards against state abuses in the provision of education rather than resolving substantive disputes about efficient, effective, or quality education. Indeed, consistent with *Rodriguez*, this interpretation of the Fourteenth Amendment does not create a fundamental right that would require the Court to define a

44. *See, e.g.*, CONG. GLOBE, 40th Cong., 1st Sess. 168 (1867) (statement of Sen. Morton) (arguing that education must be required in Southern state constitutions because property owners would not "tax themselves to provide education for the others").

45. *See infra* Parts III.B-.C.

46. *See, e.g.*, 1 CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA, *supra* note 34, at 264 (reproducing a report of the convention's Committee on Education stating that "the universal diffusion of education and intelligence among the people is the surest guarantee of the . . . preservation of the great principles of republican liberty").

47. *See, e.g.*, ALA. CONST. of 1868, art. XI, § 10 (requiring that all proceeds from new and old state lands "shall be inviolably appropriated to educational purposes, and to no other purpose whatever"); FLA. CONST. of 1868, art. VIII, § 4 (establishing a mandatory common school fund).

48. *See, e.g.*, MISS. CONST. of 1868, art. VIII, § 1 ("As the stability of a republican form of government depends mainly upon the intelligence and virtue of the people, it shall be the duty of the legislature to . . . establish[] a uniform system of free public schools . . . ."); N.C. CONST. of 1868, art. IX, § 2 ("The general assembly . . . shall provide, by taxation and otherwise, for a general and uniform system of public schools . . . .").

49. *See, e.g.*, FLA. CONST. of 1868, art. VIII, § 3 (establishing a state superintendent of public education); N.C. CONST. of 1868, art. IX, §§ 7-15 (establishing and detailing the operation of a state board of education); *see also* MATZEN, *supra* note 32, at 5-12 tbl.II, 13-14, 37-51 tbl.VIII, 52-53.

quality education or scrutinize every educational inequality. Rather, it provides a basis for regulating anomalies in the delivery of education—what this Article terms "process-based" oversight. First, states must ensure stable funding streams for their education systems. The key here is consistent and reliable funding for education that ensures all citizens actually have access to education across time, which is distinct from mandating a particular level of funding or quality of educational opportunity. Second, states cannot actively manipulate educational opportunity for partisan or other illegitimate reasons. If education is a right of citizenship, state policies and practices targeting particular communities or groups for educational disadvantage are presumptively invalid. Third, while variation and inequality in education do not pose per se problems, systemic gaps in educational opportunity that are so large as to threaten particular groups' participation in the democratic process (or leave them subject to domination by other groups) are prohibited.

As a final note, it is worth emphasizing that this citizenship-based theory of education has several doctrinal and practical advantages over other attempts to locate educational rights in the Constitution. First, because the citizenship-based education theory is originalist and narrowly constrained by historical facts, it does not raise the slippery slope concerns that often arise with more policy-based theories focusing on the importance of education and the evolving needs of individuals in a modern society.[50] Second, the citizenship-based theory avoids the problem of requiring courts to reinterpret cases construing the Equal Protection, Due Process, or Privileges or Immunities Clauses—a problem that bogs down other theories and renders them impracticable.[51] Third, the citizenship-based theory fits squarely within existing constitutional approaches to individual rights. Courts could police the process by which our democracy articulates values—in this case education—without subjectively defining those very values.[52] Fourth, the citizenship-based theory of education does not require a drastic restructuring of the

50. *Cf., e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 30-35 (1973) (rejecting the argument that the importance of education was relevant in determining whether it was a fundamental right); *id.* at 37 ("How, for instance, is education to be distinguished from the significant personal interests in the basics of decent food and shelter?").

51. *Compare, e.g.*, Liu, *supra* note 19, at 357-63 (articulating a broad concept of the rights incident to national citizenship under the Privileges or Immunities Clause, U.S. CONST. amend. XIV, § 1), *with* Saenz v. Roe, 526 U.S. 489, 500-04 (1999) (discussing "fundamentally differing views concerning the coverage of the Privileges or Immunities Clause" and recognizing only that the Clause protects "the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State"—that is, the right to travel).

52. *Cf.* ELY, *supra* note 11, at 87 (noting that the Constitution leaves "the selection and accommodation of substantive values . . . almost entirely to the political process," instead focusing on procedural fairness and political participation).

federal-state relationship in education. Thus, it avoids the political and judicial skepticism other theories occasion.[53]

This Article proceeds in four Parts. Part I explores current trends that make this Article's theory relevant. In particular, it focuses on the dangers of localism and school funding policies that privilege the majority or seek to entrench its power. These trends suggest a major defect in education policy that only constitutional intervention can correct. Part II surveys prior scholarship proposing a fundamental right to education. It then details the new impact litigation claims and how they fit within prior proposals, identifying flaws and limits. Part III explores the meaning of the Fourteenth Amendment's Citizenship Clause and the state ratification process that ultimately defined it. It concludes that education was a right of state citizenship and was thus protected by the Amendment. Part IV identifies the key state practices the right would limit and the historical and other support for these limits. It also explains why these limits do not trigger concerns previously raised by the Court and political actors.

I. Modern Dilemmas: Localism, Privilege, and Entrenchment

Recent school funding trends and policy changes that seemingly correspond with demographic shifts suggest that manipulations in educational opportunity are clogging the channels of change and undermining equal citizenship. These manipulations are made possible and incentivized by localism as a dominant policy construct. Education, by necessity, is delivered at the local level, but when educational opportunity becomes more a matter of local officials' prerogative (or of local capacity) than of state policy, education looks less like a right and more like a municipal benefit.

Localism also threatens the creation of islands of education deprivation in high-wealth states. These islands of deprivation suggest the strong possibility that a political majority in the state is subjugating or conveniently neglecting the educational rights of a minority that lacks the power to do anything about it. Likewise, states hovering around a demographic tipping point create incentives for a minority to subjugate the rising majority. In these states, the shrinking political majority (which might be defined in terms of race, socioeconomic status, or geographic population) might entrench its power by adopting policies that lock in or privilege the current status quo. Education

53. *See, e.g.*, *Rodriguez*, 411 U.S. at 44 ("[I]t would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every State."); Michael Heise, *The Political Economy of Education Federalism*, 56 EMORY L.J. 125, 152-56 (2006) (expressing substantive concerns regarding the federalization of education because it would split policy control from fiscal responsibility).

provides a powerful mechanism for doing so. The following Subparts explore each of these points further.

A. The Danger of Localism

Local education, while facially a neutral policy, represents certain normative values.[54] Those who prefer local government argue that as between the distant federal government and local government, local government is best suited to make educational decisions.[55] Whatever truth might lie in this defense, it cannot justify an unwavering policy commitment to localism. The fundamental fact remains that the right to education and the substantive citizenship it furthers are functions of the state, not of local communities.[56] Thus, education cannot be left entirely to the whims of local communities. This is not to say that local variation and discretion are inherently inappropriate, but to recognize that variation and discretion can result in educational deprivations significant enough to implicate constitutional and democratic concerns.

Take the case of local school funding. Each state has developed its own distinct system for funding education.[57] Some states fund education entirely out of the state budget, while others place most of the responsibility on local districts.[58] Illinois, for instance, places the primary funding responsibility on

54. *Cf., e.g.*, Richard Briffault, *The Role of Local Control in School Finance Reform*, 24 CONN. L. REV. 773, 785-98 (1992) (identifying parents' rights, responsiveness to diverse local needs, reducing costs, educational excellence, accountability, and democratic participation as the purported virtues of local control).

55. *See, e.g.*, Heise, *supra* note 53, at 152-56 (discussing possible downsides of reducing local authority over education in favor of federal authority); *see also* Cedric Merlin Powell, *From Louisville to* Liddell*: Schools, Rhetorical Neutrality, and the Post-racial Equal Protection Clause*, 40 WASH. U. J.L. & POL'Y 153, 180 (2012) (discussing the preference for neighborhood schools in desegregation efforts).

56. *See, e.g.*, Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 211 (Ky. 1989) ("The sole responsibility for providing the system of common schools is that of our General Assembly. . . . The General Assembly must carefully supervise it, so that there is no waste, no duplication, no mismanagement, at any level."); *see also* Derek W. Black, *The Constitutional Challenge to Teacher Tenure*, 104 CALIF. L. REV. 75, 114-23 (2016) (synthesizing the state's responsibilities in education).

57. *See generally* Sean P. Corcoran & William N. Evans, *Equity, Adequacy, and the Evolving State Role in Education Finance*, *in* HANDBOOK OF RESEARCH IN EDUCATION FINANCE AND POLICY, *supra* note 10, at 353, 353-63 (surveying trends in school funding).

58. *See, e.g.*, Lex Urban, Comment, Connecticut Coalition for Justice in Education Funding v. Rell*: What Is an Equitable Solution to Public School Funding?*, 57 CATH. U. L. REV. 203, 231 n.198 (2007) (comparing Connecticut, which derives 94.6% of school funds from local property taxes, with Hawaii, which derives only 1.2% of its funding from local property taxes as of 2003).

districts.[59] Because districts' capacity to raise funds varies so wildly, this scheme produces enormous disparities between districts. As of 2010, average funding in Illinois districts serving predominantly low-income students was only 78% of the average for districts serving predominantly middle-income students.[60] Thus, the facially neutral policy of local funding severely disadvantages some districts, which works to others' advantage.

As a practical matter, a localized funding system offers wealthy communities a triple advantage. First, it relieves them of the burden of financing a statewide education system. Second, wealthy communities can redistribute funds to their own schools that would otherwise have gone to support a statewide system,[61] whereas poorer communities struggle to support basic programs.[62] Third, with additional money, wealthy communities can actually outcompete neighboring districts for those things that matter most, like quality teachers.[63] These disparate realities reveal that the fact that a state puts some funding into public education does not mean it is running a truly statewide education system. Instead, state statutes facilitate a localized education system that is anything but neutral and that systematically works to advantage and disadvantage certain communities.[64]

The preservation or maximization of these advantages also incentivizes advantaged districts to include and exclude certain groups of people—for the haves to keep out the have-nots. A district might, for instance, intentionally keep its boundaries small and exclusive, refusing to zone in new neighborhoods or placing pressures on local housing authorities to block new

59. *See* Cauhorn, *supra* note 10, at 213 (noting that 64% of funding for Illinois schools comes from local sources rather than from the state or federal governments); *id.* ("In the 2009-2010 school year, Illinois ranked forty-eighth nationwide for state government contributions to schools . . . .").

60. *See* BRUCE D. BAKER ET AL., EDUC. LAW CTR., IS SCHOOL FUNDING FAIR?: A NATIONAL REPORT CARD 17 tbl.3 (2010), https://perma.cc/W5NA-HNCR.

61. Illinois's higher-spending districts have per-pupil expenditures near the national average, but its low-spending districts on average have less money than those in Alabama and are more comparable to districts in Arizona. *See id.* at 15, 16-17 tbl.3 (showing average state and local revenue per pupil in high-poverty districts in Alabama, Arizona, and Illinois of $8433, $8120, and $8105, respectively, compared to a national average of $10,132 per pupil).

62. *See, e.g.*, Cauhorn, *supra* note 10, at 217 (explaining how hard property-poor districts are hit when the state fails to carry its responsibility for school funding).

63. *See* Derek W. Black, *Taking Teacher Quality Seriously*, 57 WM. & MARY L. REV. 1597, 1631-35 (2016) (explaining interdistrict competition for teachers). Money, however, is not the only factor bearing on the competition for teachers. *See id.* It is one among many interrelated factors. *See id.*

64. *See, e.g.*, Horton v. Meskill, 376 A.2d 359, 374 (Conn. 1977) (detailing the "significant disparity in the quality of education available to the youth of the state" based on disparate local ability to finance education).

residential development.[65] The result is to shift undesirables onto other districts that are already disadvantaged, widening the gap between the districts even more. In recent years, small communities have likewise sought to secede from their existing school districts to create their own smaller, more privileged districts.[66]

To be clear, individual family choices and preferences also play a role. The Stanford Center for Education Policy Analysis recently found that "between-district segregation of public school families increased by over 15%" from 1990 to 2010.[67] Another study found that wealthier families with children, in particular, are making housing and school choices that intensify segregation.[68] They are, in effect, buying their way into favored schools and systems.[69] The more they do so, the more a system of clearly desirable and undesirable districts and schools emerges.[70] The fault, however, still lies with the state when it creates localized education systems that incentivize and make possible this further stratification of educational opportunity.

65. *See, e.g.*, JONATHAN ROTHWELL, METRO. POLICY PROGRAM, BROOKINGS INST., HOUSING COSTS, ZONING, AND ACCESS TO HIGH-SCORING SCHOOLS 19-23 (2012), https://perma.cc/6T3J-J4Z6 (finding that exclusionary zoning is prevalent and correlated with interdistrict achievement gaps).

66. *See, e.g.*, Emma Brown, *Judge: Mostly White Southern City May Secede from School District Despite Racial Motive*, WASH. POST (Apr. 27, 2017), https://perma.cc/9VPK-XXVD; *see also* Erika K. Wilson, *The New School Segregation*, 102 CORNELL L. REV. 139, 143-44, 165-74 (2016) (identifying a "current wave of Southern suburban school district secessions" and similar secessions outside the South).

67. *See* Ann Owens et al., *Income Segregation Between Schools and School Districts*, 53 AM. EDUC. RES. J. 1159, 1181 (2016); *Income Segregation Between Schools and School Districts*, STAN. CTR. EDUC. POL'Y ANALYSIS, https://perma.cc/64QV-SNXE (archived Jan. 28, 2018) (listing the Owens et al. article as a publication of the Stanford Center for Education Policy Analysis). Even worse, within the hundred largest districts, between-school segregation of students eligible and ineligible for free lunch increased by 40.7% over the period from 1991 to 2012. *See* Owens et al., *supra*, at 1173 & tbl.2.

68. *See* Ann Owens, *Inequality in Children's Contexts: Income Segregation of Households with and Without Children*, 81 AM. SOC. REV. 549, 565-66 (2016).

69. *See id.* at 566.

70. *See id.* (indicating that "segregation is highest and has risen steadily between neighborhoods among affluent families with children" and that "concerns about educational advantages for children may contribute to high segregation of affluent families"). The phenomenon of buying into "good" school districts is not new, but the frequency of and incentives behind that phenomenon are. Owens found that rising income inequality has contributed to the increase in segregation, with high-income households with children seeking housing in neighborhoods with desirable schools. *See id.* at 549-50, 565-67.

B. Privileging the Majority

Past and present evidence suggests that democratic majorities are systematically disadvantaging minorities under the guise of localism. Political majorities at the state level may have a vested interest in maintaining educational localism because, as suggested above, localism serves the majority's interests well and is less expensive than a system that also properly serves the minority.[71] Under these circumstances, localism may not be subject to change through the political system. The majority may simply block the state from taking responsibility for the entirety of its education system.[72]

Vermont and New Hampshire are potential examples. Both states have relatively low percentages of poor students: 36% in Vermont and 27% in New Hampshire.[73] Given the states' wealth,[74] they could easily fund education in high-need areas. Instead, they maintain funding systems that work to the distinct advantage of the middle-income and wealthy majority and lock in educational disadvantage for high-need districts—the minority. For instance, in 2007, per-pupil funding in predominantly low-income New Hampshire school districts was only 64% of that of wealthier districts.[75] The disparity narrowed slightly in subsequent years, but a substantial gap remained.[76] Vermont

71. *See, e.g.*, Guthrie & Wong, *supra* note 10, at 71 (explaining that Illinois's school finance system is a result of suburban and rural districts' refusing to fund the needs of Chicago); *see also* Daniel Kiel, *The Enduring Power of* Milliken*'s Fences*, 45 URB. LAW. 137, 145-46 (2013) (explaining how "even equal funding [to each district] is insufficient to provide equal education" because districts serving large percentages of low-income students must spend funds on basic, remedial student needs while more advantaged districts can spend their resources on supplemental pursuits). *See generally* Therese J. McGuire et al., *Local Funding of Schools: The Property Tax and Its Alternatives*, *in* HANDBOOK OF RESEARCH IN EDUCATION FINANCE AND POLICY, *supra* note 10, at 376, 380-88 (reviewing literature on the motivations behind differing school tax schemes and their effects). It is important to recognize, however, that some studies suggest that a tax system in which the state bears primary responsibility for funding education can create a tragedy of the commons, in which wealthy communities previously heavily invested in funding local education are less invested in education funding. *See, e.g.*, Corcoran & Evans, *supra* note 57, at 357-61 (discussing "leveling down" effects). The net result could be a more equitable funding system, but one with fewer overall resources. *See id.*

72. *See, e.g.*, Kiel, *supra* note 71, at 147-48 (discussing the "save the cities, spare the suburbs" dynamic of education reform, in which attempts to "save" the urban district while "sparing" the suburbs produce a net result of very little reform because suburban districts "have little appetite for significant disruption through reform").

73. *See* S. Educ. Found., *supra* note 5, app. 1 at 5.

74. *See id.*; *see also* BRUCE D. BAKER ET AL., EDUC. LAW CTR., IS SCHOOL FUNDING FAIR?: A NATIONAL REPORT CARD 26 tbl.4 (3d ed. 2014), https://perma.cc/94VK-69NX (indicating that as of 2011, New Hampshire's per capita real gross domestic product was higher than that of most states).

75. *See* BAKER ET AL., *supra* note 74, at 15 tbl.3.

76. *See id.* (showing that this percentage had climbed to 77% as of 2011, which was still toward the bottom of most states).

similarly funded schools serving predominantly low-income students at levels around 20% lower than for other schools for several years.[77]

These and other states' past practices and divisions of political power make it highly unlikely that the democratic process can easily rectify these problems. Rather, the majority may have systematically disadvantaged the minority in ways that are likely to lock in this disadvantage indefinitely.[78] Constitutional remedies may be the only means by which disadvantaged citizens can get equal access to educational opportunities.

C. Entrenching Power and Advantage

Education also offers opportunities for smaller political groups to entrench their power. A powerful plurality or shrinking majority that fears future demographic changes might take action to marginalize certain communities, so much so that the emerging numerical majority is never able to exert its political influence. Or the majority may have simply operated a system that has worked to its advantage for so long that the lingering effects enable it to block change even when its numbers shrink below a majority. The latter case is in some ways more pernicious because it is less obvious, appearing as a natural continuation of historical norms.

Recent events suggest that those in power are acting to disadvantage large groups of students, if not majorities, and there may be little the disadvantaged can do to stop it. As low-income students are becoming the majority in public schools nationally,[79] legislation stripping funding and resources from traditional public education is becoming more prevalent.[80] In North Carolina, for instance, low-income students were 49% of the public school system as of the 2006-2007 school year.[81] A few years later, low-income students became the majority.[82] Just as this transition occurred, a new political majority gained

77. BRUCE D. BAKER ET AL., EDUC. LAW CTR., IS SCHOOL FUNDING FAIR?: A NATIONAL REPORT CARD 39-40 tbl.C-2 (4th ed. 2015), https://perma.cc/DL9D-X3JF (showing percentages of 79% in 2010, 78% in 2011, and 82% in 2012).

78. *Cf.* ELY, *supra* note 11, at 103 (discussing political malfunctions in which "the ins . . . chok[e] off the channels of political change to ensure that they will stay in and the outs will stay out").

79. *See* S. Educ. Found., *supra* note 5, at 2-3.

80. *See, e.g.*, Black, *supra* note 7, at 431-39 (analyzing the sharp shift in education policy during and following the Great Recession).

81. *See* S. EDUC. FOUND., A NEW MAJORITY: LOW INCOME STUDENTS IN THE SOUTH'S PUBLIC SCHOOLS 9 (2007), https://perma.cc/W4ZS-2URL.

82. *See* S. Educ. Found., *supra* note 5, at 3 (showing that as of 2013, low-income students made up 53% of North Carolina's public school population).

power in the state legislature.[83] That new political majority took three major steps that systematically and significantly disadvantaged the low-income majority in public schools.[84]

First, the state made cuts to public education that were among the largest in the nation.[85] In two years alone, the legislature cut funding by roughly $2800 per pupil, more than a 25% cut.[86] Second, the legislature diverted substantial amounts of new money to charter schools, nearly doubling their total funding between 2009 and 2014.[87] Whether charters are generally advantageous is subject to debate,[88] but the funding shift in North Carolina was disturbing regardless because the state's charter schools were becoming whiter while its traditional public schools were becoming browner.[89] Third, at the same time the state defunded traditional public education and doubled charter school funding, it also instituted enormous tax cuts.[90] To top it off, the state targeted the tax cuts at the wealthiest individuals in the state.[91] In short, the state passed tax cuts for the wealthy and expanded charter schools that disproportionately

83. *See* Kim Severson, *G.O.P.'s Full Control in Long-Moderate North Carolina May Leave Lasting Stamp*, N.Y. TIMES (Dec. 11, 2012), https://perma.cc/J9XP-ABNR (describing the shift in control of the legislature as well as the governorship in 2012).

84. *See* Strauss, *supra* note 10 (reprinting a blog post by James Hogan). Commentators and protestors have even called it a "war on poor people." *See* Michael A. Cooper Jr., *The War on the War on Poverty*, NEW REPUBLIC (Feb. 15, 2015), https://perma.cc/6VJ5-4K2W.

85. *See* BAKER ET AL., *supra* note 77, at 8 & fig.3 (demonstrating that North Carolina dropped from being ranked twentieth among all states in terms of funding level in 2010 to forty-sixth in 2012).

86. *See id.*

87. *See* N.C. DEP'T OF PUB. INSTRUCTION, HIGHLIGHTS OF THE NORTH CAROLINA PUBLIC SCHOOL BUDGET 30 (2015), https://perma.cc/9TM7-79RX.

88. *See* Derek W. Black, *Charter Schools, Vouchers, and the Public Good*, 48 WAKE FOREST L. REV. 445, 446-47 (2013) ("Based on their track record thus far, charters and vouchers, on the whole, are not operating in furtherance of the public good. Rather[,] . . . they tend to promote the individual good and operate in ways that actively undermine the public good.").

89. *See* Helen F. Ladd et al., *The Growing Segmentation of the Charter School Sector in North Carolina* 6-7 (Nat'l Ctr. for Analysis of Longitudinal Data in Educ. Research Working Paper No. 133, 2015), https://perma.cc/AF2L-UY8T ("[W]e find that, as of 2012, charter schools served a disproportionately small number of minority students . . . .").

90. *See* Patrick Gleason, *North Carolina Lawmakers Build Upon Historic Tax Reform*, FORBES (June 10, 2015, 5:09 PM), https://perma.cc/Q7ZW-LP8X; *see also* Michael Leachman & Michael Mazerov, Ctr. on Budget & Policy Priorities, State Personal Income Tax Cuts: Still a Poor Strategy for Economic Growth 2 (2015), https://perma.cc/DSX6-KELH (characterizing North Carolina as one of the five biggest tax-cutting states in the nation since 2010).

91. *See* Lateshia Beachumm, *Big Tax Cuts for the Rich, Less for the Poor*, CTR. FOR PUB. INTEGRITY (updated May 3, 2017, 1:39 PM), https://perma.cc/PN63-E6LD.

benefited elite or middle-class whites at the expense of the state's new public school majority—low-income students.

Not only does educational disadvantage of this sort make it difficult to resort to the ballot box for change, but North Carolina also made revisions to the voting process to make change even harder. In 2012, those in power in North Carolina drew voting district lines in such a way that they would maintain control in the legislature for a decade, even if a majority of citizens in the state opposed them.[92] Even more recently, the controlling party passed legislation limiting the State Board of Education's power to reverse recent policies.[93] In short, North Carolina's legislature passed legislation that systematically undermines education for the majority of public schools and attempts to entrench that disadvantage for the foreseeable future. Absent judicial intervention, the current ruling majority may have solidified its ability to wield antidemocratic power and undermine basic citizenship for years to come. These trends cry out for a solution that courts and scholars have yet to deliver.

II. The Promises and Pitfalls of Prior Theories and Litigation

In *San Antonio Independent School District v. Rodriguez*, the plaintiffs theorized that education is a fundamental right because it is essential to the exercise of other constitutional rights such as voting and free speech.[94] The Court responded that a right's importance alone does not determine whether it is fundamental.[95] Rather, a right is fundamental when the Constitution explicitly or implicitly protects it.[96] The Constitution does not even mention education, and education's effect on other rights is not enough to warrant implied protection.[97] The Court also expressed serious policy concerns with

92. Barry Yeoman, *North Carolina's Gerrymandering Puts Democracy on the Line: How the GOP Uses Redistricting to Maintain Power in a Purple State*, NATION (Sept. 27, 2017), https://perma.cc/9U3N-YJTF; *see* Sam Wang, Opinion, *The Great Gerrymander of 2012*, N.Y. TIMES (Feb. 2, 2013), https://perma.cc/8XYF-PMGZ; *see also, e.g.*, Covington v. North Carolina, 316 F.R.D. 117, 124 (M.D.N.C. 2016) (finding that the state defendants had failed to justify their predominant consideration of race in drawing twenty-eight state legislative and federal congressional districts and ordering that new maps be drawn), *aff'd mem.*, 137 S. Ct. 2211 (2017).

93. *See* H.R. 17, 2016 Gen. Assemb., 4th Extra Sess. (N.C. 2016) (enacted) (codified as amended in scattered sections of the North Carolina General Statutes). A state trial court subsequently entered a temporary restraining order to prevent the new law from taking effect. *See* Matthew Burns, *Judge Temporarily Blocks Law Shifting Power from NC Education Board*, WRAL.COM (Dec. 29, 2016), https://perma.cc/7ARR-T6JU.

94. *See* 411 U.S. 1, 35-36 (1973).

95. *See id.* at 35.

96. *See id.* at 33-34.

97. *See id.* at 35-37.

recognizing education as a fundamental right. Doing so might create a slippery slope for recognizing other new rights, alter the federalism balance between states and the federal government, and require the Court to make educational judgments beyond its expertise.[98] The following Subparts explore the scholarly and litigation attempts to reverse or circumvent *Rodriguez*.

A. Scholarly Attempts to Rework *Rodriguez*

Since *Rodriguez*, numerous scholars have contested the Court's conclusions. A substantial number simply argue that the Court's rationale in *Rodriguez* was wrong in 1973 and continues to be wrong today.[99] Another group offers deeper equal protection and substantive due process analysis but still effectively retreads *Rodriguez*'s analysis.[100] None of these arguments are mutually exclusive, but another group focuses more heavily on what *Rodriguez* left open: the possibility that some lower level of education is constitutionally protected.[101] These scholars emphasize dicta in post-*Rodriguez* cases that refer to a minimally adequate education.[102]

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98. *See id.* at 37, 40-44.

99. *See, e.g.*, Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 123 (2004); Stephen E. Gottlieb, Commentary, *Communities in the Balance: Comments on Koch*, 37 HOUS. L. REV. 711, 718 (2000); Gregory F. Corbett, Note, *Special Education, Equal Protection and Education Finance: Does the Individuals with Disabilities Education Act Violate a General Education Student's Fundamental Right to Education?*, 40 B.C. L. REV. 633, 668-71 (1999); Timothy D. Lynch, Note, *Education as a Fundamental Right: Challenging the Supreme Court's Jurisprudence*, 26 HOFSTRA L. REV. 953, 955-56 (1998).

100. *See, e.g.*, Bitensky, *supra* note 18, at 573 (summarizing the author's arguments on the right to education as a matter of substantive due process and equal protection); Daniel S. Greenspahn, *A Constitutional Right to Learn: The Uncertain Allure of Making a Federal Case out of Education*, 59 S.C. L. REV. 755, 768-69, 773 (2008) (attempting to limit the Court's decision in *Rodriguez* to its facts and arguing that the Court has "left open the possibility that some level of education is a constitutionally protected fundamental right"); Penelope A. Preovolos, Rodriguez *Revisited: Federalism, Meaningful Access, and the Right to Adequate Education*, 20 SANTA CLARA L. REV. 75, 78-83, 119 (1980) (arguing that the *Rodriguez* Court's focus on the adequacy of public education left open the possibility of a right to adequate education); Eli Savit, Note, *Can Courts Repair the Crumbling Foundation of Good Citizenship?: An Examination of Potential Legal Challenges to Social Studies Cutbacks in Public Schools*, 107 MICH. L. REV. 1269, 1284-85 (2009) (discussing a "constitutionally protected 'quantum of education' that is a prerequisite to the 'meaningful exercise' of First Amendment freedoms and the right to vote" (quoting *Rodriguez*, 411 U.S. at 36)).

101. *See, e.g.*, Biegel, *supra* note 18, at 1093; Greenspahn, *supra* note 100, at 768-69; Preovolos, *supra* note 100, at 78-83; Robyn K. Bitner, Note, *Exiled from Education:* Plyler v. Doe*'s Impact on the Constitutionality of Long-Term Suspensions and Expulsions*, 101 VA. L. REV. 763, 768 (2015); Savit, *supra* note 100, at 1284-85.

102. *See, e.g.*, Greenspahn, *supra* note 100, at 768-69; *see also* Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 466 n.1 (1988) (Marshall, J., dissenting) ("The Court . . . does not address the question whether a State constitutionally could deny a child access to a minimally

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The theory of a minimally adequate education is, on its face, more promising than a direct reversal of *Rodriguez*, but it is still limited because it effectively tries to out-lawyer the Court. The Court may have left open the possibility of a minimally adequate education, but it has also been careful to never recognize that right.[103] Having passed on several opportunities to recognize the right,[104] it is not obvious why the Court would suddenly change its approach. More important, the substance of the Court's dicta is thin. The dicta consist primarily of laudatory statements and assumptions, not reasoned doctrinal building blocks for a fundamental right.[105] Without an affirmative theory or rationale, the Court is no more likely to suddenly recognize a fundamental right to a minimally adequate education than it is to overturn *Rodriguez*'s holding regarding a general fundamental right to education.

B. Scholarly Theories to Move Beyond *Rodriguez*

More recently, scholars have attempted to move beyond the limitations of *Rodriguez* by posing alternative theories of a fundamental right to education. To varying degrees, these scholars attempt to extend the Court's liberty principles from recent cases to education issues,[106] leverage new state

adequate education. In prior cases, this Court explicitly has left open the question whether such a deprivation of access would violate a fundamental constitutional right."); Papasan v. Allain, 478 U.S. 265, 284 (1986) (emphasizing that *Rodriguez* left open whether "some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either [the right to speak or the right to vote]" (alteration in original) (quoting *Rodriguez*, 411 U.S. at 36)); *cf.* Plyler v. Doe, 457 U.S. 202, 221-23 (1982) ("[E]ducation has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.").

103. *See, e.g.*, *Kadrmas*, 487 U.S. at 458 (majority opinion); *Papasan*, 478 U.S. at 285.

104. Lower courts have similarly refused to intuit any rights from the Court's prior opinions. *See, e.g.*, Toledo v. Sánchez, 454 F.3d 24, 33 (1st Cir. 2006); Angstadt v. Midd-W. Sch. Dist., 377 F.3d 338, 343 (3d Cir. 2004).

105. *See, e.g.*, *Plyler*, 457 U.S. at 223 ("By denying . . . children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation."); Ambach v. Norwick, 441 U.S. 68, 76-78 (1979) ("The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized . . . ."); Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) ("[E]ducation prepares individuals to be self-reliant and self-sufficient participants in society."); Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("Today [education] is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.").

106. *See, e.g.*, Areto A. Imoukhuede, *Education Rights and the New Due Process*, 47 IND. L. REV. 467, 468 (2014) (grounding a basic right to public education in due process reasoning similar to the "human dignity-based holding" of *Lawrence v. Texas*, 539 U.S. 558 (2003));
footnote continued on next page

constitutional precedent in federal court,[107] mine federal constitutional history to reinterpret the national approach to education,[108] and reconceptualize citizenship itself.[109] New historical insights have been particularly fruitful.

Most notably, Barry Friedman and Sara Solow argue that nearly two centuries of state constitutional commitments in education, along with the steady growth of the federal commitment in recent decades, establish an education tradition the Constitution would treat as fundamental[110]:

> When one interprets the Constitution as judges and lawyers interpret, it turns out . . . [that] a federal right to an adequate education . . . has emerged over time . . . . [T]he presence of the right is every bit as clear as, say, the right to possess and bear

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Matthew A. Brunell, Note, *What* Lawrence *Brought for "Show and Tell": The Non-fundamental Liberty Interest in a Minimally Adequate Education*, 25 B.C. THIRD WORLD L.J. 343, 345-46 (2005) ("[I]n light of the bold, new substantive due process architecture announced in *Lawrence* . . . , the schoolchildren living in grossly underperforming school districts may in fact have a federal constitutional remedy under the Due Process Clause."); *see also* Note, *A Right to Learn?: Improving Educational Outcomes Through Substantive Due Process*, 120 HARV. L. REV. 1323, 1327 (2007) (discussing the Court's holding in *Lawrence* that same-sex couples have the right to engage in intimate sexual conduct and writing that "although substantive due process rests on a shaky foundation, recent Supreme Court decisions not only have reaffirmed its legitimacy, but also might have expanded its scope" (footnotes omitted)).

107. *See, e.g.*, Derek Black, *Unlocking the Power of State Constitutions with Equal Protection: The First Step Toward Education as a Federally Protected Right*, 51 WM. & MARY L. REV. 1343, 1349-50 (2010) (arguing that state constitutional precedent regarding the right to education has federal equal protection implications because "a state does not have discretion to afford some citizens full access to a state constitutional right while denying it to others"); Martha I. Morgan, *Fundamental State Rights: A New Basis for Strict Scrutiny in Federal Equal Protection Review*, 17 GA. L. REV. 77, 77-78 (1982) (arguing that when a state recognizes a fundamental right, strict scrutiny should apply to federal constitutional analysis of inequities in regard to that state right); Kristen Safier, Comment, *The Question of a Fundamental Right to a Minimally Adequate Education*, 69 U. CIN. L. REV. 993, 1019-20 (2001) (relying on state court decisions to help define the meaning of a federal right to a minimally adequate education); Michael Salerno, Note, *Reading Is Fundamental: Why the No Child Left Behind Act Necessitates Recognition of a Fundamental Right to Education*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 509, 526, 529-36 (2007) (pointing to state courts as laboratories developing educational rights and as examples upon which federal courts might base decisions to infer such a right).

108. *See, e.g.*, Friedman & Solow, *supra* note 18, at 96; Liu, *supra* note 19, at 335.

109. *See, e.g.*, Liu, *supra* note 19, at 335 (arguing that education is a right of national citizenship protected by the Privileges or Immunities Clause); Ian Millhiser, Note, *What Happens to a Dream Deferred?: Cleansing the Taint of* San Antonio Independent School District v. Rodriguez, 55 DUKE L.J. 405, 431 (2005) (arguing that education is a fundamental right because it is "essential to preserving an intact right to vote"); Kara A. Millonzi, Recent Development, *Education as a Right of National Citizenship Under the Privileges or Immunities Clause of the Fourteenth Amendment*, 81 N.C. L. REV. 1286, 1294 (2003) (arguing, much like Liu, that education is a right of national citizenship protected by the Privileges or Immunities Clause).

110. *See* Friedman & Solow, *supra* note 18, at 121-47.

> arms in self-defense or the right of a woman to choose abortion—or so many other constitutional rights that at their core are part of American life in the early twenty-first century.[111]

Education, continue Friedman and Solow, is easily among the "deepest and most fundamentally constitutive" aspects of our laws and Constitution.[112] As such, they conclude that a fundamental right to at least a minimally adequate education should exist.[113]

While Friedman and Solow add important new facts to the debate, those facts do not suggest a new doctrinal approach. Instead, they offer a predicate for recognizing the minimally adequate education *Rodriguez* left open.[114] This argument is more plausible than many others insofar as it only asks the Court to account for new facts, not to reverse itself. But the argument remains largely wedded to the same analytical framework for evaluating educational rights that has failed advocates of the past: the traditional importance of education.

Goodwin Liu, in contrast, clearly breaks significant new doctrinal ground. Rather than massaging precedent or doctrine, he reinterprets the Fourteenth Amendment's Citizenship and Privileges or Immunities Clauses.[115] Liu argues, based on the legislative history of the Fourteenth Amendment and the prevailing practices that followed it, that Congress intended education to be one of the privileges of national citizenship.[116] As such, "[T]he Fourteenth Amendment authorizes and obligates Congress to ensure a meaningful floor of educational opportunity throughout the nation."[117]

Liu's focus on citizenship offers an entirely new way of thinking about the right to education. His argument for connecting education and citizenship is consistent with this Article's thesis and may have also influenced the new impact litigation in Michigan and Connecticut.[118] Yet his theory has important limits. It manages to be too bold and, at the same time, not bold enough.

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111. *Id.* at 96.

112. *See id.* at 155-56.

113. *See id.*

114. *See id.* at 112-38 (detailing the history of state, federal, and judicial support of education from the time the Fourteenth Amendment was ratified to the modern era).

115. *See* Liu, *supra* note 19, at 335-36; *see also* U.S. CONST. amend. XIV, § 1 ("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. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .").

116. *See* Liu, *supra* note 19, at 367-71.

117. *Id.* at 334.

118. For a discussion of those cases and their claims, see Part II.C below.

Liu's theory is too bold in positing an affirmative education right that is the federal government's duty to provide.[119] This framing raises a number of hurdles. It implicates the longstanding judicial reticence toward affirmative constitutional rights,[120] implicates the doctrinal complexities that accompany the Privileges or Immunities Clause,[121] and upsets the entire state-federal relationship with education.[122] As a doctrinal matter, none of these hurdles is fatal. If education was intended as a privilege of national citizenship guaranteed by the Fourteenth Amendment, all other existing doctrines should adjust accordingly. Nonetheless, that adjustment would be significant, creating extensive new federal power over education based on the rarely invoked Privileges or Immunities Clause.

Liu largely deals with this problem by narrowing the scope of his claim, indicating that he will not "address whether the Supreme Court or any court should hold that the Fourteenth Amendment guarantees an adequate

119. *See* Liu, *supra* note 19, at 400-06 (explaining the logic behind a federal congressional duty to "take steps reasonably calculated to ameliorate conditions that deny children adequate opportunity" to learn).

120. *See, e.g.*, DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 195 (1989) ("The [Due Process] Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. . . . [I]ts language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means."); *see also* Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2272-78 (1990) (discussing the negative rights concept as the "conventional wisdom" with a "lengthy pedigree"); Michael J. Gerhardt, Essay, *The Ripple Effects of* Slaughter-House*: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 410 (1990) (recognizing the Court's reluctance to recognize affirmative or positive rights). *But see* Bandes, *supra*, at 2279-308 (critiquing the negative rights assumptions).

121. *See, e.g.*, Liu, *supra* note 19, at 349-63 (analyzing the debate among members of the Court in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), regarding whether the Privileges or Immunities Clause confers any substantive rights, as well as the modern Court's continuation of the flawed logic of the majority opinion in that case). The distinction between the privileges and immunities of state versus national citizenship is one of the most illogical and doctrinally confused areas in constitutional law. *Cf., e.g.*, Saenz v. Roe, 526 U.S. 489, 527-28 (1999) (Thomas, J. dissenting) (indicating a willingness to reevaluate the meaning of the Privileges or Immunities Clause given "the current disarray of [the Court's] Fourteenth Amendment jurisprudence"); Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 63, 66-68 (1989) (positing the idea of overruling the *Slaughter-House Cases*).

122. The notion that federal government could assert primary authority would be a tough pill for the Court to swallow. *Cf., e.g.*, United States v. Lopez, 514 U.S. 549, 565-66 (1995) (rejecting the notion that "Congress can, pursuant to its Commerce Clause power, . . . regulate the educational process directly"). Liu's broad conception of national citizenship, *see* Liu, *supra* note 19, at 407-08, also raises federalism concerns beyond education.

education."[123] Instead, he directs his argument at Congress, arguing that Congress could and should act "in good faith to effectuate the core values of the Fourteenth Amendment, including the guarantee of national citizenship."[124] In this respect, however, Liu's theory is not bold enough. He articulates a key constitutional right but leaves its enforcement to the voluntary acts of "conscientious legislator[s]."[125] In other words, he provides the rationale for Congress to exercise extensive power over education but implicitly concedes that the right to education can be neglected by courts and Congress. In his defense, Liu aptly emphasizes the gap between the legally enforced Constitution and the full scope of the Constitution's meaning.[126] The latter has always fallen on legislators to effectuate, but Liu's article neglects the question why Congress would suddenly begin to effectuate that broader scope now.

C. New Litigation Claims

Whatever the shortcomings of past scholarship, its depth and breadth reflect scholars' and advocates' unwavering desire to secure a federal right to education.[127] The scholarly and advocacy communities may again be coming together. For the first time in decades, serious litigation is underway to revive a federally protected right to education, and recent scholarly advances appear to be playing some role.[128] The problem is that this new litigation has yet to offer a fully compelling theory that explains why the Constitution affords special protection for education. Both sets of plaintiffs correctly point to favorable Supreme Court dicta and constitutional principles, but a compelling theory requires a *rationale* for these dicta and principles, one that is sorely missing

123. *See* Liu, *supra* note 19, at 339.

124. *Id.*

125. *See id.* (quoting Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 587 (1975)).

126. *See id.* at 339-40 ("[T]he legislated Constitution, in contrast to the adjudicated Constitution, is not 'narrowly legal' but rather dynamic, aspirational, and infused with 'national values and commitments.'" (quoting Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 2022, 2027 (2003))).

127. *See, e.g.*, S. EDUC. FOUND., NO TIME TO LOSE: WHY AMERICA NEEDS AN EDUCATION AMENDMENT TO THE US CONSTITUTION TO IMPROVE PUBLIC EDUCATION 26-32 (2009), https://perma.cc/KR3F-XWBC; Theresa Perry, Introduction, *The Historical and Contemporary Foundations for Robert Moses's Call to Make Quality Education a Constitutionally Guaranteed Right*, *in* QUALITY EDUCATION AS A CONSTITUTIONAL RIGHT: CREATING A GRASSROOTS MOVEMENT TO TRANSFORM PUBLIC SCHOOLS, at vii, xi (Theresa Perry et al. eds., 2010); *cf.* JEANNIE OAKES ET AL., LEARNING POWER: ORGANIZING FOR EDUCATION AND JUSTICE 18 (2006) (discussing the importance of "social-movement organizing" and activism in "pursuing equitable education").

128. *See, e.g.*, *Martinez* Complaint, *supra* note 15, ¶¶ 129, 147-48 (citing Friedman & Solow, *supra* note 18, at 133).

from Supreme Court precedent. To be successful, plaintiffs should offer their own full explanation in future briefing.

In August and September 2016, two independent litigation teams filed federal lawsuits, claiming that their respective states were depriving students of a constitutionally protected education.[129] The first case, filed in the District of Connecticut, alleges that the state was "consistently failing to provide even a minimally adequate education" in its major cities.[130] The complaint posits that the state and federal commitment to education over the years has been so significant that it suffices to meet the Supreme Court's test for recognizing fundamental rights.[131] In support of this theory, the complaint draws extensively on recent scholarship detailing the federal and state governments' role in education[132]—a role that until recently had been relatively underappreciated. As a remedy, the complaint demands that the state eliminate what it terms the state's "Anti-Opportunity Laws" that trap students in failing traditional public schools and deny them access to higher-quality magnet and charter schools.[133]

The second lawsuit, filed in the Eastern District of Michigan, rests less on the evolving state and federal role in education and more on the notion that full citizenship, as a practical matter, requires access to some basic level of education. The complaint charges that the Detroit school system is so deficient that it denies many students literacy.[134] This illiteracy stigmatizes students and consigns them to an economic, political, and social underclass.[135] While these students may be citizens in a formal and technical sense, the failure of the state to ensure their literacy reduces these students, as a practical matter, to second-class citizens.[136] This, the complaint suggests, violates the basic, minimal

129. *See supra* notes 15-16 and accompanying text.

130. *See Martinez* Complaint, *supra* note 15, ¶ 3.

131. *See id.* ¶ 148; *see also* Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (articulating the Court's substantive due process test as asking whether a right is (1) "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" and (2) susceptible to "careful description" (first quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion); then quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled in other part by* Benton v. Maryland, 395 U.S. 784 (1969); and then quoting Reno v. Flores, 507 U.S. 292, 302 (1993))).

132. *See Martinez* Complaint, *supra* note 15, ¶¶ 122-36 (citing Friedman & Solow, *supra* note 18).

133. *See id.* at 69-70.

134. *See Gary B.* Complaint, *supra* note 15, ¶ 1.

135. *Id.* ¶ 22.

136. *See id.* ("[T]hey are not citizens invited to participate on equal terms in the economic, civic, and political life of our nation.").

requirements of education.[137] Thus, the plaintiffs demand improvements in school quality and services necessary to ensure literacy.[138]

While independent[139] and operating on distinct theories, these cases share striking similarities. First, both ground the right to education in liberty and stigma concepts.[140] The state is responsible for the stigma because it controls the horrendous education and compels students to suffer it.[141] Thus, the plaintiffs' complaint is not that other students receive a better education elsewhere, but that the education they receive from the state is crippling.[142] This liberty and stigma focus moots at least some of the concerns about recognizing affirmative rights under the federal Constitution.[143] Second, both cases posit a similar reading of precedent. They rely heavily on the fact that the Court in *Rodriguez* alluded to the possibility of a right to a minimally adequate education[144] and that other Supreme Court holdings and dicta consistently

137. *See id.* ¶ 21 (arguing that the failure to provide "'basic minimal skills' may run afoul of the U.S. Constitution" (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973))).

138. *See id.* at 128-29.

139. *Compare Martinez* Complaint, *supra* note 15, at 70-71 (listing counsel for the *Martinez* plaintiffs), *with Gary B.* Complaint, *supra* note 15, at 130-33 (listing counsel for the *Gary B.* plaintiffs).

140. *See Gary B.* Complaint, *supra* note 15, ¶ 20 ("[T]he exclusion of a discrete group of children from the ability to attain literacy necessary to participate in college and career, and as citizens in our democracy, is incompatible with the guarantees of liberty and equality enshrined in the Fourteenth Amendment . . . ."); *id.* ¶ 22 ("The stigma of illiteracy will mark them for the rest of their lives." (quoting Plyler v. Doe, 457 U.S. 202, 223 (1982))); *Martinez* Complaint, *supra* note 15, ¶ 3 ("This intolerable, 'state-imposed' system of discrimination 'disrespect[s] and subordinate[s]' the liberty and dignity of children living in Connecticut's most neglected communities, relegating them to second-class citizenship and stamping them with a badge of inferiority that will harm them 'for the rest of time.'" (alterations in original) (quoting Obergefell v. Hodges, 135 S. Ct. 2584, 2594-95, 2604 (2015))).

141. *See Gary B.* Complaint, *supra* note 15, ¶¶ 57-67; *Martinez* Complaint, *supra* note 15, ¶¶ 5, 30. Both groups of plaintiffs are aided in this argument by the fact that their states are obligated, by their own constitutions, to deliver education. *See* CONN. CONST. art. VIII, § 1 ("There shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation."); MICH. CONST. art. VIII, § 2 ("The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law.").

142. *See, e.g.*, *Gary B.* Complaint, *supra* note 15, ¶¶ 57-60.

143. For a discussion of these concerns, see note 120 and accompanying text above. The right to be free from stigma is a negative right. It is not that the state affirmatively owes an individual something, but rather that the state should refrain from taking harmful action that stigmatizes. In the context of education, however, this may be a distinction without a practical difference. The only way the state could prevent the stigma of illiteracy is to affirmatively provide better educational opportunities.

144. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973).

emphasize that education rests at the center of our democratic institutions and the exercise of citizenship.[145]

D. Limits of Current Strategies

That *Rodriguez* and a number of other Supreme Court opinions have alluded to a requirement of a minimally adequate education will not in itself convince courts to recognize such a right.[146] Dicta asserting that "education has a fundamental role in maintaining the fabric of our society"[147] may, in fact, be true, but actual recognition of a right to education demands explanation and proof.[148] It is too significant a doctrinal move to demand less.

That said, dicta can eventually push a court to adopt a doctrinal theory that makes sense of or systematizes past thinking.[149] In this respect, the Court's repeated positive remarks about education may represent something more important than scholars have fully recognized. While these cases do not articulate a doctrinal basis for recognizing a right to education, they reveal an unflappable judicial intuition that something about our constitutional system demands protection for education. This premise appropriately pervades both the Michigan and Connecticut complaints, yet neither offers a full explanation of *why* our Constitution protects some level of education.

The Connecticut complaint, when distilled to its essence, is little more than a retreading of *Rodriguez* with updated phrases. The plaintiffs in *Rodriguez* asked for the recognition of education as a fundamental right,[150] whereas the

145. *See Gary B.* Complaint, *supra* note 15, ¶¶ 20-22; *Martinez* Complaint, *supra* note 15, ¶¶ 139-48.

146. *See, e.g.*, Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 458 (1988) ("[Appellants' arguments] would require us to extend the requirements of the Equal Protection Clause beyond the limits recognized in our cases, a step we decline to take."); Papasan v. Allain, 478 U.S. 265, 285 (1986) ("The [*Plyler*] Court did not, however, measurably change the approach articulated in *Rodriguez*."); *see also* Pretka v. Kolter City Plaza II, Inc., 608 F.3d 744, 762 (11th Cir. 2010) ("We are not required to follow dicta in our own prior decisions. Nor for that matter is anyone else." (citation omitted)).

147. Plyler v. Doe, 457 U.S. 202, 221 (1982).

148. State supreme courts similarly went through a period of gradually recognizing special constitutional protection for education. The fact that their state constitutions had an education clause was not enough, alone, to justify judicial intervention. Seminal cases drew on original intent, legislative practices, separation of powers theory, and expert analysis of textual language in concluding that the state constitutions at issue contained such a protection. *See, e.g.*, Horton v. Meskill, 376 A.2d 359, 373-74 (Conn. 1977); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 205-06, 210-13 (Ky. 1989).

149. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 482-85 (1965) (drawing a constitutional theory of privacy out of "penumbras, formed by emanations" from other constitutional guarantees).

150. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

Connecticut plaintiffs ask for "minimally adequate education."[151] The underlying rationale of both is nearly the same: Education is really important for voting, speech, and life opportunities.[152] In taking this seemingly safe route, the Connecticut complaint falls short for the same reason *Rodriguez* and subsequent cases' dicta fell short: It does not fully explain why the Constitution might protect some form of minimally adequate education but not education in general.

The Michigan complaint is premised on a more progressive theory of citizenship. It frames Supreme Court quotations and Reconstruction-era history regarding education around citizenship rights rather than just the intrinsic value of education.[153] The complaint, however, hedges by concurrently pursuing the liberty interest in being free from stigma.[154] These distinct theories could reinforce one another in a broader concept of citizenship or simply merit individual attention. Either way, the complaint hints at a new theory but does not fully explain it. This Article demonstrates that such a theory can be found in a closer examination of the Fourteenth Amendment's ratification and the state constitutional conventions that coincided with it.

III. The Fourteenth Amendment's Guarantee: Educated Citizens in a Republican Form of Government

The Fourteenth Amendment explicitly extends state and federal citizenship to all persons born or naturalized in the United States.[155] Scholars have examined what that citizenship entails in the broadest theoretical sense, finding that the Fourteenth Amendment guarantees full substantive citizenship for those to whom such citizenship had previously been denied.[156]

151. *See Martinez* Complaint, *supra* note 15, ¶¶ 161-65.

152. *See Rodriguez*, 411 U.S. at 30; *Martinez* Complaint, *supra* note 15, ¶ 1. The *Martinez* Complaint adds a deep exploration of the national tradition in favor of education, but on this score, the complaint regurgitates Friedman and Solow's article, adding very little explanation of its own. *See Martinez* Complaint, *supra* note 15, ¶¶ 125-28 (citing Friedman & Solow, *supra* note 18).

153. *See Gary B.* Complaint, *supra* note 15, ¶¶ 44-46.

154. *See id.* ¶¶ 57-59.

155. U.S. CONST. amend. XIV, § 1 ("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.").

156. *See, e.g.*, KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 3 (1989) [hereinafter KARST, BELONGING TO AMERICA] (arguing that the Fourteenth Amendment guarantees equal citizenship "for people previously relegated to the status of outsiders"); David H. Gans, *The Unitary Fourteenth Amendment*, 56 EMORY L.J. 907, 907-08 (2007) ("The overarching aim of the Fourteenth Amendment was to

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Aside from Goodwin Liu, scholars have paid relatively little attention to whether education is specifically included within full substantive citizenship.[157] A close look at the conjunction of the Fourteenth Amendment's ratification and Southern states' readmission to the Union reveals that education is included within the right of citizenship.

Southern states' readmission to the Union was occurring concurrently with the ratification of the Fourteenth Amendment.[158] As a condition of readmission, Southern states were rewriting their state constitutions and ratifying the Fourteenth Amendment, one state at a time, to constitute the three-fourths majority necessary to formally include the Fourteenth Amendment in the U.S. Constitution.[159] Education was specifically mandated in every new Southern constitution and implicit in the republican form of government Congress demanded pursuant to its own existing constitutional authority.[160] That demand might very well make education an appropriate candidate for enforcement through the Guarantee Clause.[161] In fact, another new lawsuit in Mississippi is taking that approach to some extent.[162]

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make the newly emancipated slaves equal citizens in the reconstructed United States."); Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 4 (1977) [hereinafter Karst, *Equal Citizenship*] ("The substantive core of the amendment, and of the equal protection clause in particular, is a principle of equal citizenship, which presumptively guarantees to each individual the right to be treated by the organized society as a respected, responsible, and participating member.").

157. Moreover, Liu's article focuses on a different time period that excludes ratification itself. *See* Liu, *supra* note 19, at 375-99 (detailing Congress's post-Fourteenth Amendment education policies from 1870 to today).

158. Some argue that the fact that readmission was conditioned on ratification of the Fourteenth Amendment rendered the ratification invalid or originalist arguments illogical. *See, e.g.*, Douglas H. Bryant, Commentary, *Unorthodox and Paradox: Revisiting the Ratification of the Fourteenth Amendment*, 53 ALA. L. REV. 555, 578 (2002) ("It seems quite clear that the Fourteenth Amendment was not ratified, if proposed, even loosely within the text of Article V of the Constitution."); Thomas B. Colby, *Originalism and the Ratification of the Fourteenth Amendment*, 107 NW. U. L. REV. 1627, 1629-31 (2013) (arguing that because there was no original bipartisan supermajority ratification of the Fourteenth Amendment, arguments assigning weight to its original meaning are flawed). This Article does not address that concern but rather accepts what has been accepted fact for a century and a half: The Fourteenth Amendment became part of the U.S. Constitution in 1868.

159. At the time, this required ratification by twenty-seven states. *See* Bryant, *supra* note 158, at 558.

160. *See infra* Part III.C.

161. U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . . .").

162. *See* Complaint ¶¶ 1.1-.10, Williams *ex rel.* J.E. v. Bryant, No. 3:17-cv-00404-WHB-LRA (S.D. Miss. May 23, 2017), 2017 WL 2255288; Emma Brown, *Black Parents Use Civil War-*

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Republican form of government claims, however, raise unique justiciability concerns[163] not present in Fourteenth Amendment cases.

Education rests equally within the protection of the Fourteenth Amendment. First, the Fourteenth Amendment explicitly guarantees state and federal citizenship and, as Subpart A below demonstrates, this right to citizenship entailed more than just formal recognition as a citizen; it also entailed substantive rights. The most obvious examples are those explicitly included in the Fourteenth Amendment: equal protection, due process, and privileges and immunities. Second, as Subpart B reveals, the substantive rights of citizenship are not limited to those explicitly mentioned in the Fourteenth Amendment; they include education and voting.

Third, while Liu argues that this right to education rests in national citizenship,[164] this Article demonstrates that it fits more accurately in state citizenship because that is exactly where Congress and the states placed it. Subpart C details Congress's demand that states provide public education and

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Era Law to Challenge Mississippi's "Inequitable" Schools, WASH. POST (May 23, 2017), https://perma.cc/A7U7-A2V9.

163. The claim that Mississippi is bound by the specific terms of its readmission to the Union directly implicates the justiciability of the republican-form-of-government guarantee. "In most of the cases in which the Court has been asked to apply the [Guarantee] Clause, the Court has found the claims presented to be nonjusticiable under the 'political question' doctrine." New York v. United States, 505 U.S. 144, 184 (1992) (citing City of Rome v. United States, 446 U.S. 156, 182 n.17 (1980), *superseded in other part by statute*, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified as amended in scattered sections of 52 U.S.C.), *and abrogated in other part by* Shelby County v. Holder, 133 S. Ct. 2612 (2013)); Baker v. Carr, 369 U.S. 186, 218-29 (1962); and Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 140-51 (1912))). The plaintiffs in the Mississippi case do, however, distinguish their claim from those raising political questions. *See* Memorandum in Support of Response to Motion to Dismiss at 11-21, *Williams*, No. 3:17-cv-00404-WHB-LRA (S.D. Miss. Sept. 15, 2017), 2017 WL 6994340 (arguing against application of the political question doctrine).

The Court, of course, initially found voting malapportionment claims to be nonjusticiable as well, reasoning that they raised political questions, only to later reverse course. *Compare* Colegrove v. Green, 328 U.S. 549, 556 (1946) (dismissing a districting claim as raising a political question), *with Baker*, 369 U.S. at 232 (exercising jurisdiction over a malapportionment case and rejecting the notion that *Colegrove* precluded it from doing so), *and* Evenwel v. Abbott, 136 S. Ct. 1120, 1134 (2016) (recognizing that the "Court changed course in *Baker*"). States, likewise, have defended their apportionment schemes on Guarantee Clause grounds. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 582 (1964).

Ely has argued that the Guarantee Clause should be justiciable in certain instances. *See* ELY, *supra* note 11, at 122-23. He noted, in particular, that claims that would otherwise implicate equal protection may implicate the Guarantee Clause. *See id.* at 119, 122. And he argued that there is nothing "special about the [Guarantee] Clause that suggests that a line of growth or development (like that the Court has given virtually every other constitutional phrase) would be inappropriate." *Id.* at 123.

164. *See* Liu, *supra* note 19, at 334-35.

states' actions to guarantee as much through their state constitutions. In doing so, states not only made education a state constitutional right but also expanded the rights of state citizens under the federal Constitution. In other words, they gave further meaning to state citizenship.

Fourth, that meaning was then constitutionalized when states ratified the Fourteenth Amendment and its guarantee of state citizenship. Subpart C further reinforces this idea by detailing the rapid change that occurred in state constitutions in the years surrounding the ratification of the Fourteenth Amendment. Prior to the Fourteenth Amendment, only a smattering of states guaranteed education in their constitutions. Within two years of ratification, every state in the South and 80% of states nationally guaranteed education. This trend confirms the notion that education had suddenly—and in conjunction with the Fourteenth Amendment—become a right of state citizenship.

Subpart D conceptualizes these events as representing a constitutional compromise that embedded education as an implicit right in the Fourteenth Amendment. The federal Constitution would demand that states educate their citizens and would protect state-provided education against certain manipulations, but it would recognize education as first and foremost an aspect of state citizenship. As such, states would still retain substantial latitude in how they deliver education. In retrospect, this distinction also fits nicely with the Supreme Court's approach to individual rights and federalism. The Court could recognize a state citizenship right to education without upsetting settled doctrine in other areas.

A. Constitutionalizing Full Citizenship

The Fourteenth Amendment represents a single holistic concept of citizenship.[165] Charles Black famously argued that the Citizenship Clause alone would have been sufficient to grant Congress the power to enforce the principles of equal protection and due process even if those terms had not been explicitly included in the Amendment.[166] Kenneth Karst later added that the

165. *See, e.g.*, Gans, *supra* note 156, at 907 ("[T]he four component parts of Section 1 work together, and our constitutional doctrine often obscures the connections between and among the provisions that make up Section 1."); *see also* Karst, *Equal Citizenship*, *supra* note 156, at 5 (arguing that the Fourteenth Amendment "present[s] the principle of equal citizenship as an ideal, a cluster of value premises"); Liu, *supra* note 19, at 341-44 (arguing that equality is implicit in the concept of citizenship); Kevin Maher, Comment, *Like a Phoenix from the Ashes:* Saenz v. Roe*, the Right to Travel, and the Resurrection of the Privileges or Immunities Clause of the Fourteenth Amendment*, 33 TEX. TECH L. REV. 105, 115 (2001) ("[T]he Fourteenth Amendment redefined citizenship to account for the slave race and to incorporate the protections created by the Amendment into the fabric of the Constitution.").

166. *See* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 50-66 (1969); *see also* Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99
footnote continued on next page

Amendment's citizenship and equality guarantees "were melded into a single policy, as was entirely natural, given the draftsmen's objectives."[167] In other words, the original intent of the Fourteenth Amendment was neither to create a series of independent clauses nor for those clauses to operate as limits on the scope of the rights of citizenship.[168] Rather, the point was for the Fourteenth Amendment as a whole to secure a full and substantive concept of citizenship. Section 1 of the Amendment specifically established the right of citizenship, and the Due Process, Equal Protection, and Privileges or Immunities Clauses that followed were a list of the core, but nonexclusive, dimensions of the right of citizenship.[169]

Over time, however, the Due Process, Equal Protection, and Privileges or Immunities Clauses took on distinct meaning and precedent.[170] The practical effect of this approach has been to largely ignore and thus indirectly narrow citizenship.[171] This is more an accident of history and litigation than a purpose

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VA. L. REV. 493, 546 (2013) (arguing that with one potential exception, those in the Senate during debates over what became the Fourteenth Amendment "uniformly endorsed a conception of 'citizenship' that would encompass, at least, the equal enjoyment of basic civil rights to the same extent enjoyed by other citizens").

167. Karst, *Equal Citizenship*, *supra* note 156, at 14. Karst adds that it was this more substantial concept of citizenship that drew President Johnson's veto. *See id.* (citing CONG. GLOBE, 39th Cong., 1st Sess. 1679-81 (1866); and Letter from President Andrew Johnson to the U.S. Senate (Mar. 27, 1866), *in* 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 405, 405-06 (James D. Richardson ed., Washington, Gov't Printing Office 1897)).

168. *See* JACOBUS TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 215 (1951) (stating that the Due Process and Equal Protection Clauses "would 'merely secure the rights attached to citizenship in all free governments'" (quoting CONG. GLOBE, 39th Cong., 1st Sess. 3031 (1866) (statement of Sen. Henderson)); Karst, *Equal Citizenship*, *supra* note 156, at 15 ("There was no serious effort to differentiate the functions of the various clauses—privileges and immunities, due process, equal protection—of section one of the proposed amendment. . . . [T]he section in its entirety was taken to guarantee equality in the enjoyment of the rights of citizenship."); *see also* Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 59-63 (1955) (arguing that the Fourteenth Amendment was not drafted like a statute but rather as an intentionally "broadly worded organic law" that could adapt to address various different types of infringements on individuals' rights).

169. *See, e.g.*, Williams, *supra* note 166, at 579-81 (stating that Congress's intent was for "United States citizenship [to] carr[y] with it certain rights, including, paradigmatically, a right to equal legal treatment at the hands of government," and that certain civil rights and legal norms were likely considered to inhere in citizenship and thus did not require explicit articulation).

170. *See* Gans, *supra* note 156, at 907.

171. *See id.*

of the Amendment itself.[172] On its face, the text of the Amendment and the history motivating its enactment make the citizenship imperative clear.[173]

As to the text, the first sentence of the Amendment extends state and national citizenship to "[a]ll persons born or naturalized in the United States."[174] While a self-evident declaration from today's perspective,[175] slavery and the Supreme Court's prior endorsement of it required this formal explicit declaration of citizenship.[176] In 1865, the Thirteenth Amendment had abolished slavery,[177] but no more.[178] Southern states quickly repealed slavery

172. The Fourteenth Amendment was first severed into pieces by the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), which "narrowly interpreted each part of section one." *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 547-48 (5th ed. 2017). The case's due process holding was quickly overruled, while its equal protection interpretation lasted until the mid-twentieth century, and its privileges or immunities reasoning remained largely untouched until 1999. *See id.*; *see also* Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the* Slaughter-House Cases *Without Exhuming* Lochner*: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. REV. 1, 76 (1996) ("[The *Slaughter-House Cases*] left protections of Bill of Rights liberties to the tender mercies of the very states that had so recently made mincemeat of them.").

173. Congress thought the Civil Rights Act of 1866 had secured citizenship, but questions regarding its constitutionality prompted Congress to amend the Constitution to resolve the issue and eliminate the possibility that the Act might be subsequently repealed or invalidated. *See* Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 910 (1986); *see also* Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981-1982, 1988 (2016)).

174. U.S. CONST. amend. XIV, § 1.

175. In fact, the Citizenship Clause was not part of the initial draft of the Amendment and generated relatively little debate after it was inserted, and Congress offered relatively little explanation as to its meaning. *See* Williams, *supra* note 166, at 549 (indicating that "many modern scholars . . . view [the Citizenship Clause] as an 'afterthought'" (quoting Alexander M. Bickel, Essay, *Citizenship in the American Constitution*, 15 ARIZ. L. REV. 369, 374 (1973))); Sara Catherine Barnhart, Note, *Second Class Delivery: The Elimination of Birthright Citizenship as a Repeal of "The Pursuit of Happiness,"* 42 GA. L. REV. 525, 550 (2008) (discussing the original and amended drafts). *But see* Barnhart, *supra*, at 550 (characterizing the debate in the Senate over the Clause as "vigorous"); *see also* CONG. GLOBE, 39th Cong., 1st Sess. 2890-97 (1866) (setting out the debate over the Clause).

176. In *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 425-27 (1857), the Court denied citizenship to black people. *See* Henry L. Chambers, Jr., Dred Scott*: Tiered Citizenship and Tiered Personhood*, 82 CHI.-KENT L. REV. 209, 210-11 (2007). The Thirteenth Amendment formally freed slaves, but citizenship and equality required Section 1 of the Fourteenth Amendment. *See id.* at 220-22; *see also* Maher, *supra* note 165, at 115 ("The Fourteenth Amendment ended all . . . argument [over whether there was such a thing as citizenship in the United States separate from state citizenship] by creating a national citizenship in clear and unequivocal language.").

177. *See* U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude . . . shall exist within the United States . . . ."); Proclamation No. 52, 13 Stat. app. at 774, 775 (1865) (Secretary of State William H. Seward's proclamation that the Thirteenth Amendment had become "part of the Constitution of the United States").

178. The Civil Rights Cases, 109 U.S. 3, 25 (1883) (writing that the Thirteenth Amendment "merely abolishes slavery"), *abrogated in part by* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

and their acts of secession.[179] But they took no steps to suggest that black people would become part of broader society, much less citizens.[180] To the contrary, Southern states began passing so-called Black Codes to restrict freedmen's rights to contract, property, employment, and judicial process.[181] Black people may have no longer been slaves, but so far as Southern whites were concerned, the Supreme Court's pronouncement in *Dred Scott v. Sandford*—that blacks were not citizens and lacked any rights a white man was bound to respect[182]—remained good law.

Against this historical backdrop, the Fourteenth Amendment was designed to achieve far more than just a declaration of legal status for slaves and an exclusive list of prohibitions. The Amendment was designed to secure substantive citizenship for black Americans and prevent them from slipping back into de facto slavery or becoming no more than second-class citizens.[183]

179. *See, e.g.*, Ordinance Prohibiting Slavery in North Carolina (1865), *in* 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2799, 2799-800 (Francis Newton Thorpe ed., 1909). *But see* John C. Eastman, *When Did Education Become a Civil Right?: An Assessment of State Constitutional Provisions for Education, 1776-1900*, 42 AM. J. LEGAL HIST. 1, 27 (1998) ("None of [Southern states'] first post-war constitutions was long-lived. The constitutions and contemporaneous appeals to reenter the Union were rejected by Congress . . . .").

180. *See, e.g.*, Ordinance Prohibiting Slavery in North Carolina, *supra* note 179, at 2799-800; *see also* Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 39-43 (1990) (describing white violence and a system of "Black Codes" as the response to the Thirteenth Amendment).

181. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 199-202 (Perennial 2002) (1988); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1388 (1992); Williams, *supra* note 166, at 528.

182. *See* 60 U.S. (19 How.) 393, 426-27 (1857) (holding that by virtue of his race, "Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts"), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

183. *See Civil Rights Cases*, 109 U.S. at 49 (Harlan, J., dissenting) (arguing that the purpose of the Fourteenth Amendment was to "secur[e] to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy," including "the rights, privileges, and responsibilities of citizenship" (first quoting Strauder v. West Virginia, 100 U.S. 303, 306 (1880), *abrogated in other part by* Taylor v. Louisiana, 419 U.S. 522 (1975); then quoting Neal v. Delaware, 103 U.S. 370, 386 (1881))). Recognizing and protecting educational rights was crucial to preventing black people from being relegated to second-class citizenship. *See* CONG. GLOBE, 40th Cong., 1st Sess. 169 (1867) (statement of Sen. Cole) (arguing that to change the culture of subjugation, states needed to extend those rights, including education, necessary for black people to participate in government); INST. FOR EDUC. EQUITY & OPPORTUNITY, EDUCATION IN THE 50 STATES: A DESKBOOK OF THE HISTORY OF STATE CONSTITUTIONS AND LAWS ABOUT EDUCATION 36 (2008) ("With expansion of citizenry to the newly freed African-American populations, the country correspondingly expanded the right to education [to freedmen] to assure the ability of these new citizens

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Given the marginal circumstances of so many poor and uneducated Southern whites, expanding citizenship would also serve to secure them a meaningful place in the new governments of the South.[184]

B. The Meaning of Full Citizenship: Status, Voting, and Education

The notion that the original intent of the Fourteenth Amendment was to guarantee full citizenship is easy enough to discern. The meaning of full citizenship, however, is less so. Was its meaning to evolve over time in relationship to individual and national needs, or was it limited to some specific rights envisioned in 1868? One could debate the merits of either approach,[185] but at the very least, citizenship was meant to include those aspects of citizenship that were immediately pressing following the Civil War. From Congress's perspective, those aspects included three core substantive rights: the legal status of citizenship, voting rights, and access to public education.[186] In

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to participate in a democratic society."); *id.* at 37 (recounting comments from Missouri's 1865 constitutional convention that justified the mandatory provision of education as necessary to "throw[] off the shackles of a system of domestic slavery" (quoting CONSTITUTIONAL CONVENTION OF MISSOURI, *supra* note 35, at 196)).

184. William Forbath wrote of the eighteenth century Constitution, "The political theories of the Framers confirmed that the hireling's status of dependence and submission disqualified him for citizenship. Indeed, most states at first restricted suffrage to the independent freeholder." William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 19 (1999) (footnote omitted). By the 1820s, disadvantaged whites demanded the ballot. *See id.* Thus, the Framers of the Reconstruction Amendments "outlined an understanding of equal citizenship that spoke to the social and economic circumstances not only of former slaves, but also of white free laborers." *See id.* at 26.

185. *Compare, e.g.*, Saby Ghoshray, *Rescuing the Citizenship Clause from Nativistic Distortion: A Reconstructionist Interpretation of the Fourteenth Amendment*, 51 WASHBURN L.J. 261, 267 (2012) (arguing for "a timeless interpretation that will remain a bulwark against any future distortions" of the Amendment), *with, e.g.*, Kaczorowski, *supra* note 173, at 923-26 (supporting a "developmental conception" that "permit[s] the future inclusion of rights within [the Amendment's] protective guarantees that the framers might not have intended to protect in 1866"), *and* Karst, *Equal Citizenship*, *supra* note 156, at 21-22 (explaining that the concept of equal citizenship has expanded in the modern era).

186. *See* Forbath, *supra* note 184, at 26 ("Citizenship demanded suffrage; and the independence of the freedmen's ballots required material foundations. That entailed not only equal rights to contract and own property, but also to public education and training."); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 760-61, 785 (1985) (explaining that "substantial evidence" suggests a major purpose of the Amendment was to provide a constitutional basis for the work of the Freedmen's Bureau, which attended largely to the educational and social needs of freedmen); *see also* Williams, *supra* note 166, at 548 ("[C]itizenship was viewed by members of the Thirty-ninth Congress as anything but inconsequential and . . . such members fully expected that recognizing particular classes of persons as 'citizens' would have significant practical and legal consequences.").

fact, Congress forcefully advocated for and, to varying degrees, legally required Southern states to extend these three rights to citizens.[187]

The Fourteenth Amendment explicitly achieved the first aspect of citizenship—formal status. In the initial debates in Congress, the question whether the Amendment secured voting and education sparked controversy. Those opposed to the entire Amendment sought to curry votes against it by emphasizing that the Amendment would extend suffrage to black citizens.[188] Those who supported the Amendment downplayed or rejected this possibility.[189] Once the Amendment was ratified, each group flipped its position. The Amendment's supporters argued that citizenship necessarily included voting, and the opposition argued otherwise.[190] Rather than risk controversy and uncertainty, Congress moved to pass the Fifteenth Amendment and specifically guarantee voting equality.[191]

One could interpret this additional step of the Fifteenth Amendment as evidence that neither voting nor education were part of the rights of citizenship, equality, or due process protected by the Fourteenth Amendment. The sounder interpretation is that the Fifteenth Amendment was an insurance policy for voting.[192] The rapidity with which Congress passed the Fifteenth Amendment is consistent with this reading. Congress passed the Fifteenth Amendment just six months after the Fourteenth was ratified by the states, and ratification of the Fifteenth moved twice as quickly as ratification of the Fourteenth.[193] The fact that the Fifteenth Amendment generated relatively

187. *See* Reconstruction Act of 1867, ch. 153, § 5, 14 Stat. 428, 429 (requiring a republican form of government, adoption of the Fourteenth Amendment, suffrage, and rewritten state constitutions).

188. *See* Williams, *supra* note 166, at 552-54. Given that many in the North still opposed black suffrage, *see infra* note 191, this concept raised eyebrows beyond just the South.

189. *See* Williams, *supra* note 166, at 552-54.

190. *See id.* at 556.

191. U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."). This uncertainty was important in the North as well. Congress had already forced Southern states to extend suffrage to black citizens, *see* Reconstruction Act of 1867, § 5, 14 Stat. at 429, but many in the North continued to oppose suffrage for black citizens following the war. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 29 (2004); *see also* FONER, *supra* note 181, at 446-47 (discussing various restrictions on the right to vote in the North).

192. *See, e.g.*, FONER, *supra* note 181, at 417 (recounting contemporaneous accounts of the Fifteenth Amendment that indicated that its passage was necessary to prevent Southern Democrats from fighting back against black suffrage).

193. Congress passed the Fourteenth Amendment on June 13, 1866. *See* CONG. GLOBE, 39th Cong., 1st Sess. 3148-49 (1866). It was certified as ratified on July 28, 1868. *See* Proclamation No. 13, 15 Stat. app. at 708, 710 (1868). Congress passed the Fifteenth Amendment on February 26, 1869. *See* CONG. GLOBE, 40th Cong., 3d Sess. 1638-41 (1869). It was

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little debate and controversy suggests that it was clarifying what was already implicit in the Fourteenth. Consistent with this notion, the Court has refrained from driving a wedge between the two amendments. It has, instead, recognized voting as a fundamental right under equal protection[194] and struck down a number of inequalities in voting under the Fourteenth rather than the Fifteenth Amendment.[195]

That explanation, however, still raises a question: If education was the third aspect of full citizenship, why did Congress fail to pass an insurance policy for education in the form of a constitutional amendment? The short answer is that neither Congress nor the states had any reason to pass a federal insurance amendment for education once the Fourteenth and Fifteenth Amendments were in place.

First, at the time, guaranteeing education as a right of citizenship, in contrast to doing the same for voting, did not spark significant controversy. A majority in the North initially voted against black suffrage.[196] Some expressed racist objections while others were more concerned about how enfranchising black citizens would shift national and political balances of power.[197] General objections to education simply were not made. As Subpart C.4 below details, states readily acceded to guaranteeing education in their state constitutions, recognizing that public education would cure the problem of political manipulation by elites and help ensure democratic government processes. Debates occurred over how best to fund education and whether schools should be integrated, but no meaningful opposition ever arose to expanding education

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certified as ratified on March 30, 1870. *See* Proclamation No. 10, 16 Stat. app. at 1131, 1132 (1870) (Secretary of State Hamilton Fish's proclamation that the Fifteenth Amendment had become "part of the Constitution of the United States").

194. *See, e.g.*, Bush v. Gore, 531 U.S. 98, 104-05 (2000) (per curiam) ("The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise."); Harper v. Va. Bd. of Elections, 383 U.S. 663, 667 (1966) (recounting the Court's prior case law treating voting as a fundamental right); *see also* Reynolds v. Sims, 377 U.S. 533, 561-62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society[,] [e]specially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights . . . .").

195. *See, e.g.*, *Harper*, 383 U.S. at 670 (striking down poll taxes under the Equal Protection Clause); *Reynolds*, 377 U.S. at 581 (indicating that malapportionment in voting districts is unconstitutional); *see also* Baker v. Carr, 369 U.S. 186, 209 (1962) (holding that a legislative apportionment challenge was justiciable under the Equal Protection Clause).

196. *See* WILLIAM GILLETTE, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT 25 (1965).

197. *See id.* at 25, 113-20, 149-50. Interestingly, the Fifteenth Amendment was warmly received with little debate in the South. *See id.* at 92-93.

itself.[198] Thus, as a practical matter, education did not require a constitutional insurance policy in the way voting did.

Second, Southern states' need for readmission to the Union offered its own de facto insurance policy, which worked perfectly. By the time Congress passed the Fifteenth Amendment, state constitutions in the South and nationwide had undergone a drastic shift regarding education. In just a few short years, guaranteed education had become a uniform aspect of Southern state constitutions, and it was becoming the same elsewhere.[199] Thus, education had been constitutionalized at the state level without an additional federal amendment. In short, the combination of the Fourteenth Amendment's citizenship guarantee, state constitutions' education clauses, and the Fifteenth Amendment's voting rights—which provided democratic protection for full citizenship—would have made an additional explicit federal education amendment superfluous or more trouble than it was worth. As the following Subpart demonstrates, education had already been incorporated into the meaning of the Fourteenth Amendment itself.

C. Education, Readmission, and the Ratification of the Fourteenth Amendment

Southern states that had yet to rejoin the Union prior to 1867 had to go through specific steps to be readmitted.[200] Congress dictated what those steps should be. Some in Congress would have readmitted Southern states with no conditions other than the abolition of slavery.[201] Others believed that the war had been caused by more than slavery alone and thus wanted to require changes beyond abolition.[202] They believed that the South would have to

198. *See, e.g.*, James Lowell Underwood, *African American Founding Fathers: The Making of the South Carolina Constitution of 1868*, *in* AT FREEDOM'S DOOR: AFRICAN AMERICAN FOUNDING FATHERS AND LAWYERS IN RECONSTRUCTION SOUTH CAROLINA 1, 13-15, 15 tbl.1.3 (James Lowell Underwood & W. Lewis Burke Jr. eds., 2000) (counting overwhelming "ayes" in favor of education and noting that even the most controversial proposals supporting education, such as integration, still passed).

199. *See* Calabresi & Perl, *supra* note 30, at 450-63 (surveying state constitutions).

200. *See, e.g.*, Reconstruction Act of 1867, ch. 153, § 5, 14 Stat. 428, 429.

201. *See, e.g.*, CONG. GLOBE, 40th Cong., 1st Sess. 168 (1867) (statement of Sen. Hendricks) (objecting to the idea that Congress could dictate to states the content of their constitutions or place conditions on readmission).

202. *See, e.g.*, *id.* at 167 (statement of Sen. Sumner) (assigning blame for the war in part on the lack of education and reasoning that adequate education would have made the "Barbarism of Slavery . . . shr[i]nk into insignificance"); 2 CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA, *supra* note 34, at 688-89 (Mr. A.J. Ransier commenting that had South Carolina been more educated "there is no doubt that many of the evils which at present exist would have been avoided").

convert from a slavery oligarchy to a republican form of government.[203] To do so, Southern states had to rewrite their constitutions, commit to a new set of constitutional norms, extend the franchise, and educate their citizens.[204] Those who believed the South must do more than just abolish slavery won out.

The winners in this debate exercised Congress's power under Article IV of the Constitution to "guarantee to every State in this Union a Republican Form of Government."[205] They used this power to set specific conditions on the readmission of Southern states. Those conditions took statutory form in the Reconstruction Acts of 1867[206] and 1868.[207] Those Acts explicitly required Southern states to (1) ratify the Fourteenth Amendment, (2) extend the right to vote, (3) rewrite their state constitutions consistent with a republican form of government, and (4) submit those constitutions to Congress for approval.[208] Implicit in the third condition was the requirement that states provide public education. In fact, those states that were slow to comply with this implicit condition later saw Congress explicitly mandate it. Whether implicitly or explicitly, those states seeking readmission received the message. They ratified the Fourteenth Amendment and uniformly adopted state constitutions that obligated them to provide education.[209]

Subparts C.1 through C.3 below further detail why education was so crucial to rebuilding the South, how Congress conditioned readmission to the Union, and why education was included among those conditions. Subparts C.4 and C.5 track the specific enactments of education clauses in the South and how that trend spread to states outside the South. Subparts C.6 and C.7 explore the virtues of framing this history as a constitutional compromise and why it has, thus far, been overlooked.

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203. *See infra* Part III.C.3.

204. *See infra* Parts III.C.2-.4.

205. U.S. CONST. art. IV, § 4.

206. *See* Reconstruction Act of 1867, ch. 153, 14 Stat. 428; Act of Mar. 23, 1867, ch. 6, 15 Stat. 2; Act of July 19, 1867, ch. 30, 15 Stat. 14.

207. *See* Act of Mar. 11, 1868, ch. 25, 15 Stat. 41. *See generally* Harrison, *supra* note 22, at 406-08 (providing an overview of the Reconstruction Acts and their chronology).

208. *See* Reconstruction Act of 1867, § 5, 14 Stat. at 429. Robert Williams emphasized the significance of this moment in time. *See* ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 90-91 (2009) (noting that "[f]or the first time Congress imposed requirements concerning 'integral matters of state government'" and that those requirements "reflected a deep sense of principled ideology" (quoting Biber, *supra* note 38, at 140-41)).

209. *See* Calabresi & Perl, *supra* note 30, at 450-63.

1. The educational imperative in the South

Southern and Northern states were drastically different with regard to education prior to the Civil War. Public education in the North had taken hold in the late 1700s and early 1800s and had developed substantially by the eve of the war.[210] But in the South, before Reconstruction, education was only sporadically available through the patchwork efforts of public, private, and religious institutions.[211] Illiteracy rates demonstrated the practical effect of this difference. The illiteracy rate among whites in the South was more than four times that in the North.[212] Of course, black illiteracy in the South was even higher because it had largely been a crime to teach black people to read.[213]

Some in Congress believed that the lack of education in the South was a source of the Civil War itself.[214] The South had withheld education for a reason: The education of the masses was "a threat to the social order" that elites were determined to avoid.[215] By withholding education, elites could more easily dominate the political system and move an entire region, regardless of

210. *See* LAWRENCE A. CREMIN, AMERICAN EDUCATION: THE NATIONAL EXPERIENCE, 1783-1876, at 148-63 (1980) (contrasting the history of public education in New York and Massachusetts, which was well developed by the nineteenth century, with that in Virginia, which had been less successful).

211. *See, e.g., id.* at 149 ("All effort [in Virginia] to go beyond a patchwork quilt of public, quasi-public, religious, and pauper schools on the elementary and secondary levels failed until Reconstruction . . . ."); DOROTHY ORR, A HISTORY OF EDUCATION IN GEORGIA 169-78 (1950) (describing various starts and stops in the effort to create a public education system in Georgia prior to the Civil War). By comparison, Lawrence Cremin points out that Michigan "moved early and decisively to establish a comprehensive public system extending from the elementary school through the state university." CREMIN, *supra* note 210, at 149.

212. *See* CONG. GLOBE, 40th Cong., 1st Sess. 167 (1867) (statement of Sen. Sumner) (recounting calculations based on U.S. Census data).

213. *See* Wahl, *supra* note 42, at 17 n.51. Approximately 85% of blacks ages twenty to twenty-nine were illiterate prior to the war. *See* William J. Collins & Robert A. Margo, *Historical Perspectives on Racial Differences in Schooling in the United States, in* 1 HANDBOOK OF THE ECONOMICS OF EDUCATION 107, 119 tbl.4 (Eric A. Hanushek & Finis Welch eds., 2006). But free blacks were roughly three times more likely to be literate than enslaved blacks. *See id.*

214. *See, e.g.*, CONG. GLOBE, 40th Cong., 1st Sess. 167 (1867) (statement of Sen. Sumner).

215. *See* Leviton & Joseph, *supra* note 43, at 1155; *see also* WYTHE HOLT, VIRGINIA'S CONSTITUTIONAL CONVENTION OF 1901-1902, at 254 (1990) (describing the Virginia elite's perception of the state's Reconstruction-era constitution as threatening and dangerous); 2 CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA, *supra* note 34, at 694-95 (Mr. R.B. Elliott arguing that compulsory education would eliminate the "danger of . . . a second secession" and that "ignorance . . . was the sustainer of the late gigantic slaveholder's rebellion"); *id.* at 688-89 (Mr. A.J. Ransier stating that had the prior state constitution provided for education, "many of the evils which at present exist would have been avoided").

the interests of the masses, to secession.[216] Senator Charles Sumner, debating Reconstruction legislation, argued that the war itself might have been averted had education reached the South sooner:

> A republic without education is like the creature of imagination, a human being without a soul, living and moving blindly, with no just sense of the present or the future. . . .
>
> It is not too much to say that had these States been more enlightened they would never have rebelled. . . . A population that could not read and write naturally failed to comprehend and appreciate a republican government.[217]

Regardless of the real cause of the war, Congress saw closing the educational gap in the South as indispensable to rebuilding the South and the overall Union. Only by extending public education to the masses could the disadvantaged of the South become full citizens and their states finally operate as democracies.[218] Operating from this perspective, enshrining access to education in the South was at the forefront of Reconstruction. As a practical matter, education consumed much of the work and resources of the Freedmen's Bureau.[219] As a legal matter, it became part of the debate over the readmission of Southern states to the Union.

2. Conditions on Southern readmission to the Union

Through the Reconstruction Act of 1867,[220] Congress placed several specific conditions on Southern states' readmission to the Union. First, Southern states were required to "have formed a constitution of government in conformity with the Constitution of the United States in all respects."[221] Second, conformity with the Constitution meant that "the elective franchise

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216. Only after the Civil War had ended those elites' political dominance did public education become possible, even in a relatively moderate state like Maryland. *See* Leviton & Joseph, *supra* note 43, at 1155.

217. CONG. GLOBE, 40th Cong., 1st Sess. 167 (1867) (statement of Sen. Sumner).

218. *See id.* at 168 (statement of Sen. Morton) ("[U]ntil [black people] are educated the political power will remain almost entirely in the hands of the present rebel-educated classes."); *see also* CONG. GLOBE, 41st Cong., 2d Sess. 1333 (1870) (statement of Sen. Edmunds) (stating that the "aristocratic" tendencies of the South and lack of general education led to the war).

219. *See* CREMIN, *supra* note 210, at 517-18 (arguing that "much of Reconstruction policy was essentially educational" and that "the very act of emancipation had carried 'the sacred promise to educate'" (emphasis omitted) (quoting NAT'L TEACHERS' ASS'N, PROCEEDINGS AND LECTURES OF THE SIXTH ANNUAL MEETING 242 (Hartford, Office of the Am. Journal of Educ. 1865))); FONER, *supra* note 181, at 144 (discussing the Bureau's responsibilities and noting that "[e]ducation probably represented the agency's greatest success in the postwar South").

220. Ch. 153, 14 Stat. 428.

221. *Id.* § 5, 14 Stat. at 429.

shall be enjoyed by all such persons as have the qualifications herein stated."[222] Third, states were required to submit those constitutions to Congress, which would determine whether they were consistent with the federal Constitution.[223] Finally, states were required to adopt the Fourteenth Amendment.[224]

Congress seriously considered and nearly included an additional explicit condition that those state constitutions provide for public education. In the Senate, Charles Sumner introduced an amendment to the Reconstruction Act of 1867 that would have required states "to establish and sustain a system of public schools open to all, without distinction of race or color."[225] Sumner called the condition a simple "safeguard for the future"—a safeguard that was also consistent with the existing requirement for universal suffrage.[226] If peace was to be sustained, argued Sumner, "As the soldier disappears his place must be supplied by the schoolmaster."[227] Other senators rose in agreement, arguing that education was essential to successful reconstruction and defending the amendment by reference to the fact that some Southern states' laws still barred the education of black people.[228] Sumner's amendment to require education nonetheless failed by the narrowest margin, by a vote of 20 to 20.[229]

Education as a condition of readmission, however, did not die with this vote. Rather, this close vote is just the first of multiple pieces of evidence

222. *Id.* The Act previously indicated that males twenty-one years of age or older, regardless of race, were qualified to vote—except for those who might be excluded for participation in the rebellion or commission of a felony. *See id.*

223. *Id.*

224. *Id.* Some have questioned whether this forced ratification of the Fourteenth Amendment and other procedural irregularities render the Amendment's ratification invalid. *See* Colby, *supra* note 158, 1629-30, 1630 nn.7-8 (collecting scholarship questioning the validity of the Fourteenth Amendment). That argument goes beyond the scope of this Article. Here, it suffices to say that neither the Court nor Congress has ever seriously entertained the possibility that the ratification was invalid. *See* Coleman v. Miller, 307 U.S. 433, 449-50 (1939) ("This decision by the political departments of the Government as to the validity of the adoption of the Fourteenth Amendment has been accepted."); Harrison, *supra* note 22, at 377 (indicating that both political parties had accepted the validity of the Amendment by 1872 and that since then the question has "attracted almost no attention for practical or even theoretical purposes"). Moreover, this Article subscribes to the argument that while unconventional, the Fourteenth Amendment was still a product of voluntary assent by the people and the states. *See, e.g.*, 2 BRUCE ACKERMAN, WE THE PEOPLE 184-85, 204-05 (1998) ("[N]ineteeth-century Americans appear to have brilliantly adapted their constitutional traditions to allow for a remarkably open and even-handed process. . . . When viewed as a whole, . . . the act was a landmark in the adaptation of constitutional forms . . . .").

225. *See* CONG. GLOBE, 40th Cong., 1st Sess. 165 (1867) (statement of Sen. Sumner).

226. *Id.* at 167.

227. *Id.*

228. *See id.* at 168 (statement of Sen. Morton); *id.* at 169 (statement of Sen. Cole).

229. *See id.* at 170 (recording the vote).

showing that education, whether explicit or implicit, was a condition of readmission. As an initial matter, the votes against Sumner's proposal were not votes against education itself but were directed at other issues. Some senators apparently voted no because they objected to advance conditions on readmission as a general principle.[230] Others seemingly objected to the specific language of Sumner's proposal, which would have required not only education but also integrated education.[231]

Second, regardless of what advance conditions Congress placed on readmission, Congress retained authority to evaluate state constitutions after they were drafted and to determine whether they conformed to Congress's expectations for a republican form of government.[232] Education remained one of those expectations.[233]

Third, notwithstanding the objections raised to Sumner's integration proposal, the same concept found in his proposed amendment—"a system of public schools open to all"—would make its way into all of the education clauses in the newly readmitted states' constitutions.[234]

Fourth, those states that were slow to include education in their constitutions and meet the other conditions of Reconstruction actually saw the terms of their readmission change. As to the final three readmitted states, Congress

230. *See id.* at 148 (statement of Sen. Conkling); *id.* at 149 (statement of Sen. Sherman); *id.* at 157 (statement of Sen. Hendricks) (arguing that it was wrong to impose readmission conditions "at the point of the bayonet"); *id.* at 168 (statement of Sen. Hendricks) ("I vote against this amendment and all such amendments to this bill upon the ground that I think the Congress of the United States has no power under the Constitution to make a constitution for a State . . . ."); *see also* Harrison, *supra* note 22, at 419 n.227 (recounting senators' concerns regarding conditioning readmission).

231. *See* CONG. GLOBE, 40th Cong., 1st Sess. 169-70 (1867) (statement of Sen. Williams) (asking whether the amendment would require integration and then voting against it).

232. Reconstruction Act of 1867, ch. 153, § 5, 14 Stat. 428, 429.

233. *See infra* Part III.C.3.

234. *Compare* CONG. GLOBE, 40th Cong., 1st Sess. 165 (1867) (statement of Sen. Sumner) (suggesting an amendment to require that states "establish and sustain a system of public schools open to all"), *with* ALA. CONST. of 1868, art. XI, § 6 (establishing education for "all the children of the State"), ARK. CONST. of 1868, art. IX, § 1 (requiring the state legislature to "establish and maintain a system of free schools, for the gratuitous instruction of all persons in this State" of suitable age), FLA. CONST. of 1868, art. VIII, § 1 (obligating the state to "provi[de] for the education of all the children residing within its borders"), GA. CONST. of 1868, art. VI, § 1 (mandating that public education "be forever free to all children of the State"), LA. CONST. of 1868, tit. VII, art. 135 ("All children of this State [of suitable age] shall be admitted to the public schools . . . without distinction of race . . . ."), N.C. CONST. of 1868, art. IX, § 2 (mandating an education system "free of charge to all the children of the State"), *and* S.C. CONST. of 1868, art. X, § 4 (requiring the state legislature to provide for compulsory education of "all children").

explicitly conditioned their readmission on the provision of education.[235] In short, the demand for education shifted from an explicit condition to an implicit condition and then back to an explicit one, but it remained a condition all the same.

3. Education as inherent in a republican form of government

Article IV of the U.S. Constitution governs the admission of states into the Union. It offers a singular substantive concept regarding admission: "The United States shall guarantee to every State in this Union a Republican Form of Government."[236] This provision has generated very little precedent over the years, but two basic principles have emerged. First, Congress can impose conditions on states' admission to ensure a republican form of government.[237] Second, those conditions cannot be used to consign new states to second-class status.[238] Rather, new states are to be admitted on "equal footing" with existing states.[239]

During Reconstruction, Congress made it clear that it could and would reject constitutions that did not conform to a republican form of government.[240] While neither Congress nor the Constitution specifically defines "republican form of government," Jack Balkin explains that the phrase historically means a form of government based on:

> (1) opposition to monarchy, aristocracy, and oligarchy; (2) duties to further the public good and act for the public interest; (3) equality of citizenship with no special classes, privileges or disabilities that might create a new aristocracy; (4) freedom as non-domination; (5) individual and political self-rule; (6) a principle against corruption (including individual and systemic corruption); and (7) a principle against political self-entrenchment.[241]

Carrying out this form of self-government in the South would have been extremely difficult, if not impossible, given the general lack of education and the power imbalance between the masses and elites. Operating against that background, Congress, in word and deed, expressed the belief that providing

235. *See supra* note 38 (providing statutory conditions); *see also* Biber, *supra* note 38, at 143-44.

236. U.S. CONST. art. IV, § 4.

237. *See* Coyle v. Smith, 221 U.S. 559, 566-68 (1911) (stating that Congress, through the Guarantee Clause, "may imply the duty of such new State to provide itself with [a republican form of] government . . . [and] see[] that such form is not changed to one anti-republican").

238. *See id.*

239. *See id.* at 567.

240. *See* Reconstruction Act of 1867, ch. 153, § 5, 14 Stat. 428, 429.

241. Jack M. Balkin, *Which Republican Constitution?*, 32 CONST. COMMENT. 31, 50 (2017) (book review).

education through state constitutions was part of a republican form of government.[242] On the floor of the Senate, even a senator who ultimately voted against Sumner's amendment suggested that Congress could perhaps reject state constitutions later if they did not include education because they did not conform to a republican form of government.[243] Sumner and others were more forceful, specifically indicating that they would vote against the readmission of such a state.[244]

Congress communicated a related message through its military presence and Reconstruction programs. Until Southern states adopted republican forms of government, they were likely to remain under military rule.[245] The preamble to the Reconstruction Act of 1867 bluntly stated: "[P]eace and good order should be enforced in said States until loyal and republican State governments can be legally established."[246] This provision and other similar ones were published and distributed throughout the South.[247] At the same time, Congress itself was working to transition Southern states to republican forms of government by funding the vast expansion of educational opportunities to blacks as well as poor whites through the Freedmen's Bureau. Those once unable to read, write, and participate in the political process were being equipped to do so. As Lawrence Cremin has explained, the lion's share of Reconstruction policy was essentially educational policy.[248] More than two-thirds of the Freedmen's Bureau's budget, in most years, went toward education.[249] Thus, Congress's intent to vastly expand and formalize educational opportunity, if not explicit in the statutory requirements of the Reconstruction Act, was still communicated.

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242. *See* CONG. GLOBE, 40th Cong., 1st Sess. 168 (1867) (statement of Sen. Morton); *id.* (statement of Sen. Sumner).

243. *See id.* (statement of Sen. Hendricks) ("Whether Congress may afterward hold [a state] constitution to be republican in form is altogether another question; . . . the power of Congress to judge of that particular question confers no power upon Congress to prescribe in advance a form of government to a State."); *id.* at 170 (recording the vote).

244. *See, e.g., id.* at 572 (statement of Sen. Sumner) (arguing that senators were "perfectly entitled to . . . refuse to vote for such a constitution [that did not provide for education] . . . [and] nobody could criticise [them]").

245. *See* Scott R. Tkacz, *In Katrina's Wake: Rethinking the Military's Role in Domestic Emergencies*, 15 WM. & MARY BILL RTS. J. 301, 323 (2006) (discussing the conditions Southern states had to meet before military rule could end).

246. Ch. 153, pmbl., 14 Stat. 428, 428.

247. *See* S. EXEC. DOC. NO. 40-14, at 1-2 (1867) (explaining the Johnson Administration's efforts to ensure the establishment of new governments in the Southern states and including a report of expenditures already incurred toward that end).

248. *See* CREMIN, *supra* note 210, at 517-18 (summarizing the educational work that occurred during Reconstruction).

249. *See* Schnapper, *supra* note 186, at 780-81.

The clearest indication of this implicit condition, however, may be the fact that Congress later passed legislation to add an explicit condition for those few states that did not comply in short order. Mississippi, Texas, and Virginia were three of the last states to rejoin the Union.[250] Virginia, in particular, had resisted adopting an affirmative education clause in its constitution, apparently over integration concerns.[251] Congress readmitted Virginia on the additional condition that "the constitution of Virginia shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the constitution of said State."[252] Shortly thereafter, Congress readmitted Mississippi and Texas under identical language.[253] In short, by the end of Reconstruction, Congress made explicit what had been implicit all along: Education was a condition of readmission. Moreover, education was a condition because education was central to a republican form of government.

4. The uniform inclusion of education clauses in Southern constitutions

The affirmative duty to provide public education to all became an animating feature, if not the raison d'être, of Southern state constitutional conventions as well. These state conventions and the constitutions they produced provide the most persuasive evidence of what state citizenship did and did not mean. The conventions gave life to the rights of state citizenship by creating constitutions that established, in Congress's judgment, republican forms of government.[254] Moreover, the debates at the state conventions lack the ambiguity often found in congressional debates over the Fourteenth Amendment. These state conventions and constitutions supported a singular idea: States had the duty to provide public education to all.

Once Congress passed the Reconstruction Act of 1867, states immediately realized that new constitutions were necessary.[255] Within months, state

250. *See* NORTON ET AL., *supra* note 37, at 416 (showing that those three states were not readmitted until 1870).

251. *See* Brief for Appellants in Nos. 1, 2 and 4 and for Respondents in No. 10 on Reargument at 152-53, Brown v. Bd. of Educ., 347 U.S. 483 (1955) (Nos. 1 et al.), 1953 WL 78288 (describing Virginia's proposals to require segregated education in its constitution).

252. Act of Jan. 26, 1870, ch. 10, 16 Stat. 62, 63.

253. *See* Act of Mar. 30, 1870, ch. 39, 16 Stat. 80, 81 (Texas); Act of Feb. 23, 1870, ch. 19, 16 Stat. 67, 68 (Mississippi).

254. *See, e.g.*, Act of June 25, 1868, ch. 70, 15 Stat. 73, 73 (admitting Alabama, Florida, Georgia, Louisiana, North Carolina, and South Carolina after becoming satisfied that the states had "framed constitutions . . . which are republican").

255. Several Southern states passed new constitutions to ban slavery in 1865. *See, e.g.*, FLA. CONST. of 1865, art. XVI, § 1 ("Whereas, slavery has been destroyed in this State by the

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constitutional conventions met to begin the process.[256] Their job was to create a republican form of government,[257] and they understood that any such government would have two main ingredients: equal suffrage and public education. Equal suffrage would ensure that all male citizens could participate in self-government, and education would ensure that they would have the knowledge and understanding to exercise their votes in ways that would reinforce self-government.

South Carolina's convention offers one of the most poignant examples. On the first day of the convention, delegate Jesse Craig stated the obvious: He had come to the convention "to frame a new Constitution, or to make such changes in the old one as were necessary to secure a Republican form of Government."[258] From that day until the end of the convention, the charge to create a republican government would be repeated incessantly. In one seven-day stretch, for instance, the concept of a republican form of government was mentioned dozens of times.[259]

The phrase, moreover, was not just linguistic filler. It was the ideological lodestar for a number of policies—most clearly for voting and education. The necessity of voting in a republican form of government is relatively self-evident and does not warrant extended discussion here, but the South Carolina delegates placed education alongside voting in terms of its importance to the new government and its citizens. At a structural level, for instance, the convention established eleven committees.[260] Eight of those committees addressed the bureaucracy of governmental operations and the government's specific branches.[261] There were only three substantive committees: the

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Government of the United States; therefore, neither slavery nor involuntary servitude shall in future exist in this State, except as a punishment for crimes . . . ."); Washington v. Washington, 69 Ala. 281, 284 (1881) ("[T]he [Alabama] constitutional convention of 1865, on the 22d September, adopted an ordinance in recognition of the fact that the events and results of the war had destroyed slavery; and declaring that thereafter, in this State, there should not be 'slavery nor involuntary servitude, otherwise than as a punishment for crime'" (quoting ALA. CONST. of 1865, art. I, § 34)). Those changes, however, were far short of what was necessary to rejoin the Union. *See supra* Part III.C.2.

256. *See generally* CYNTHIA E. BROWNE, STATE CONSTITUTIONAL CONVENTIONS FROM INDEPENDENCE TO THE COMPLETION OF THE PRESENT UNION, 1776-1959: A BIBLIOGRAPHY 5, 39, 46, 80, 112, 167, 234 (1973) (providing basic information about constitutional conventions in 1867 and 1868 in Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, and Virginia).

257. *See* Reconstruction Act of 1867, ch. 153, pmbl., 14 Stat. 428, 428.

258. 1 CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA, *supra* note 34, at 10.

259. *See* 2 *id.* at 628-807 (covering a span from February 29 to March 7, 1868).

260. 1 *id.* at 40.

261. *See id.* Those were the Legislative Committee, the Executive Committee, the Committee on the Judiciary, the Committee on Finance, the Committee on Rules and

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Committee on Bill of Rights, the Committee on Franchise and Elections, and the Committee on Education.[262] Thus, by its structure, the convention placed individual liberties, voting, and education on equal footing.

The Committee on Education's first report proposed a robust, detailed, and mandatory public education system.[263] The Committee's rationale for the system was the same as the one previously offered in Congress: Education "is the surest guarantee of the . . . preservation of the great principles of republican liberty."[264] As such, the Committee reported, "[I]t shall be the duty of the General Assemblies, in all future periods of this Commonwealth, to establish, provide for, and perpetuate a liberal system of free public schools."[265] The robust system was to be "open to all . . . , without regard to race or color,"[266] which curiously was nearly identical to the phrase contained in Senator Sumner's proposed amendment to the Reconstruction Act of 1867.[267]

As to the basic issue whether to constitutionalize education, not a single delegate rose to offer a substantive objection.[268] The discussion on this point was extensive, but it was all offered in furtherance of education in a republican form of government.[269] The most forceful delegates posited that an ignorant

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Regulations, the Committee on Petitions, the Committee on Miscellaneous Matter, and the Committee on Review and Consolidation. *Id.*

262. *See id.* The notion of structurally embedding education into the fabric of society was further evidenced in the Convention's communications with Congress regarding whether to continue the Freedmen's Bureau until civil government was restored in the state. A minority of the Committee on Miscellaneous Matters objected to the continuation of the Freedmen's Bureau, but there was unanimous support for Congress to establish a Bureau of Education. *See id.* at 166-67.

263. *See id.* at 264.

264. *Id.*

265. *Id.*

266. *See id.* at 266.

267. *See* CONG. GLOBE, 40th Cong., 1st Sess. 165 (1867) (statement of Sen. Sumner) (suggesting an amendment that would have required states "to establish and sustain a system of public schools open to all, without distinction of race or color").

268. The only concern was regarding whether the state could pay for education, but only a single delegate voiced that concern, *see* 1 CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA, *supra* note 34, at 172-73, although others did raise the question how best to finance education and when to begin the system, *see infra* text accompanying notes 272-74.

269. *See, e.g.*, 2 CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA, *supra* note 34, at 692, 696 (Mr. J.A. Chestnut and Mr. J.K. Jillson discussing the challenges of supporting education but emphasizing its necessity in a republican form of government).

electorate would be the downfall of the republic[270] and that, without education, citizens could not carry out their basic duties to the state.[271]

The only real debates were in regard to compulsory attendance,[272] school integration,[273] and funding methods.[274] The education article of the state constitution took progressive stances on each of these issues, and it was still not enough to slow the agenda to constitutionalize education. When the final votes were tallied, compulsory and nondiscriminatory education passed by supermajorities.[275] Likewise, an annual poll tax of one dollar passed, with blacks supporting it at a higher rate than whites, presumably because all proceeds were to go toward education.[276] As the convention neared its close, delegate B. Odell Duncan summed up the issue of education as "probably the most important one we have had to consider in this body."[277]

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270. *See, e.g.*, *id.* at 697 (Mr. J.K. Jillson quoting a "celebrated advocate . . . of compulsory education" as arguing that with more than a million illiterate children soon to have access to the ballot box, "[t]he question is, what are they going to do with us" if their "animal ferocity and traditional prejudices" are not tamed (emphasis omitted) (quoting CHARLES BROOKS, AN APPEAL TO THE LEGISLATURES OF THE UNITED STATES IN RELATION TO PUBLIC SCHOOLS 10 (Cambridge, John Wilson & Son 1867))); *id.* at 688 (Mr. A.J. Ransier stating that compulsory education was necessary to prevent parents from undermining republican progress); *id.* at 694 (Mr. R.B. Elliott suggesting that education would eliminate the "danger of . . . a second secession of South Carolina from the Union"); *id.* at 691 (Mr. A.C. Richmond: "[C]heap education is the best defence of the State.").

271. *See id.* at 695 (Mr. R.B. Elliott: "If a man is so ignorant as to know nothing of political economy of his State or country, he can never be a good citizen."); *id.* at 697 (Mr. J.K. Jillson arguing that black suffrage created "the pressing necessity of their being educated to comprehend their new position, exercise their new rights, and obey their new laws" (quoting BROOKS, *supra* note 270, at 10)).

272. *See id.* at 688-89, 694, 697.

273. *Compare id.* at 692 (Mr. J.A. Chestnut supporting integration), *and id.* at 893-94 (Mr. J.J. Wright supporting integrated but noncompulsory education), *with id.* at 702-03 (Mr. C.P. Leslie opposing compulsory integration), *and id.* at 894 (Mr. R.C. DeLarge questioning integration). For more on the South Carolina debate over education, see Underwood, *supra* note 198, at 14.

274. *See* 1 CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA, *supra* note 34, at 172-73.

275. The votes for compulsory education alone were not counted; instead, it passed as part of the overall education provisions. *See* Underwood, *supra* note 198, at 13-15, 15 tbl.1.3. The convention held a separate vote as to whether to include affirmative language indicating that all schools would be "free and open to all the children and youths of the State, without regard to race or color," *see* S.C. CONST. of 1868, art. X, § 10. This even more controversial measure still passed with approximately 81% voting in favor. *See* Underwood, *supra* note 198, at 15 tbl.1.3.

276. *See* Underwood, *supra* note 198, at 9-10. Approximately 74% of blacks supported the poll tax, whereas only 62% of whites supported it. *See id.* at 10 tbl.1.2. Notably, the poll tax amendment included a proviso that no one would be disqualified from voting for failure to pay the tax. *See id.* at 9.

277. 2 CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA, *supra* note 34, at 889.

South Carolina's constitutional convention, while emphatic, was not unique. Similar rationales and objections were repeated across the South.[278] In some states, education clauses sailed through with very little debate or action other than to simply strengthen the clauses.[279] In other states, education was considered part of democratic governance in general and central to elevating black Americans to full citizenship.[280] The most significant distinction from South Carolina in other states may have been the prevalence and aggressiveness of racist appeals against education.[281] But the end result was the same:

278. *See* WILLIAMS, *supra* note 208, at 91 (indicating that "[t]hese conventions produced 'progressive documents'" that "established free public schools (attendance was compulsory in some states)" but noting that "[t]here was disagreement . . . about integrated schools" (quoting ERIC FONER, FOREVER FREE: THE STORY OF EMANCIPATION AND RECONSTRUCTION 143-44 (2005))). In addition to integration concerns, the cost of a new education system and how to fund it was a concern. *See, e.g.*, OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE CONVENTION, FOR FRAMING A CONSTITUTION FOR THE STATE OF LOUISIANA 277 (New Orleans, J.B. Roudanez & Co. 1867-1868) [hereinafter CONSTITUTIONAL CONVENTION OF LOUISIANA] (Mr. T.S. Crawford protesting that the system of public education would impose too heavy a burden on taxpayers).

279. *See, e.g.*, JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE PEOPLE OF GEORGIA 482-83 (Augusta, E.H. Pughe 1868) (offering an amendment to strengthen the education clause by ensuring that one or more common schools would be established in every district as soon as possible); CONSTITUTIONAL CONVENTION OF LOUISIANA, *supra* note 278, at 60-61, 200-01 (demonstrating that both majority and minority reports agreed on the same core aspects of delivering education to all the youth in the state and reporting that the delegates voted 61 to 12 in support of the measure).

280. *See, e.g.*, DEBATES AND PROCEEDINGS OF THE CONVENTION TO FORM A CONSTITUTION FOR THE STATE OF ARKANSAS 500 (Little Rock, J.G. Price 1868) [hereinafter CONSTITUTIONAL CONVENTION OF ARKANSAS] (Mr. Grey arguing that access to education would give black people the means to "'work their way up' in the world" and "take their place among the races of men, and among the leaders of their people"); *id.* at 683 (Mr. White commenting that he would give "ten thousand votes" for the constitution because he "see[s] in it a principle that is intended to elevate our families—the principle of schools—of education"); CONSTITUTIONAL CONVENTION OF LOUISIANA, *supra* note 278, at 200-01, 289 (reproducing a comment by Mr. Victor Lange following the final vote on the entire constitution that education was necessary because it had been denied to black Americans for two centuries); CONSTITUTIONAL CONVENTION OF NORTH CAROLINA, *supra* note 34, at 486-87 (providing for county government to carry out the "Republican principle of local self-government," by means of a school teaching lessons of "statesmanship" and participatory government, as well as for education); *see also* CONSTITUTIONAL CONVENTION OF MISSOURI, *supra* note 35, at 198 (Mr. Strong, chairman of the Committee on Education, arguing that the state could not fairly enforce laws against men who could not read the constitution under which they were to be governed).

281. *See, e.g.*, CONSTITUTIONAL CONVENTION OF ARKANSAS, *supra* note 280, at 626-27; CONSTITUTIONAL CONVENTION OF LOUISIANA, *supra* note 278, at 292. Ironically, however, even some of the racism was grounded in notions of the necessities of a republican government. *See, e.g.*, CONSTITUTIONAL CONVENTION OF NORTH CAROLINA, *supra* note 34, at 235-36 (minority report of the Committee on Suffrage: "We cannot view, without serious apprehension, the admission to all the highest rights and

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State after state enacted new constitutional education clauses mandating the provision of education.[282] A comparison to their antebellum constitutions reveals just how significant this development was.

Prior to the Civil War, no Southern state constitution affirmatively obligated the state to deliver education (although Tennessee's and Kentucky's strongly encouraged it).[283] But by 1868, nine out of the ten states seeking readmission through the Reconstruction Act of 1867 had enacted a new affirmative education clause in their constitutions.[284] The tenth, Virginia, would not be readmitted until 1870,[285] by which time it had amended its constitution to provide for education.[286] Equally compelling is the fact that all of these affirmative education mandates included specific language obligating

privileges of citizenship of a race, consisting almost entirely of those recently emerged from slavery and unfitted by previous education and habits of thought and self-reliance, for the intelligent discharge of the duties and responsibilities, which would devolve upon them.").

282. *See, e.g.*, ALA. CONST. of 1868, art. XI, § 6 (requiring schools in every township or district); ARK. CONST. of 1868, art. IX, § 1 (requiring "a system of free schools"); FLA. CONST. of 1868, art. VIII, § 1 (requiring "education of all the children residing within [the state's] borders"); GA. CONST. of 1868, art. VI, § 1 (requiring "a thorough system of general education"); LA. CONST. of 1868, tit. VII, art. 135 (requiring "at least one free public school in every parish throughout the State"); MISS. CONST. of 1868, art. VIII, § 1 (requiring "a uniform system of free public schools"); N.C. CONST. of 1868, art. IX, § 2 (requiring "a general and uniform system of public schools"); S.C. CONST. of 1868, art. X, § 3 (requiring a "uniform system of free public schools"); TEX. CONST. of 1869, art. IX, § 1 (requiring "suitable provisions for the support and maintenance of a system of Public Free Schools"); *id.* art. IX, § 4 (requiring "a uniform system of Public Free Schools throughout the State").

283. Both states' constitutions mandated that the state maintain a common education fund, *see* KY. CONST. of 1850, art. XI, § 1; TENN. CONST. of 1834, art. XI, § 10, but Tennessee's oddly only indicated that the state shall "cherish literature and science" and "encourage[]" schools, TENN. CONST. of 1834, art. XI, § 10. One could read this as a constitutional mandate. *See* Calabresi & Perl, *supra* note 30, at 455-56 ("We think that if a state constitution explicitly required that a school fund be maintained, then . . . the state constitution implicitly recognized an individual child's right to a free public school education."). Note, however, that Kentucky was not part of the Confederacy and is not included in subsequent calculations.

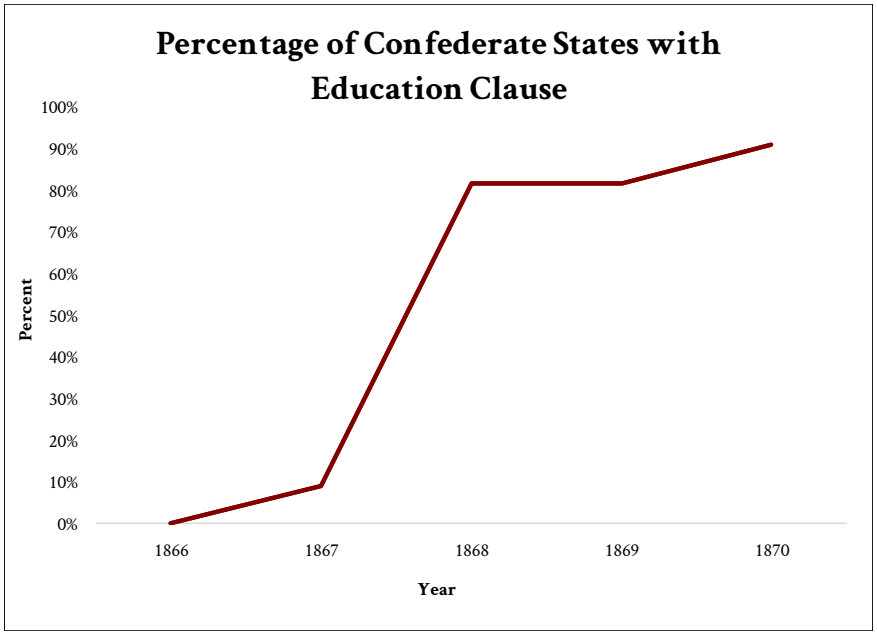
284. *See* sources cited *supra* note 282.

285. Act of Jan. 26, 1870, ch. 10, 16 Stat. 62.

286. *See* VA. CONST. of 1870, art. VIII, § 3.

the state to provide education to "all" children,[287] the exact concept Senator Sumner had sought to impose as a condition of readmission to the Union.[288]

Figure 1



Once the first seven of these states also adopted the Fourteenth Amendment, the Amendment was officially ratified, and those states were readmitted to the Union.[289] At this point, Congress provided another significant piece of

287. ALA. CONST. of 1868, art. XI, § 6 (obligating the state to establish education for "all the children of the State" in a given age range); ARK. CONST. of 1868, art. IX, § 1 (mandating the provision of "instruction of all persons in this State" of suitable age); FLA. CONST. of 1868, art. VIII, § 1 (obligating the state to provide "for the education of all the children residing within its borders, without distinction or preference"); GA. CONST. of 1868, art. VI, § 1 (mandating that public education "be forever free to all children of the State"); LA. CONST. of 1868, tit. VII, art. 135 ("All children of this State [of suitable age] shall be admitted to the public schools . . . without distinction of race, color, or previous condition."); N.C. CONST. of 1868, art. IX, § 2 (mandating an education system "free of charge to all the children of the State"); S.C. CONST. of 1868, art. X, § 4 (providing for compulsory education of "all children"). The Virginia Constitution contained no such provision, *see* VA. CONST. of 1870, art. VIII, but Congress conditioned Virginia's readmission to the Union on guaranteed access to all the state's children, *see* Act of Jan. 26, 1870, 16 Stat. at 63.

288. *See* CONG. GLOBE, 40th Cong., 1st Sess. 165 (1867) (statement of Sen. Sumner).

289. *See* Act of June 22, 1868, ch. 69, 15 Stat. 72, 72 (readmitting Arkansas); Act of June 25, 1868, ch. 70, 15 Stat. 73, 73 (readmitting Alabama, Florida, Georgia, Louisiana, North

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evidence indicating that education was part of the citizenship guaranteed by the Fourteenth Amendment and part of a republican form of government. As discussed earlier, Congress explicitly conditioned the readmission of Mississippi, Texas, and Virginia on the provision of education.[290] The readmission of the final Southern states under this explicit term adds another layer of strength to the notion that education had been incorporated into the meaning of the Fourteenth Amendment itself. When the Fourteenth Amendment was ratified in 1868, its Citizenship Clause embodied this full citizenship concept.[291] Thus, it was not surprising that with full citizenship finally constitutionalized, Congress would return to the remaining Southern states with the explicit demand that they not deprive their citizens of education.[292]

5. A new nationwide consensus of the states emerges

While the Southern experience is most instructive, the idea that education was part of a republican form of government also took hold in the North and only accelerated following the ratification of the Fourteenth Amendment. On the eve of the Civil War, affirmative right-to-education clauses were already becoming a standard aspect of the constitutions of other newly admitted states. Four new states joined the Union in the 1860s: Kansas, West Virginia, Nevada, and Nebraska.[293] All four entered with education clauses in their state constitutions.[294] During this same period, Missouri, which had been a state

Carolina, and South Carolina); *see also* Harrison, *supra* note 22, at 408. Georgia's readmission to the Union was delayed after the state expelled its newly elected black representatives from service. *See supra* note 37. The seventh state, Tennessee, ratified the Fourteenth Amendment in 1866 and technically reentered the Union prior to the Reconstruction Acts. *See* Act of July 24, 1866, ch. 73, 14 Stat. 364, 364; FONER, *supra* note 181, at 261.

290. *See supra* notes 250-53 and accompanying text.

291. *See supra* Part III.A.

292. Moreover, having passed the Fifteenth Amendment in 1869, *see supra* note 193, Congress's later 1870 readmission conditions "ensuring that blacks would be eligible for public offices, and that public education would be available to blacks, can be seen as efforts to ensure that the political system was open to blacks, and that blacks would have sufficient education and understanding to effectively use their voting power." *See* Biber, *supra* note 38, at 147.

293. *See* Act of Jan. 29, 1861, ch. 20, 12 Stat. 126 (admitting Kansas); Act of Dec. 31, 1962, ch. 6, 12 Stat. 633 (admitting West Virginia); Act of Mar. 21, 1864, ch. 36, 13 Stat. 30 (admitting Nevada); Act of Feb. 9, 1867, ch. 36, 14 Stat. 391 (admitting Nebraska).

294. *See* KAN. CONST. of 1861, art. VI, § 2 (requiring that the state legislature "establish[] a uniform system of common schools"); NEB. CONST. of 1866, art. I, § 16 (requiring the legislature "to encourage schools and the means of instruction"); *id.* art. II, Education, § 1 (requiring the legislature to "secure a thorough and efficient system of common schools throughout the State"); NEV. CONST. of 1864, art. XI, § 2 (requiring the state legislature

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since 1821,[295] added an education clause to its existing constitution.[296] Missouri's state constitution was one of the first to mandate education for "all" children[297]—again, the same idea found in Senator Sumner's proposal and the constitutions of all the readmitted states of 1868.[298] Missouri also offered the same rationale as Congress and the Southern states: to "throw[] off the shackles of a system of domestic slavery" and ensure that citizens could participate in a republican form of government.[299] By doing so, "free Missouri [would be] a worthy pattern for all States that would carry the means of a good education to the door of every inhabitant, without distinction of race, of color, or condition."[300]

The Missouri convention was prescient. The new and revised state constitutions of the 1860s drastically reshaped the national consensus regarding education. As Figure 2 below reveals, only one in five states had education clauses at the turn of the nineteenth century. At midcentury, that number was still only one in three. The 1850s saw four existing states and one new state add an education clause, edging the number close to fifty percent.[301]

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to "provide for a uniform system of common schools"); W. VA. CONST. of 1863, art. X, § 2 ("The Legislature shall provide, as soon as practicable, for the establishment of a thorough and efficient system of free schools.").

295. *See* Resolution of Mar. 2, 1821, 3 Stat. 645.

296. *Compare* MO. CONST. of 1820, art. VI, § 1 ("Schools and the means of education shall forever be *encouraged* in this state . . . ." (emphasis added)), *with* MO. CONST. of 1865, art. IX, § 1 ("[T]he General Assembly shall establish and maintain free schools, for the gratuitous instruction of all persons in this State . . . .").

297. MO. CONST. of 1865, art. IX, § 1.

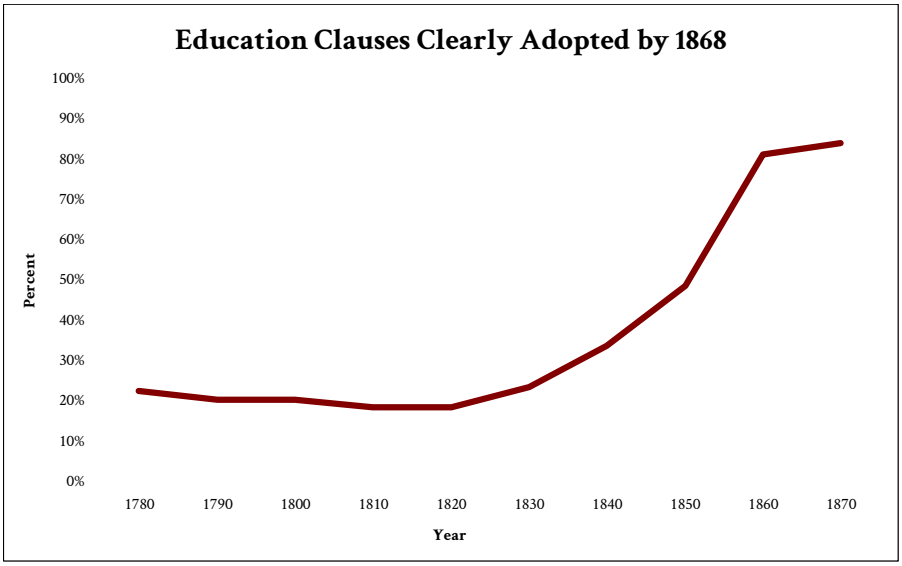
298. *See supra* notes 287-88 and accompanying text. Prior to Missouri's, only New Jersey's and Wisconsin's constitutions had included such language, but by the mid-1870s Illinois, Pennsylvania, Nebraska, and Colorado had followed Missouri's lead. *See* Eastman, *supra* note 179, at 23.

299. *See* CONSTITUTIONAL CONVENTION OF MISSOURI, *supra* note 35, at 196 (Mr. Strong, chairman of the Committee on Education, presenting the Committee's report).

300. *See id.*

301. Those states were Indiana, Michigan, Minnesota, Ohio, and Oregon. *See* IND. CONST. of 1851, art. VIII, § 1; MICH. CONST. of 1850, art. XIII, § 4; MINN. CONST. of 1857, art. VIII, § 1; OHIO CONST. of 1851, art. VI, § 2; OR. CONST. of 1857, art. VIII, § 3.

Figure 2



The Civil War and Reconstruction turned the tide. By 1868—the year the Fourteenth Amendment was ratified[302]—81% of states had clearly adopted an education clause.[303] As Steven Calabresi and Michael Perl have written, "It is thus as clear as day that there was an Article V consensus of three-quarters of the states in 1868 that recognized that children have a fundamental right to a free public school education."[304] Likely well aware of this shift, and having come from the state that declared itself the model for this movement, Senator Drake of Missouri was among those who insisted on conditioning Southern states' readmission to the Union on their adopting education clauses in their constitutions.[305]

The radical changes afoot regarding education during the short period prior to the ratification of the Fourteenth Amendment offer strong evidence that provision of education to all was part of the original understanding and meaning of equal citizenship in a republican form of government. The denial of education to black people in the South had, in fact, been central to the denial

302. *See supra* note 36 and accompanying text.

303. *See* Calabresi & Perl, *supra* note 30, at 460 & n.134 (indicating that 30 of 37 states had "clearly recogniz[ed] the right to a public school education").

304. *See id.* at 460. On this fact alone Calabresi and Perl conclude: "A child's right to a free public school education was clearly a privilege or immunity of state citizenship in 1868 as to which racial discrimination was forbidden by the Fourteenth Amendment." *See id.*

305. *See* CONG. GLOBE, 40th Cong., 1st Sess. 571-72 (1867) (statement of Sen. Drake).

of their citizenship—and for that matter their personhood.[306] Likewise, the virtual nonexistence of public education in the South had been central to the ruling elites' ability to dominate politics and move the region to secession and war.[307] Under these circumstances, education was central to effectuating the grant of citizenship after the war. For those who passed and ratified the Fourteenth Amendment, education was to be part of citizenship because education, along with the right to vote, would be the only assurance that freedmen and disempowered whites became full citizens, exercised their rights as citizens, and fulfilled their obligations as citizens to the state. Without education, Southern state constitutions would not represent the republican form of government Congress was constitutionally obligated to ensure under Article IV.

Pursuant to this obligation, Congress placed de facto and de jure conditions on states' readmission to the Union.[308] The result in the South was a set of constitutions that were uniform in enshrining education.[309] By guaranteeing education through their state constitutions, these states made education a central component of state citizenship. That central component of state citizenship then took on a federal constitutional dimension when the Fourteenth Amendment shortly thereafter guaranteed state citizenship. It was, after all, Congress that passed the Fourteenth Amendment and the readmitted states that provided the numbers to finally ratify the Amendment. Thus, Congress's demands and the states' actions evidence the original meaning of the right to state citizenship in the Fourteenth Amendment.

This original meaning is further evidenced by states' actions following the Amendment's ratification. Subsequent newly admitted states included education clauses in their constitutions as well.[310] And eventually, every state in the Union would recognize education as a state constitutional right as existing states amended their constitutions in due course.[311]

306. *Cf.* WILLIAMS, *supra* note 43, at 7 (indicating that allowing the education of slaves would undermine the dehumanizing rationale for and practice of slavery).

307. *See* CONG. GLOBE, 40th Cong., 1st Sess. 167 (1867) (statement of Sen. Sumner); HOLT, *supra* note 215, at 254; Leviton & Joseph, *supra* note 43, at 1155.

308. *See* Biber, *supra* note 38, at 130 tbl.1 (surveying the various conditions placed on readmitted states).

309. *See supra* Part III.C.4.

310. *See* Calabresi & Perl, *supra* note 30, at 483 (noting that all eleven states to enter the Union from 1868 to 1954 "recognize[d] a child's right to a free and common public school education").

311. *See* Derek W. Black, *Reforming School Discipline*, 111 NW. U. L. REV. 1, 10 (2016) ("[A]ll fifty state constitutions specifically mandate that the state establish and maintain public schools.").

The practical importance of this history is that the recognition of a right to education in the federal Constitution does not, as scholars have so long argued, rest solely on some evolving concept of education, citizenship, or the Constitution.[312] Rather, the Constitution, at the time the Fourteenth Amendment was ratified, afforded special recognition to education. Evolving concepts of education might very well broaden educational rights today, but education was part of the Fourteenth Amendment and the citizenship it guaranteed from the outset.[313]

6. The constitutional, structural, and political virtues of an education compromise

This education compromise makes sense constitutionally, politically, and structurally. Constitutionally, it is a simple concept. In addition to declaring federal citizenship, the Fourteenth Amendment declared all persons born or naturalized in the United States to be "citizens . . . of the State wherein they reside."[314] If education is a right of state citizenship, then the Fourteenth Amendment can still protect education while respecting the primacy of state prerogatives. In other words, education is a citizenship right extended by states, but one that the federal Constitution, and Congress exercising its constitutional authority,[315] expects states to deliver.

This division is analogous to the constitutional treatment of voting. The Constitution does not explicitly or affirmatively extend the right to vote in any particular election to citizens. As the Court in *Rodriguez v. Popular Democratic Party* explained: "No provision of the Federal Constitution expressly mandates the procedures that a state . . . must follow in filling vacancies in its own legislature. . . . [T]he Constitution 'does not confer the right of suffrage upon any one' . . . ."[316] In fact, the Fourteenth Amendment explicitly recognizes

312. *Cf., e.g.*, Biegel, *supra* note 18, at 1083-87 (arguing for a reassessment of fundamental rights); Morgan, *supra* note 107, at 79 (arguing that state law developments could justify the Court applying strict scrutiny to education); Salerno, *supra* note 107, at 538-40 (arguing that new federal statutes demand a reexamination of the fundamental right to education).

313. The idea that education was necessary for citizenship predated the Fourteenth Amendment. *See* AMY GUTMANN, DEMOCRATIC EDUCATION 19-22 (1987) (summarizing theories connecting education and citizenship, which date back to the ancient Greeks). States had simply resisted or failed to guarantee it until after the Civil War. It was this flaw—the failure to protect education—that the process of ratifying the Fourteenth Amendment helped cure.

314. U.S. CONST. amend. XIV, § 1.

315. *See id.* amend. XIV, § 5 ("Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.").

316. 457 U.S. 1, 8-9 (1982) (quoting Minor v. Happersett, 88 U.S. (21 Wall.) 162, 178 (1874), *abrogated in other part by* Reed v. Reed, 404 U.S. 71 (1971)).

the right of states to deny felons and those who participated in the rebellion the right to vote.[317] Rather than create affirmative voting rights, the Constitution regulates the right to vote by prohibiting certain forms of discrimination in those elections that states see fit to hold.[318] Thus, the basic qualifications to vote remain primarily in the hands of the state.[319] Yet states cannot entirely deny citizens the right to elect their public officials and still call themselves republican forms of government.[320] In this respect, the republican form of government is the ultimate, albeit less obvious, guarantee of voting and education, one equally embedded in the Fourteenth Amendment's guarantee of state citizenship.

Politically and practically, an education compromise also avoids the problem of begrudging state acceptance. Given the opportunity, the Reconstruction-era state conventions saw education as essential to the operation of their own republican forms of government at the state and local levels.[321] Even to this day, state supreme courts regularly justify aggressive interpretations of education clauses by citing the Framers' original democratic intent: ensuring that citizens can discharge their duties at the ballot box and on juries.[322] In these respects, education serves state governments' interests as

317. *See* U.S. CONST. amend. XIV, § 2.

318. *See id.* amend. XV, § 1 (prohibiting denial or abridgement of the right to vote "on account of race, color, or previous condition of servitude"); *id.* amend. XIX (prohibiting denial or abridgement of the right to vote "on account of sex"); *id.* amend. XXIV, § 1 (prohibiting poll taxes); *id.* amend. XXVI (reducing the voting age to eighteen); *see also id.* amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws").

319. *See, e.g.*, Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 189-90 (2008) (opinion of Stevens, J.) (confirming the "general rule that 'evenhanded restrictions that protect the integrity and reliability of the electoral process itself' are not invidious" (quoting Anderson v. Celebrezze, 460 U.S. 780, 788 n.9 (1983))); Common Cause/Ga. v. Billups, 554 F.3d 1340, 1345 (11th Cir. 2009) (upholding Georgia's imposition of a photo identification requirement); Democratic Party of Ga., Inc. v. Perdue, 707 S.E.2d 67, 75 (Ga. 2011) (same); *see also* Note, *Voter and Officeholder Qualifications*, 119 HARV. L. REV. 2230, 2234 (2006) ("Madison first noted the difficulty in achieving uniformity in the qualifications for voters, which resulted in the Framers' decision to require only that such qualifications in federal elections be the same as in state elections.").

320. *Cf.* Baker v. Carr, 369 U.S. 186, 222 n.48 (1962) (discussing the obligation of states to provide for a form of government in which citizens elect their representatives).

321. *See supra* Part III.C.4.

322. *See, e.g.*, Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell, 990 A.2d 206, 227 (Conn. 2010) (holding that education must be "suitable" to prepare students to "participate fully in democratic institutions, such as jury service and voting"); McDuffy v. Sec'y of the Exec. Office of Educ., 615 N.E.2d 516, 548 (Mass. 1993) ("[T]he Commonwealth has a duty to provide an education for *all* its children, rich and poor, in every city and town of the Commonwealth at the public school level, and . . . this duty is designed not only to serve the interests of the children, but, more fundamentally, to prepare them to participate as free citizens of a free State to meet the needs and interests of a republican

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much as, if not more than, federal interests. The discretion afforded states through the Fourteenth Amendment's compromise allows states to independently affirm their own commitment to education.

An education compromise also fits naturally with prevailing federalism concepts—past and present—embedded in our constitutional structure and culture. Federalism concerns have played a dominant role in all of the most significant education reforms of the past half century, including desegregation, school funding, and student achievement.[323] The federal role was expanded in each, but never without a fight and never without later retrenchment.[324] Thus, whatever the merits of an expanded federal role, education has always remained primarily a function of state prerogative.[325] The Fourteenth Amendment's constitutional compromise does not upset this balance.

This federalism struggle in education, moreover, is not new, but rather dates back to Reconstruction. Some of the same concerns that dominate today's education debates existed then as well. When Congress sought to play a larger role in education during Reconstruction, serious objections were raised in Congress.[326] The result was that Congress supported education through funding and land grant legislation[327]—which scholars and advocates often cite

government . . . ."); Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 666 (N.Y. 1995) (defining the quality of education as whatever is "necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury"); Brigham v. State, 692 A.2d 384, 397 (Vt. 1997) (per curiam) ("To keep a democracy competitive and thriving, students must be afforded equal access to all that our educational system has to offer. In the funding of what our Constitution places at the core of a successful democracy, the children of Vermont are entitled to a reasonably equal share.").

323. *See, e.g.*, Milliken v. Bradley, 418 U.S. 717, 741 (1974) (expressing concern over disturbing the "deeply rooted [tradition of] local control over the operation of schools"); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 44 (1973) (emphasizing the enormous "potential impact on our federal system" were the Court "to abrogate systems of financing public education presently in existence in virtually every State"); Kimberly Jenkins Robinson, *The High Cost of Education Federalism*, 48 WAKE FOREST L. REV. 287, 323-30 (2013) (analyzing federalism issues in the No Child Left Behind Act); *see also* No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (repealed 2015).

324. *Compare* Derek W. Black, *Federalizing Education by Waiver?*, 68 VAND. L. REV. 607, 652-58 (2015) [hereinafter Black, *Federalizing Education*] (describing the vast extension of federal power through the No Child Left Behind Act waiver process), *with* Black, *supra* note 9, 1340-42 (describing the response to No Child Left Behind waivers, which was to return vast power to the states).

325. *See* Robinson, *supra* note 323, at 287.

326. Liu, for instance, describes the "array of objections" to an 1870 federal bill to nationalize education, which claimed that the bill trampled on state rights in education and overextended federal power. *See* Liu, *supra* note 19, at 376-77.

327. *See* Friedman & Solow, *supra* note 18, at 114-15.

in support of their federal right-to-education theories[328]—but those funds flowed through states and were employed at the states' discretion rather than at the federal government's.[329] In other words, Congress heavily supported a state system of schools but made no attempt to federalize education or develop a national system. Thus, an education compromise would have made sense then as well.

In sum, the Fourteenth Amendment secured a compromise that would avoid claims of federal overreach in education while also ensuring the delivery of education. Understanding this compromise, however, raises another question: Why has this right been overlooked for so long? The short answer is that education fell victim to later, larger fights over federalism that caused an already complex history to be lost.[330] The following Subpart explores this point further.

7. Why the right has been overlooked

A profound reinterpretation of the Fourteenth Amendment raises the question how courts, historians, and scholars have overlooked that interpretation. The first explanation is practical. This reinterpretation rests on the complex interaction of three distinct but interrelated processes: Fourteenth Amendment ratification, Southern states' readmission, and state constitutional conventions. Scholars have looked at some of these processes in isolation,[331]

328. *See, e.g.*, *Gary B.* Complaint, *supra* note 15, ¶ 63; *Martinez* Complaint, *supra* note 15, ¶¶ 121-22.

329. *See, e.g.*, FLETCHER HARPER SWIFT, A HISTORY OF PUBLIC PERMANENT COMMON SCHOOL FUNDS IN THE UNITED STATES, 1795-1905, at 47-50 (1911) (explaining the Northwest Ordinance, which controlled what land would be held to support education but did not itself address education, and noting that the Ordinance was part of furthering the ongoing "struggle and experimentation" in public education).

330. For prominent examples in the fight over federalism and constitutional rights, see Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981-1982, 1988 (2016)); United States v. Lopez, 514 U.S. 549, 551 (1995) (striking down a congressional enactment as beyond the scope of Congress's Commerce Clause power); Katzenbach v. Morgan, 384 U.S. 641, 657-58 (1966) (upholding a congressional statute that forbade states from conditioning the exercise of the right to vote on a literacy test); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261 (1964) (upholding congressional power to prohibit discrimination by places of public accommodation operating in interstate commerce); and The Civil Rights Cases, 109 U.S. 3, 25 (1883) (rejecting congressional power to regulate discrimination), *abrogated in part by* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). Only recently in the context of state school finance litigation has this history begun to resurface. *See, e.g.*, Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 205-06 (Ky. 1989) (recounting the nineteenth century legislative history of the state's education clause); Leandro v. State, 488 S.E.2d 249, 255 (N.C. 1997) (examining the original intent of North Carolina's education clause).

331. *See, e.g.*, Biber, *supra* note 38, 119-24 (analyzing readmission conditions in isolation); Harrison, *supra* note 22, at 375-80 (analyzing ratification in isolation); Liu, *supra*

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but rarely have any looked at the combined whole. And in fact, missing from the literature is a thorough analysis focusing on the state conventions' approach to education,[332] much less how those conventions relate to the broader whole. The history of these education clauses is so underdeveloped that it was lost and not rediscovered until the later decades of the twentieth century by state supreme courts.[333] These education clauses became, in effect, dead letters for over a century.[334]

The second explanation is that scholars and advocates have looked for the wrong answer. Because states have historically been so derelict in their education duties, most scholars and advocates have sought to identify a way to federalize education.[335] Likewise, major shifts in the relationship between state and federal government over time have obscured the original education compromise.[336] By its very text, the Fourteenth Amendment instantly altered the state-federal relationship. The original Constitution as ratified in 1789 was designed to limit the federal government and created almost no rights against states.[337] In contrast, the Fourteenth Amendment declared that "no State shall" deny citizens equal protection, due process, or privileges and immunities.[338] It also granted Congress power to pass legislation to limit and address state

note 19, at 332-41 (analyzing Congress's intent regarding education primarily in light of its actions after, but not prior to or during debates over, ratification of the Fourteenth Amendment).

332. In 1931, well before anyone seriously entertained the idea of a fundamental right to education, John Matzen produced an excellent book tracing the enactments of education clauses, but the book neither focused on Reconstruction nor delved into the conventions' debates and competing rationales. *See* MATZEN, *supra* note 32, at 1-2 (explaining the purpose of his study as the identification of the specific types of education clauses adopted by the states). The closest to substantive examination is an article by John Eastman, but it is relatively short and primarily examines the text of education clauses. *See* Eastman, *supra* note 179, at 20-31 (examining Reconstruction-era education clauses).

333. *See, e.g.*, *Rose*, 790 S.W.2d at 205-06; *Leandro*, 488 S.E.2d at 255; *see also* Derek W. Black, *Education's Elusive Future, Storied Past, and the Fundamental Inequities Between*, 46 GA. L. REV. 557, 572-80 (2012) (describing the historical evolution of educational opportunity).

334. *See* Black, *supra* note 107, at 1361-62 (describing the initiation of education litigation based on state constitutions, which did not begin until the 1970s).

335. *See, e.g.*, Bitensky, *supra* note 18, at 554-63; Liu, *supra* note 19, at 334-35.

336. *See* sources cited *supra* note 330; *see also* Tiffany C. Graham, *Rethinking Section Five: Deference, Direct Regulation, and Restoring Congressional Authority to Enforce the Fourteenth Amendment*, 65 RUTGERS L. REV. 667, 672-96 (2013) (surveying the historical shifts in Congress's Section 5 power (citing U.S. CONST. amend. XIV, § 5)).

337. *Cf., e.g.*, Barron *ex rel.* Tiernan v. Mayor of Balt., 32 U.S. (7 Pet.) 243, 250 (1833) ("[The Bill of Rights] demanded security against the apprehended encroachments of the general government—not against those of the local governments.").

338. U.S. CONST. amend. XIV, § 1.

abuses.[339] In these respects, the Fourteenth Amendment reframed the entire Constitution.[340]

This reframing was so radical that the South, and even the judiciary, spent the decades following Reconstruction fighting against the intended effect of the Fourteenth Amendment and attempting to reset the balance of power between the states and the federal government.[341] This post-Reconstruction agenda was successful well into the second half of the twentieth century.[342] This made the 1960s civil rights movement largely an attempt to secure the rights that had been lost since Reconstruction, particularly in voting and education.[343]

The civil rights reclamation agenda, however, was almost entirely one-dimensional in assuming that the solution was always to be found in federal power and rights.[344] Education advocacy was no different. Litigants and

339. *Id.* amend. XIV, § 5 ("Congress shall have power to enforce, by appropriate legislation, the provisions of this article."); *see also* Seminole Tribe v. Florida, 517 U.S. 44, 59 (1996) (explaining that Section 5 of the Fourteenth Amendment gives the federal government authority to abrogate state sovereign immunity); Graham, *supra* note 336, at 672-73 (summarizing Congress's historical use of its Section 5 powers).

340. *See Seminole Tribe*, 517 U.S. at 59 ("[T]he Fourteenth Amendment, by expanding federal power at the expense of state autonomy, had fundamentally altered the balance of state and federal power struck by the Constitution."); *see also* William J. Rich, *Taking "Privileges or Immunities" Seriously: A Call to Expand the Constitutional Canon*, 87 MINN. L. REV. 153, 200 (2002) ("The Civil War Amendments changed the relationship between state and federal citizenship, putting to rest arguments about the supremacy of state sovereignty.").

341. *See* FONER, *supra* note 181, at 587-601 (describing the period of so-called Southern Redemption following Reconstruction); Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CALIF. L. REV. 1923, 1936-37 (2000) (summarizing Southern Redemption).

342. *See* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 7-8 (2d rev. ed. 1966) (describing efforts to restore the promises of Reconstruction that "in the face of apparent solidarity of Southern resistance to change" were largely unsuccessful until World War II).

343. *See, e.g.*, James Thomas Tucker, *Affirmative Action and [Mis]representation: Part I; Reclaiming the Civil Rights Vision of the Right to Vote*, 43 HOW. L.J. 343, 370 (2000) ("[During the civil rights movement,] [e]ducation became an essential part of efforts to secure the right to vote and the citizenship it conferred upon blacks because many blacks were illiterate and ill-equipped to deal with the literacy tests and complicated methods of registration and casting ballots that were used as means to disenfranchise blacks." (footnote omitted)).

344. *See* Lynda G. Dodd, *Presidential Leadership and Civil Rights Lawyering in the Era Before* Brown, 85 IND. L.J. 1599, 1629 (2010) (recounting Thurgood Marshall's testimony before the President's Committee on Civil Rights that only the federal government could protect the basic civil rights of minorities); Pace Jefferson McConkie, *Civil Rights and Federalism Fights: Is There a "More Perfect Union" for the Heirs to the Promise of* Brown*?*, 1996 BYU L. REV. 389, 403 ("It was clear in the middle of the nineteenth and the

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scholars consistently conceptualized an affirmative federal right to education,[345] overlooking the possibility that education could be a state citizenship right that is federally protected.[346] The closest anyone has come to seizing on this possibility is Goodwin Liu, but he too located the right in federal citizenship, raising a host of complex doctrinal issues.[347]

IV. Protecting Citizens' Education in a Republican Form of Government

Identifying citizenship as the source of the Constitution's protection of education is only the first step. The second step involves specifying the nature and scope of the education right and identifying what limits it would actually place on state governments. At the most general level of abstraction, a constitutional right to education is relatively uncontroversial, but deep concerns arise over whether a federal constitutional right to education can be reasonably defined and fairly policed by courts. The inability to answer these questions can easily serve as the death knell of the right, as it did in *Rodriguez*.[348]

Unlike other theories that would call on courts to make value-based judgments regarding the right to education or to reevaluate existing general constitutional principles, a citizenship-based concept of education fits well within our Constitution's existing structure, providing a framework for answering these questions. Our Constitution's overall structure protects individual rights by policing the processes by which our democracy articulates values, not by subjectively defining those values itself.[349] Subpart A below examines how a citizenship-based right to education fits within this structure,

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twentieth centuries that if there were to be any civil rights protection for African Americans, it would have to come from the federal government.").

345. *See, e.g.*, Bitensky, *supra* note 18, at 552-53; Peter S. Smith, Note, *Addressing the Plight of Inner-City Schools: The Federal Right to Education After* Kadrmas v. Dickinson Public Schools, 18 WHITTIER L. REV. 825, 826 (1997) ("Recognizing an affirmative right to education could have profound effects throughout the nation . . . ."); Dianne Piché et al., *Remedying Disparate Impact in Education*, HUM. RTS., Fall 2011, at 15, 15 (conceptualizing education as a human right and using the international human rights framework to argue for federal protection).

346. This is not to overlook or disparage state-based education litigation, which has been voluminous, but to recognize that this litigation has often been a fallback position and in any event is its own distinct movement.

347. *See supra* notes 115-26 and accompanying text.

348. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42 (1973) ("In addition to matters of fiscal policy, this case also involves the most persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels.").

349. *See* ELY, *supra* note 11, at 87.

more as a procedural right than a substantive right. The Fourteenth Amendment obligates states to provide education but does not specify the content of that education. Yet obligating the provision of education brings new dangers: While education can serve an empowering function, manipulating access to education can be used to subvert the overall democratic process in new ways. The possibility of such manipulation requires that the Fourteenth Amendment place some limits on states.

Southern states were particularly attuned to this danger following the war. Subpart B reveals that those Reconstruction-era constitutions did more than just obligate states to deliver education. Many of those constitutional conventions foresaw the possibility that the democratic process might abuse education and enacted specific constitutional provisions to shield education from this possibility. Thus, the creators of the state constitutions established statewide and inviolable mechanisms to fund education,[350] state-level officers with some level of independence from the legislature who would be tasked with running that system,[351] and requirements that the education system be uniform across the state.[352] In short, they attempted to place the right to education beyond normal politics.

These state constitutional provisions reinforce the intent and logic of affording procedural protection to education. They also offer guideposts for the types of limits the Fourteenth Amendment might place on states. Drawing on those provisions, original intent, and the federal Constitution's overall structure, Subpart C articulates three core limits that the Fourteenth Amendment places on states in their delivery of education. First, states must provide stable funding streams for public education.[353] Second, states cannot specifically target any group for educational disadvantage.[354] Third, even absent intent to specifically target a group, states cannot systematically disadvantage groups in their access to education.[355]

Subpart D then explores the practical legal implications of a citizenship-based right to education. Most obviously, the right would give rise to a private cause of action to remedy violations of the Fourteenth Amendment—the mere existence of which would discourage certain state practices. A right to education would also trigger Congress's Section 5 power to enforce that right through appropriate legislation. Congress could do more than just enforce the core right; it could likely pass prophylactic legislation.

350. *See infra* Part IV.B.1.

351. *See infra* Part IV.B.2.

352. *See infra* Part IV.B.3.

353. *See infra* Part IV.C.1.

354. *See infra* Part IV.C.2.

355. *See infra* Part IV.C.3.

Finally, Subpart E points out that a citizenship-based right to education avoids the objections raised by courts and policymakers regarding a federal role in education.

A. Education as a Process-Based Constitutional Right

Rights to education can take both substantive and procedural forms. A substantive form entails, for instance, the right to an adequate, efficient, or thorough education. These substantive rights can require courts to determine, for instance, exactly what constitutes an adequate education.[356] Substantive approaches to educational rights are common in state school finance litigation,[357] but educational rights can just as easily be procedural. Courts can afford procedural protection without taking any particular stance on substantive issues relating to education. For instance, regardless of the type or quality of education a state chooses to provide, a procedural right to equal access would mandate that the state make its education equally available to all.[358]

Substantive rights to education, more than procedural rights, implicate separation of powers and judicial competency concerns.[359] These concerns range from the basis upon which a court defines an adequate education to the means by which a court determines that the substantive right has been violated

356. *See, e.g.*, Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 205-13 (Ky. 1989); Leandro v. State, 488 S.E.2d 249, 255 (N.C. 1997); DeRolph v. State (*DeRolph I*), 677 N.E.2d 733, 740-47 (Ohio), *modified per curiam*, 678 N.E.2d 886 (Ohio 1997), *and modified*, 699 N.E.2d 518 (Ohio 1998); Abbeville Cty. Sch. Dist. v. State, 515 S.E.2d 535, 540 (S.C. 1999).

357. Substantive approaches are common in the scholarly literature as well. *See, e.g.*, Joshua E. Weishart, *Transcending Equality Versus Adequacy*, 66 STAN. L. REV. 477, 481-82 (2014).

358. For an example of an equity approach, see Horton v. Meskill, 376 A.2d 359, 374 (Conn. 1977) ("[T]he trial court correctly held that, in Connecticut, elementary and secondary education is a fundamental right, that pupils in the public schools are entitled to the equal enjoyment of that right, and that the state system of financing public elementary and secondary education as it presently exists and operates cannot pass the test of 'strict judicial scrutiny' as to its constitutionality.").

359. *See, e.g.*, Campaign for Fiscal Equity, Inc. v. State, 861 N.E.2d 50, 58 (N.Y. 2006) ("[I]n fashioning specific remedies for constitutional violations, we must avoid intrusion on the primary domain of another branch of government."); *Leandro*, 488 S.E.2d at 261 ("[T]he administration of the public schools of the state is best left to the legislative and executive branches of government. Therefore, the courts of the state must grant every reasonable deference to the legislative and executive branches when considering whether they have established and are administering a system that provides the children of the various school districts of the state a sound basic education."); *see also* Scott R. Bauries, *Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 ALA. L. REV. 701, 704 (2010) ("Litigation over educational adequacy ostensibly places the judiciary in the position of rendering value judgments as to legislative appropriation levels in the absolute, and this requirement raises significant separation of powers concerns.").

and the authority by which a court imposes a particular remedy.[360] Even in successful litigation, these concerns never go away.[361] Litigants raise them as issues in both the earliest and latest stages of school finance litigation under state constitutions.[362] Recognizing a substantive right to education under the federal Constitution only further heightens these concerns because the Constitution does not contain the word "education," much less qualitative concepts that might guide a federal court in its substantive analysis of education.

The line between process and substance can be thin in education, as procedural protections can often force the state, as a practical matter, to make substantive improvements.[363] Practical effects aside, the Fourteenth Amendment's education compromise did not call on courts to make substantive judgments regarding education. Instead, the compromise secured a right more appropriately understood as procedural in nature. The Fourteenth Amendment's education compromise included two major advances: One was to mandate education as a primary function of state government, and the other was to limit abuses in the delivery of that education. The basic education mandate itself was no small feat, bringing education to people and places that had previously been without.[364] But the mandate left the substance of

360. *See generally* Bauries, *supra* note 359, at 721-35 (surveying the literature analyzing how separation of powers concerns come to bear on educational adequacy and equity cases).

361. *See, e.g.*, Hoke Cty. Bd. of Educ. v. State, 599 S.E.2d 365, 372-73, 394-95 (N.C. 2004) (affirming the trial court's finding that the state "had failed in its constitutional duty to provide certain students with the opportunity to attain a sound basic education" but reversing in part the court's remedy because it "amount[ed] to a judicial interdiction that . . . infringe[d] on the constitutional duties and expectations of the legislative and executive branches of government").

362. *Compare* DeRolph v. State (*DeRolph II*), 728 N.E.2d 993, 1002-03 (Ohio 2000) (emphasizing that separation of powers concerns had persisted throughout the case's history and that too much deference to the legislature would lead to "no enforceable remedy," but concluding that legislating a specific remedy was ultimately beyond the court's role), *with DeRolph I*, 677 N.E.2d 733, 737 (Ohio) ("[W]e dismiss as unfounded any suggestion that the problems presented by this case should be left for the General Assembly to resolve."), *modified per curiam*, 678 N.E.2d 886 (Ohio 1997), *and modified*, 699 N.E.2d 518 (Ohio 1998).

363. Federal special education laws, for instance, are primarily aimed at requiring schools to go through extensive processes in determining appropriate education programs for students with disabilities. *See* Mark C. Weber, *In Defense of IDEA Due Process*, 29 OHIO ST. J. ON DISP. RESOL. 495, 496-501 (2014) (reviewing the processes provided to students with disabilities under federal law); *see also* Individuals with Disabilities Education Act (IDEA), Pub. L. No. 101-476, 104 Stat. 1103 (1990) (codified as amended in scattered sections of 20 and 42 U.S.C.). While the law primarily dictates process, the net result is to provide students the services necessary to ensure a "free appropriate public education." *See* Endrew F. *ex rel.* Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 993-94 (2017).

364. *See supra* Part III.B.1.

education largely to states. Not even Senator Sumner, let alone Congress more generally, articulated a specific substantive level of education that states must provide. The most Congress demanded—and the terms to which states acceded—was that states enshrine education as a central aspect of their republican forms of government.[365] If states could achieve a system of public education and make it open to all, Congress appeared content that the substance of education could take care of itself.

In the absence of a public education system, however, very little could be trusted to states and their democratic processes, including substantive and procedural aspects of education. Thus, Congress mandated the provision of education because fair access to education would further fair democratic processes, thereby producing substantively appropriate education. In other words, Congress first and foremost sought to resolve the basic question whether a state must provide education. As to this basic step, Congress was wildly successful.

As a practical matter, both in word and deed education became the central function of state government. All fifty states now include education clauses in their constitutions, and all have passed compulsory education laws.[366] A number of states, either through explicit constitutional language or judicial construction thereof, provide that education is the "primary," "paramount," most important obligation of the state, or simply the solitary obligation the state must discharge.[367] As such, education consumes the largest share of state

365. *See, e.g.*, Act of Jan. 26, 1870, ch. 10, 16 Stat. 62, 63 (conditioning Virginia's readmission to the Union upon the state's promise that it would never amend its constitution so as to "deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the [state] constitution"); Reconstruction Act of 1867, ch. 153, § 5, 14 Stat. 428, 428-29 (conditioning Southern states' readmission into the Union on their adopting constitutions establishing a republican form of government).

366. *See, e.g.*, VICTORIA J. DODD, PRACTICAL EDUCATION LAW FOR THE TWENTY-FIRST CENTURY 9 (2d ed. 2010) (indicating that all states have compulsory education laws); Black, *supra* note 311, at 10 (noting that all states' constitutions require the state to "establish and maintain public schools").

367. *See, e.g.*, FLA. CONST. art. IX, § 1 (describing the provision of education as "a paramount duty of the state"); GA. CONST. art. VIII, § 1 ("The provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia."); NEV. CONST. art. XI, § 6(2)-(3) (requiring education to be funded before any other programs are funded); R.I. CONST. art. XII, § 1 ("The diffusion of knowledge, as well as of virtue among the people, being essential to the preservation of their rights and liberties, it shall be the duty of the general assembly to promote public schools . . . ."); WASH. CONST. art. IX, § 1 ("It is the paramount duty of the state to make ample provision for the education of all children residing within its borders . . . ."); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 91 (Wash. 1978) ("[By imposing] a *paramount duty* to make ample provision for the education of all children residing within the State's borders, the constitution has created a 'duty' that is supreme, preeminent or dominant." (footnote omitted)); *see also* Michael A. Rebell, *Safeguarding the Right to a Sound Basic Education in Times of Fiscal Constraint*, 75 ALB. L. REV. 1855, 1870-85 (2011/2012) (reviewing state law

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and local revenues,[368] and public school is a singular public door through which roughly 90% of the nation's children pass.[369] Drawing on these realities, the Supreme Court has likewise consistently reiterated the centrality of education to state and local government.[370]

The constitutional imperative to limit abuses in the delivery of education is less obvious, but equally compelling. As the central function of state government, education is the context in which states exercise their most extensive power. Through education, the state socializes citizens and prepares them for the roles they will later perform.[371] This extensive power also offers the opportunity for extensive abuse. While education can strengthen our democracy, it can also be a powerful mechanism to subvert the democratic process.[372] It can underprepare, disempower, disadvantage, handicap, exclude,

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precedent requiring various states to provide education regardless of other financial exigencies).

368. *See State and Local Expenditures*, URB. INST., https://perma.cc/GMA5-5FTE (archived Jan. 30, 2018) ("State and local governments spend most of their resources on education, health, and social service programs. In 2015, about one-third of state and local spending went toward elementary and secondary education (22 percent) and higher education (10 percent)."). In California, for instance, elementary and secondary education was 39% of the state budget as of 2011. *See* Cal. Budget Project, Where Do California's Tax Dollars Go? 1 (2011), https://perma.cc/3B6M-WCR5. At the local level, education can consume an even larger percentage of the budget. *See, e.g.*, *Elementary and Secondary Education Expenditures*, URB. INST., https://perma.cc/FY5E-H644 (archived Jan. 30, 2018) ("Local governments spend more of their budgets on elementary and secondary education than states. In 2015, 40 percent of local direct general spending went to elementary and secondary education . . . .").

369. *See* BAKER ET AL., *supra* note 60, at 30 tbl.5 (finding as of 2010 that 87.1% of school-aged students attend public school and that on average those students who attend private school come from more affluent families).

370. *See, e.g.*, Milliken v. Bradley, 418 U.S. 717, 741 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools . . . ."); *see also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 44 (1973) (deferring to local judgment in education).

371. *See* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("Today [education] is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."); *see also* Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?*, 78 CORNELL L. REV. 1, 7-11 (1992) [hereinafter Brown, *Segregation*] (discussing the socializing function schools play as well as the constitutional contours of states exercising their power over education in potentially harmful ways).

372. *See* GUTMANN, *supra* note 313, at 13-14 (discussing the incentives to use education for democratically repressive purposes and opining that "[a] democratic society . . . must be constrained not to legislate policies that render democracy repressive or discriminatory" (emphasis omitted)). According to Gutmann, "Education not only sets the stage for democratic politics, it plays a central role in it." *Id.* at 3.

and indoctrinate in ways no other governmental function can.[373] When it does, education becomes the power through which those in control of government perpetuate a system that is not democratic at all.

Amy Gutmann has explained, for instance, that at any given moment a majority of legislators or voters might support what she calls "repressive" education.[374] If repressive education becomes law, those who support it can use it to stay in power long after their actual majority has faded because those who would otherwise oppose them lack the knowledge or political power to do so.[375] In other words, once in place, repressive education becomes practically impossible to remedy, even when it is contrary to the interests of the majority of citizens. In these circumstances, constitutional protection for education serves as the only meaningful check on the abuses of an antidemocratic majority, and judicial intervention the only means for a true republican form of government to once again operate.[376] In this respect, the provision of public education gives rise to a constitutional conundrum: Public education is essential to the functioning of our constitutional democracy but, if manipulated, can be a tool of antidemocratic repression.

To ensure a republican form of government and equal citizenship, the Fourteenth Amendment demands public education from states. Yet merely mandating that states provide education is insufficient to protect the interest with which Congress and the state conventions were concerned around the

373. *See, e.g.*, *id.* at 9 (explaining the power schools can exercise to reinforce social inequality); Brown, *Segregation*, *supra* note 371, at 10-11 ("From the perspective of the socializing function of public schools, the Court, in approaching public education issues, should be concerned about public schools inculcating the 'proper' values.").

374. *See* GUTMANN, *supra* note 313, at 14.

375. *See* NEWMAN, *supra* note 11, at 17 (noting that undereducated communities are in a "'double bind' when it comes to challenging prevailing public measures of what counts as an adequate floor" for education (quoting James Bohman, *Deliberative Democracy and Effective Social Freedom: Capabilities, Resources, and Opportunities*, *in* DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS 321, 336 (James Bohman & William Rehg eds., 1997))).

376. White majorities fought strenuously to maintain their advantage in the face of mandated school desegregation. They went so far as to close public schools altogether and maintain their privilege through alternative means. *See, e.g.*, Griffin v. Cty. Sch. Bd., 377 U.S. 218, 232 (1964) (noting that Louisiana and Virginia, through different means, set out "to accomplish the same thing: the perpetuation of racial segregation by closing public schools and operating only segregated schools supported directly or indirectly by state or county funds"); *see also* JAMES E. RYAN, FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA 39-51 (2010) (recounting resistance and alternatives to desegregation in Virginia, including a local county's decision to "close its schools rather than comply with a desegregation order"). While the Court struck down those measures, as discussed below, its rationale for mandating the reopening of the public schools was tenuous and would have been far stronger had it been premised on a right to education. *See infra* notes 449-66 and accompanying text.

time the Amendment was ratified. Public education itself offers states the power to both promote and undermine democracy. A state might very well manipulate educational opportunity in ways that advantage one group or another.[377] At some point, that manipulation could undermine citizenship and a republican form of government. Consequently, policing the process of education is as important as providing education itself, and the federal Constitution must regulate the education it compels if the provision of education is to have positive effect.

To be clear, the point at which manipulation undermines citizenship and democracy implicates qualitative inquiries. The need to make those inquiries, however, is tempered by effective policing of manipulations. If the process of delivering education is fair, the substance of education can more safely be left to the democratic process.

John Hart Ely's work offers force to this logic and constitutional design. Ely identified the constitutional tension—what he called "the central function, and . . . at the same time, the central problem, of judicial review"—in an unelected judiciary protecting individual rights allegedly deprived by elected representatives.[378] Ely found the solution to this tension in our overall constitutional structure.

Ely explained that the Constitution's structure is designed to police the processes of our democracy, not to define its substantive values.[379] The Constitution can count on the democratic majority itself to protect the appropriate substantive values, so long as the majority adheres to certain constitutional processes.[380] Those processes bind the interests of the majority

377. *See* GUTMANN, *supra* note 313 at 13-14; NEWMAN, *supra* note 11, at 17. As the Supreme Court of Pennsylvania recently described the problem:

> It is fair neither to the people of the Commonwealth nor to the General Assembly itself to expect that body to police its own fulfillment of its constitutional mandate [in education]. This is especially so in light of the many competing and not infrequently incompatible demands our legislators face to satisfy non-constitutional needs, appease dissatisfied constituents, and balance a limited budget in a way that will placate a majority of members in both chambers despite innumerable differences regarding policy and priority.

William Penn Sch. Dist. v. Pa. Dep't of Educ., 170 A.3d 414, 464 (Pa. 2017).

378. *See* ELY, *supra* note 11, at 4-5.

379. *See id.* at 87-88.

380. *See id.* at 100-01 (writing that rather than directly define substantive rights such as liberty, "[t]he Constitution has instead proceeded from the quite sensible assumption that an effective majority will not inordinately threaten its own rights, and has sought to assure that such a majority not systematically treat others less well than it treats itself" by ensuring that the political process "will not be manipulated so as to reintroduce in practice the sort of discrimination that is impermissible in theory").

to those of the minority.[381] The judiciary's role in enforcing the Constitution is to prevent the majority from severing those links or systematically suppressing the interests of the minority.[382] As the Supreme Court in *United States v. Carolene Products Co.* explained in its now-famous footnote four, "[P]olitical processes . . . can ordinarily be expected to bring about repeal of undesirable legislation," but legislation that "restricts those political processes" or deprives minorities of normal protections "may call for a correspondingly more searching judicial inquiry."[383]

Ely focuses on logjams or malfunctions in the political process.[384] According to Ely:

> Malfunction occurs when the *process* is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority . . . and thereby denying that minority the protection afforded other groups by a representative system.[385]

Ely argues that judicial intervention is particularly appropriate when the malfunctions "involve rights (1) that are essential to the democratic process and (2) whose dimensions cannot safely be left to our elected representatives."[386] Both Congress and the state conventions recognized education as a right of citizenship that is central to our democracy. And as such, access to it cannot simply be left to the complete whims of political majorities. Doing so poses risks of the logjams and malfunctions of which Ely warns. As Subpart B below demonstrates, those threats in education were real in the aftermath of the Civil War and motivated state constitutional conventions to enact specific provisions to avoid those problems.

B. State Constitutional Efforts to Shield Education from Manipulation

The education provisions and constitutional structures the state conventions passed immediately following the Civil War provide an excellent starting point for answering the question how to regulate the process of

381. *See id.* at 83-87 ("[B]y constitutionally tying the fate of outsiders to the fate of those possessing political power, the framers insured that their interests would be well looked after.").

382. *See id.* at 83-87, 103.

383. 304 U.S. 144, 152-53 n.4 (1938).

384. *See* ELY, *supra* note 11, at 117.

385. *Id.* at 103. The omitted portion of the quotation provides that the "ins" may be disadvantaging the "outs" due to "simple hostility or a prejudiced refusal to recognize commonalities of interest." *Id.* Whether this motivation is generally necessary to justify judicial intervention is beyond the scope of this Article.

386. *See id.* at 117 (discussing these factors in the context of voting rights cases).

education delivery without wading into a substantive assessment of the quality or adequacy of education. The state constitutions enacted immediately before and after the ratification of the Fourteenth Amendment devoted specific attention to the structures through which education would be delivered.[387] Those early constitutions isolated education funding and policymaking from politics,[388] focusing less on the substance of education and more on the political manipulations and challenges that would plague educational opportunity if left to chance.[389] Manipulations in education, second perhaps only to voting, posed a fundamental threat to the republican forms of government Congress and the delegates to the state constitutional conventions were seeking to ensure.[390]

In the immediate aftermath of the Civil War, these threats were at their height. As Senator Morton cautioned when discussing the conditions of Southern readmission, when "you have a full half of the whole voting population [in the South] unable to read and write[,] . . . we cannot expect the men who own the property voluntarily to tax themselves to provide education for the others."[391] Morton warned that until constitutional provisions forced states to deliver education to the uneducated masses, "the political power will remain almost entirely in the hands of the present rebel-educated classes."[392] Against this cultural backdrop, states needed not only to adopt education, but also to adopt processes and structures that would ward off political

387. *See, e.g.*, S.C. CONST. of 1868, art. X, § 1 (establishing an elected position of state superintendent of education); *id.* art. X, § 2 (establishing a state board of education chaired by the state superintendent); *id.* art. X, § 5 (prescribing a tax system to fund education); *id.* art. X, § 11 (requiring funds from public lands to be appropriated for educational purposes).

388. *See, e.g.*, ALA. CONST. of 1868, art. XI, § 10 (indicating that proceeds from all new and old state lands "shall be inviolably appropriated to educational purposes, and to no other purpose whatever"); *id.* art. XI, § 11 (requiring that "one-fifth of the aggregate annual revenues of the State . . . be devoted exclusively to the maintenance of public schools"); S.C. CONST. of 1868, art. X, § 5 (mandating a real estate tax and poll tax to support schools); *id.* art. X, § 11 (providing that revenues from government-held land would be placed in a common education fund).

389. *See* Lane v. Stanly, 65 N.C. 153, 157-58 (1871) (detailing the structural protections provided by North Carolina's education clause).

390. *See, e.g.*, CONG. GLOBE, 40th Cong., 1st Sess. 168 (1867) (statement of Sen. Morton) (reasoning that education was "essential" to wresting power from the slaveholding elite and rebuilding the South); 2 CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA, *supra* note 34, at 694-95 (Mr. R.B. Elliott arguing that educational deprivation was the cause of social strife in the past and could again be in the future); *see also, e.g.*, HOLT, *supra* note 215, at 254 (describing the Virginia elite's perception of the state's Reconstruction-era constitution as threatening and dangerous); Leviton & Joseph, *supra* note 43, at 1155 (discussing the Maryland elite's opposition to public education "as a threat to the social order").

391. CONG. GLOBE, 40th Cong., 1st Sess. 168 (1867) (statement of Sen. Morton).

392. *Id.*

manipulations and ensure that education decisions were arrived at through fair processes. If those evils could be avoided and the process of delivering education routinized, educational opportunities that met the needs of a republican form of government could reasonably be expected to follow.

In the South, where the need was greatest, state constitutional conventions achieved these ends through three mechanisms: statewide school financing, specialized education decisionmaking at the state rather than the local level, and requirements that education systems be uniform across the state. A century and a half later, these constitutional provisions might seem like obvious or necessary aspects of educational bureaucracy. Considered in the context of ensuring a republican form of government, they represented something much more profound. As the remainder of this Subpart demonstrates, they represented an attempt to remove major aspects of education from the normal political process—to place education on its own plane as a basic right of citizenship that could not be subjected to the whims of a majority.

1. Common school funds

The most obvious check against statewide, regional, or local manipulations of education was to create a constant source of funding. States achieved this by constitutionalizing what they called a common school fund.[393] As Figure 3 below shows, common school funds were present in only a minority of Southern states before the Civil War, but the remaining Southern states ratified constitutions with such provisions as they were readmitted to the Union.[394] Other states followed suit.[395] By 1870, common school funds were included in 80% of all states' constitutions.[396]

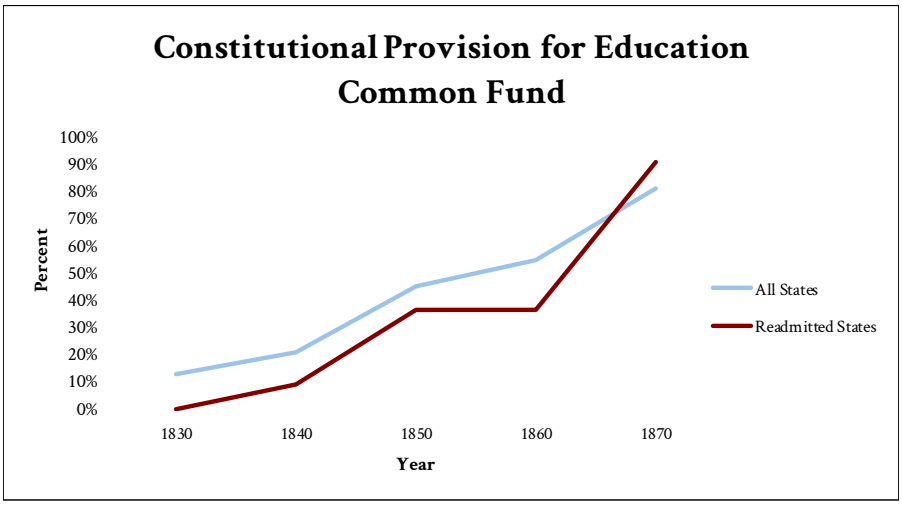
393. *See, e.g.*, ALA. CONST. of 1868, art. XI, § 10 (providing that proceeds from new and old state lands would be funneled into a "perpetual fund, which may be increased but not diminished, and the interest and income of which" along with other funding sources would "be inviolably appropriated to educational purposes"); *id.* art. XI, § 11 (requiring that one-fifth of general annual state revenues "be devoted exclusively to the maintenance of public schools"); *see also* MATZEN, *supra* note 32, at 129-39 (tracking distributive common school funds in state constitutions).

394. *See* MATZEN, *supra* note 32, at 130 tbl.XX. Of the eleven states in the Confederacy, only Florida, Louisiana, Tennessee, and Texas had common fund constitutional provisions prior to 1861. *See id.* Alabama, Arkansas, Georgia, Mississippi, North Carolina, South Carolina, and Virginia incorporated such provisions into their constitutions between 1867 and 1870. *See id.*

395. *See id.*

396. *See id.* (showing that thirty states' constitutions had common fund provisions as of 1870). There were thirty-seven states in the Union as of 1870. *See 1870 Fast Facts*, U.S. CENSUS BUREAU, https://perma.cc/K2PP-4NH6 (archived Jan. 30, 2018).

Figure 3



Common school funds were initially financed by the earnings generated each year by state-held land.[397] To be clear, the practice of funding education through land earnings was not itself new, nor was it the states' own idea.[398] But it was significant that states constitutionalized these common school funds during Reconstruction. In doing so, states established a permanent source of funds for schools and, in some instances, a nonnegotiable method of distributing them.[399] States' serious commitment to depoliticizing school financing was also evidenced by the fact that in addition to federal resources, many states used their own resources to support those common school funds.[400] Again, this meant that education funding would not depend solely on year-to-year politics.

397. *See, e.g.*, ALA. CONST. of 1868, art. XI, § 10; FLA. CONST. of 1868, art. VIII, § 4.

398. *See* Turney v. Marion Cty. Bd. of Educ., 481 So. 2d 770, 783-84 (Miss. 1985) (recounting the Land Ordinance of 1785, as passed by the Continental Congress under the Articles of Confederation, along with later grants that helped set aside land in trust for education).

399. *See, e.g.*, FLA. CONST. of 1868, art. VIII, § 7 (requiring the distribution of funds among counties based on the number of children residing in each county).

400. *See, e.g., id.* art. IX, § 4 (including criminal fines, military exemption fees, and proceeds from the per capita tax in the common fund); GA. CONST. of 1868, art. VI, § 3 (funding education through proceeds from poll taxes and other taxes).

2. Isolating education from localized decisionmaking

The second Reconstruction-era innovation was the centralization of education decisionmaking and authority. The principal means of doing so was creating a state superintendent and state board of education. Prior to the Civil War, Louisiana had the only Southern state constitution that mentioned a state superintendent.[401] Nationally, only roughly one-quarter of state constitutions had such a provision.[402] Yet 80% of the readmitted Southern states' constitutions established a state superintendent of education.[403] State boards of education were similarly popular. No antebellum Southern constitution had established a state board of education, but by the end of Reconstruction, seven of the eleven former Confederate states' constitutions did.[404]

Today, every school district has a superintendent, as does every state department of education.[405] This uniform practice could give the false impression that statewide education officers are somehow inherent to providing education. But education could be run completely at the local level or based upon state statutes interpreted locally. And even though there may be policy benefits to statewide officers, a state could choose not to constitutionalize them. These officers could just as easily have been created and structured by statute.

The Reconstruction-era practice of constitutionalizing state superintendents and boards of education was a deliberate and substantive act. First, like mandating school funding and specifying that funding's permanent sources, creating statewide supervisory bodies is another means of separating education policy from regular politics. Education decisions can be made on a statewide, rather than local, basis, and without first moving through the normal

401. *See* MATZEN, *supra* note 32, at 36 tbl.VII. Kentucky's constitution also established a state superintendent. *See id.*

402. *See id.* (listing nine states whose constitutions featured chief state school officials as of 1860). There were thirty-three states in the Union as of 1860. *See 1860 Fast Facts*, U.S. CENSUS BUREAU, https://perma.cc/Q724-SYLR (archived Jan. 30, 2018).

403. *See* MATZEN, *supra* note 32, at 36 tbl.VII. With the exception of Tennessee (which had reentered the Union prior to Reconstruction, *see supra* note 289), all Southern state constitutions included a provision for a state superintendent of education during the 1860s, but Texas later discontinued its provision in 1876. *See id.* This meant that after 1876, Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia all had such a provision—roughly 80% of the eleven states in the Confederacy.

404. *See id.* at 4 tbl.I (showing that Alabama, Florida, Mississippi, North Carolina, South Carolina, Texas, and Virginia had included state boards of education in their constitutional schemes by 1870). Alabama discontinued its provision in 1875, but Louisiana added such a provision in 1898. *See id.*

405. *See generally* DODD, *supra* note 366, at 24-52 (describing state boards and commissioners of education, local school boards and districts, school superintendents, and how decisions such as hiring, setting the curriculum, or merging school districts get made).

legislative process. Second and equally important, those powers vested in superintendents or boards by the state constitution could not be taken away, altered, or constrained by ordinary legislation.[406] Together, these two advances guaranteed that certain education decisions would always be made at the state level and would not be entirely subject to the whims of legislatures. In state court litigation, this guarantee has served to strike down legislation that would have undermined public education and invaded these state officers' provinces.[407]

3. Uniform systems of education

State constitutions also increasingly chose a specific phrase to describe the type of education system they were creating: "uniform." A few states included the term "uniform" to describe their systems of education prior to Reconstruction, but of those states, most did so just a few years before the Civil War.[408] Regardless, Southern states adopted this terminology for the first time during Reconstruction, and the term became prevalent.[409]

While states clearly thought it important to include this language in their constitutions, the specific meaning of "uniform" is not obvious. Several state

406. *See, e.g.*, Coyne v. Walker, 879 N.W.2d 520, 524-26, 533, 544-46 (Wis. 2016) (striking down a Wisconsin statute that "[a]llow[ed] the Governor (and in some instances the Secretary of Administration) to permanently halt the [state administrative] rulemaking process," citing a provision of the state constitution requiring that "'the supervision of public instruction . . . be vested in a state superintendent' and in 'other officers of supervision of public instruction'" "as the legislature shall direct" (quoting WIS. CONST. art. X, § 1)).

407. *See, e.g.*, *id.* at 546 (striking down the legislature's attempt to strip the office of state superintendent of some of its supervisory and rulemaking powers); Burns, *supra* note 93 (recounting a state trial court's decision temporarily blocking the legislature's attempt to strip central constitutional powers from the state board of education and transfer them to the state superintendent).

408. *See, e.g.*, IND. CONST. of 1851, art. VIII, § 1 (providing for "a general and uniform system of Common Schools"); KAN. CONST. of 1861, art. VI, § 2 (providing for "a uniform system of common schools"); MINN. CONST. of 1857, art. VIII, § 1 (providing for "a general and uniform system of public schools"); OR. CONST. of 1857, art. VIII, § 3 (providing for "a uniform and general system of common schools"); *see also* Eastman, *supra* note 179, at 13 (discussing language in antebellum constitutions, some of which "contained such ambiguous phrasing" as to "giv[e] enough discretion to the legislature to render them perhaps only hortatory").

409. *See* FLA. CONST. of 1868, art. VIII, § 2; MISS. CONST. of 1868, art. VIII, § 1; N.C. CONST. of 1868, art. IX, § 2; S.C. CONST. of 1868, art. X, § 3; TEX. CONST. of 1869, art. IX, § 4; VA. CONST. of 1870, art. VIII, § 1. During this same period, the term "uniform" also came into use in other states as they rewrote their constitutions or sought admission to the Union. *See, e.g.*, NEV. CONST. of 1864, art. XI, § 2; *see also* Draft Illinois Constitution of 1862, art. X, § 3, *in* 3 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 274, 283 (William F. Swindler ed., 1974). *But see* ILL. CONST. of 1870, art. VIII, § 1 (providing for "a thorough and efficient system of free schools" but omitting the term "uniform").

courts have struggled with what having a uniform system of education actually requires of the state.[410] A uniformity requirement may prohibit a state from running a distinct form of education in every district, but uniformity does not require exactly the same education everywhere.[411] Fortunately, a precise definition does not matter for this Article's thesis. The goal here is to discern the general intent behind the adoption of uniformity requirements, not the specific practical obligations they have imposed on states. The general intent is more readily discernible.

The intent behind a uniformity requirement was to ensure that education was systematically available on a statewide basis. Prior to Reconstruction, education in the South was random at best.[412] Education was available in several locations, but who delivered it, who could get access to it, and what it would consist of did not follow any legitimate rhyme or reason.[413] A ten-year-old child in one county might have received three months of schooling a year while his older brother received none and his ten-year-old cousin in an adjacent county received only one month.[414] And in almost all instances, education would have been optional.[415] Even when dictated by statute, education resources were often malapportioned. For instance, South Carolina's antebellum statutes apportioned school funding according to a formula that gave "equal weight to population and taxable property."[416] This meant that schools were not always built in the places where most children actually lived.[417] In short, Southern states did not have a "system" of education, much less a uniform one.

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410. *See, e.g.*, Skeen v. State, 505 N.W.2d 299, 308-12 (Minn. 1993).

411. *See id.* at 308-12 ("Construing 'uniform' as meaning 'identical' (or 'nearly identical') would be inconsistent with a plain reading of the Education Clause . . . .").

412. *See supra* note 211 and accompanying text.

413. *See, e.g.*, CREMIN, *supra* note 210, at 425-32 (surveying the provision of education across time in Sumter District, South Carolina); ORR, *supra* note 211, at 156-78 (detailing the difficulty in passing legislation and raising funds to support common schools in Georgia prior to the Civil War).

414. *Cf., e.g.*, ORR, *supra* note 211, at 175 (noting "marked differences among the counties in the management of school affairs" in antebellum Georgia); WILLIAM PRESTON VAUGHN, SCHOOLS FOR ALL: THE BLACKS & PUBLIC EDUCATION IN THE SOUTH, 1865-1877, at 51-52 (1974) (describing that in 1853, North Carolina enrolled less than half of eligible children—a group that did not include black children—and that by the end of the war the "rudimentary Southern school systems disintegrated").

415. *See* MICHAEL S. KATZ, A HISTORY OF COMPULSORY EDUCATION LAWS 17-18 (1976) (indicating that only two Northern states, Massachusetts and Vermont, and the District of Columbia had compulsory education laws in the 1860s and cataloging the growth of those laws in subsequent years).

416. Underwood, *supra* note 198, at 13.

417. *See id.*

Southern state governments could tolerate these disparities in educational opportunity prior to readmission because full citizenship for the masses and a republican form of government had not yet become their goals. But random education was incompatible with the new constitutional concept of equal citizenship.[418] The sudden shift in Southern state constitutions to a mandate for a "uniform" system that systematically delivered education to all was a reflection of the Fourteenth Amendment's citizenship demands. As some state constitutions explicitly stated, because "the stability of a republican form of government depends mainly upon the intelligence and virtue of the people, it shall be the duty of the legislature to . . . establish[] a uniform system of free public schools."[419]

In sum, basic education structures that we take for granted today were Reconstruction-era constitutional innovations designed to isolate education from certain political manipulations. Common school funds were not just a practical means of funding education; they were a specific means to permanently fund education and minimize political and year-to-year fiscal pressures.[420] State superintendents and state school boards did not come into being as practical necessities; they were constitutional officers who could make statewide decisions for the good of all and from outside normal politics.[421]

418. *See* CONG. GLOBE, 42d Cong., 2d Sess. app. at 16-17 (1872) (statement of J.H. Rainey) (arguing that the remedy for the unequal enrollment of students between the North and the South and the surest way to ensure an equal chance in life for former slaves was to create widespread access to free schools); *cf.* KARST, BELONGING TO AMERICA, *supra* note 156, at 39-40, 142-43 (reasoning that equal access to education is necessary for equal citizenship).

419. MISS. CONST. of 1868, art. VIII, § 1; IDAHO CONST. of 1890, art. IX, § 1; *accord* MINN. CONST. of 1857, art. VIII, § 1; S.D. CONST. art. VIII, § 1; *see also* Eastman, *supra* note 179, at 8 (reasoning that education was provided in numerous state constitutions not "to declare a fundamental right to education," but rather for "the protection of republican government").

420. In his comprehensive review of the creation of common funds, Fletcher Harper Swift reveals that common funds were often initially held by individual townships—which could dispose of them as they saw fit—but were later turned over to the state for the benefit of the entire state's school system. *See* SWIFT, *supra* note 329, at 96, 107-09. Swift also details how poorly the common funds had been managed by both townships and the states. Several states lost enormous sums of money that otherwise would have gone to public schools. *See id.* at 129-59. Constitutionalizing these common funds presumably would have assisted in cutting down on corruption and mismanagement, but unfortunately problems continued throughout the second half of the nineteenth century. *See id.*

421. To be clear, however, the typical superintendent and state board of education were not free of all politics and were still subject to the legislature's control. While qualified electors would select the state superintendent in South Carolina, for instance, the legislature could control the superintendent's "powers, duties, term of office and compensation." *See* S.C. CONST. of 1868, art. X, § 1; *see also* ORR, *supra* note 211, at 186-97 (detailing how similar provisions for state legislative control over the state school commissioner developed during Georgia's convention).

State constitutions reinforced the notion that education was a basic right in a republican government by increasingly mandating that the system be uniform. Regardless whether these Reconstruction-era innovations were successful in preventing manipulations then or now, they represent an intent to do so.

C. Identifying Procedural Principles and Protections

A federal procedural approach would not mandate any of the specific foregoing state innovations. The point of the procedural approach is for the federal Constitution to prevent certain anomalies in state education policy without mandating any specific substantive policy. The broader evils those state innovations sought to prevent, however, logically intersect with the concept of a citizenship-based right to education. This Subpart argues that the citizenship-based right to education dictates at least three categorical limitations on states' provision of educational opportunity. First, states must ensure stable funding streams for their education systems. Second, states cannot actively manipulate educational opportunity—for partisan or other illegitimate reasons—in ways that target groups for disadvantage. Third, while variation and inequality do not pose per se problems, systemic gaps in educational opportunity that are so large as to threaten or undermine democratic processes are prohibited.

1. Unstable funding

Of the three principles, stable education funding is historically and logically the most obvious. The point of requiring a state to provide for education in its constitution is to ensure that citizens' access to education will not be by happenstance or a function of local discretion, economic fluctuation, or partisan divides.[422] The way to guard against these problems and make the constitutional right to education real is to guarantee the availability of education funding.[423]

422. *See, e.g.*, Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 206 (Ky. 1989) (recounting the debates over Kentucky's education clause and distilling the principles that "[e]ducation must be provided to the children of the rich and poor alike," "[t]here must be a constant and continuing effort to make our schools more efficient," "[w]e must not finance our schools in a *de minimis* fashion," and "[a]ll schools and children stand upon one level in their entitlement to equal state support").

423. *See* 1 CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA, *supra* note 34, at 172-73 (Mr. N.G. Parker emphasizing the financial challenge of creating a system of education and the fact that a constitutional amendment would require that the state meet those challenges); *cf.* ORR, *supra* note 211, at 169-78 (detailing the struggle to pass and fund a common school system prior to Reconstruction, when Georgia was under no constitutional obligation to do so).

In some states, the question whether the state could afford a public education system took center stage in the debate over whether to constitutionalize education.[424] While conceding the virtue of public education, some delegates to the state conventions argued against constitutionalizing education because they believed that the financial burden of public education was more than the state could bear in the short term.[425] Both Congress and the states took specific steps to address this concern in the short and long term. Congress, before and after the Civil War, transferred land to states to be held inviolably in trust to support public education.[426] Those federal resources helped states solidify the creation of their common funds to support statewide education.[427]

Stabilizing a source for statewide funding also guards against the possibility of fluctuations and variations that would otherwise undermine uniformity and equal citizenship principles. Unstable statewide funding systems lead to nonuniform and inequitable systems.[428] Without consistent state funding during times of economic downturn, poorer communities struggle to generate the resources necessary to operate schools, whereas wealthier communities can offset state cuts with local revenues.[429] The net result of these disparate capacities is increased nonuniformity and failure of basic education operations in poor communities.[430] To be clear, mere variation between school districts does not automatically trigger constitutional concern. Unstable statewide funding, however, is a distinct threat because it necessarily poses the risk of

424. *See, e.g.*, 1 CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA, *supra* note 34, at 172-73; *see also* ORR, *supra* note 211, at 193 (identifying the cost of creating racially separate schools and the "alleged injustice of an educational tax" as being difficulties in the establishment of Georgia's education system).

425. *See, e.g.*, 1 CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA, *supra* note 34, at 172-73.

426. *See generally* SWIFT, *supra* note 329, at 39-80.

427. *See id.* at 61-64, 68-69.

428. *See* BRUCE BAKER ET AL., EDUC. LAW CTR., IS SCHOOL FUNDING FAIR?: A NATIONAL REPORT CARD 1 (2d ed. 2012), https://perma.cc/2XD7-T63W ("[H]aving a predictable, stable and equitable system of education finance is of critical importance to the success of any improvement effort. Sufficient school funding, fairly distributed . . . , is an *essential precondition* for the delivery of a high-quality education through the states.").

429. *See* Bruce D. Baker, *Evaluating the Recession's Impact on State School Finance Systems*, EDUC. POL'Y ANALYSIS ARCHIVES 14, 24 (2014), https://perma.cc/6EH7-KZMR. *But see id.* at 10 (noting that this effect varies across states).

430. *See* BRUCE BAKER ET AL., EDUC. LAW CTR., IS SCHOOL FUNDING FAIR?: AMERICA'S MOST FISCALLY DISADVANTAGED SCHOOL DISTRICTS 4 (2d ed. 2017), https://perma.cc/5UUU-KQZ5 ("Many districts—especially urban, inner suburban and rural, serving very high-need student populations—continue to struggle from a lack of sufficient funding, which makes it impossible to provide all students with the opportunity for a high quality education. This does not happen by accident. . . . [S]ome states allocate the majority of their aid with little or no sensitivity to either local district need or fiscal capacity."); Rebell, *supra* note 367, at 1857-58, 1860-61.

education failures and expansive nonuniformity.[431] Thus, when a state adopts or maintains an unstable funding system, it actively puts a basic right of citizenship in jeopardy.

One might argue that the concept of stable funding is procedure masquerading as substance. Stable funding is, of course, a matter of degree—degrees that derive importance in relation to their qualitative effects on education. Yet unstable funding mechanisms implicate constitutional concerns regardless whether they cause educational opportunity to fall below some qualitative threshold. While stable funding likely ensures better substantive outcomes, the guarantee remains a procedural one that protects education from contingency—whatever that contingency might be—and the substantive harms that would become all the more likely in the absence of the protection.[432] Thus, the inquiry is not how much instability is too much, but whether a state has adopted funding mechanisms that on their face create instability.[433] The state

431. *Cf., e.g.*, Baker, *supra* note 429, at 24-25 (finding an increase in funding unfairness during the Great Recession and an unequal ability of districts to offset cuts in state aid); Rebell, *supra* note 367, at 1857-58, 1860-61, 1866-69.

432. Voting, the other basic right of citizenship, *see supra* Part II.B, is not subject to contingency. Elections are to be held and citizens provided the right to vote regardless of local circumstance. State statutes, for instance, recognize that unexpected events do not offer justifications for cutting short voters' right to vote and thus create mechanisms for keeping polling places open until every person in line when the polls officially close gets the chance to vote. *See* Robert C. O'Brien, *Election Day Challenges to Polling Hours and the Judiciary's Cautious Response*, 27 BUFF. PUB. INT. L.J. 1, 3-12 (2008-2009).

The Supreme Court, however, has never held that citizens are guaranteed polling places, voting machines, or waiting lines that are entirely equal. *Cf., e.g.*, Bush v. Gore, 531 U.S. 98, 109 (2000) (per curiam) ("[T]he problem of equal protection in election processes generally presents many complexities. The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. Instead, we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards."). The absence of such guarantees will necessarily result in individuals having different voting experiences. But what the Court *has* prohibited are poll taxes that affirmatively create class-based distinctions between citizens when it comes to exercising the right to vote. *See* Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966). State legislation that lowered the income tax rate for high earners at the same time it mandated that all students must begin covering the cost of their own textbooks and technology needs in school would present the same concern. Seemingly, by both design and effect, it would create differential and unstable access to education.

433. An example of such a funding mechanism might be recent legislation passed in Nevada that "allow[ed] public funds to be transferred from the [state distributive common fund] into private education savings accounts maintained for the benefit of school-aged children to pay for private schooling, tutoring, and other non-public educational services and expenses." *See* Schwartz v. Lopez, 382 P.3d 886, 891-93 (Nev. 2016); *see also* Act of June 2, 2015, ch. 332, 2015 Nev. Stat. 1824 (codified as amended in scattered sections of the Nevada Revised Statutes). That program would have authorized the

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cannot be said to guarantee public education for all citizens if it fails to guarantee stable resources.

2. Political manipulation and targeted disadvantage

The primary evil a citizenship-based right to education would block is manipulation of educational opportunity for partisan, political, or other reasons. As a right of citizenship, education cannot be subject to manipulations by the political process in the same way as other public benefits. A simple comparison of roads and voting rights confirms this logic. Road quality—even the existence of roads at all—can vary from county to county for any number of reasons, including political patronage, political revenge, or just competing senses of where the state should build roads.[434] Analogous motivations and variations in voting would, in contrast, raise serious constitutional concerns.

The Court's one person, one vote doctrine has, for instance, rejected unequal apportionment of legislative seats in state and federal elections.[435] The reasons for the malapportionment are irrelevant.[436] What matters, and what

transfer of nearly the entire public school budget to private school expenditures. *See Schwartz*, 382 P.3d at 891-92 (noting that the Nevada law authorized the transfer of 100% of state funds into a savings account for disabled and low-income students and 90% for all other students). The Supreme Court of Nevada struck down the law as violating the state constitution's requirement that public education be sufficiently funded prior to making other appropriations. *See id.* at 891, 902 (citing NEV. CONST. art. XI, § 2; and *id.* art. XI, § 6). Similar programs might be permissible in other states that lack this technical priority for public education funding. A federal requirement for stable education funding, however, might create a limit insofar as the voucher program renders education funding contingent on unpredictable variations in the number of students enrolling in private school.

Another example might be the wild year-to-year fluctuations in per-pupil spending that occur in states that place significant burdens on local districts with no assurance that the state will cover district-level shortfalls. *See, e.g.*, BAKER ET AL., *supra* note 77, at 8 & fig.3 (charting that average per-pupil funding dropped by $2352 in Florida from 2008 to 2012 and by $2780 in North Carolina from 2010 to 2012).

434. Courts need not rely strictly on these motivations in upholding the law; under rational basis review, courts may also surmise or invent a legitimate interest for the state. *See, e.g.*, Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487 (1955) (speculating as to what the legislature "may have concluded" was a good reason for passing the challenged law).

435. *See* Evenwel v. Abbott, 136 S. Ct. 1120, 1123-24 (2016); *see also* Baker v. Carr, 369 U.S. 186, 191-92, 232-37 (1962) (holding that the plaintiffs' complaint that their state had denied them the equal protection of the laws by failing to account for "substantial growth and redistribution" of the state's population in its apportionment plan presented a justiciable controversy).

436. *Cf. Evenwel*, 136 S. Ct. at 1124 (explaining that the presumptive constitutionality or unconstitutionality of a legislative apportionment under one person, one vote depends on a quantitative calculation of the "maximum population deviation between the largest and smallest district"); Mahan v. City of Virginia Beach, 410 U.S. 315, 328 (1973)

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the Court will not tolerate, are voting systems in which one citizen's vote counts less than another's.[437] The Court has likewise rejected voter qualifications and requirements that treat citizens differently or impose unequal burdens on citizens.[438] The Court draws a line between legitimate voter qualification requirements and rules based on artificial distinctions between groups and classes of citizens.[439]

The Court heavily scrutinizes group- and class-based distinctions between citizens because of the danger they pose to the functioning of democracy itself.[440] Second possibly only to voting, education poses the same risks and requires the same treatment. The Framers of the Fourteenth Amendment recognized the need to place education as a right of citizenship on the same plane as voting.[441] Congress and the state constitutional conventions consistently reiterated the deep connection between education and voting, pointing out that differential access to education affects political power.[442] Thus, manipulation of education would undermine democracy itself. As pro-education advocates emphasized, disparities in education prior to the Civil

(requiring that the apportionment plan "may reasonably be said to advance [a] rational state policy" and then asking only whether any population disparities "exceed constitutional limits").

437. *Cf. Evenwel*, 136 S. Ct. at 1124 ("States must draw congressional districts with populations as close to perfect equality as possible."); Brown v. Thomson, 462 U.S. 835, 842-43 (1983) (holding that a plan with a population deviation greater than 10% "creates a prima facie case of discrimination and therefore must be justified by the State").

438. *See, e.g.*, Kramer v. Union Free Sch. Dist., 395 U.S. 621, 622, 633 (1969) (applying "[a] more exacting standard" than rational basis review to invalidate a state law that had limited the right to vote to those who owned local taxable property or were parents or custodians of children enrolled in local public schools); Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966) (striking down a poll tax).

439. *Compare* Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 185, 188-89, 203-04 (2008) (opinion of Stevens, J.) (upholding a voter identification requirement as an appropriate means of safeguarding elections), *and* Lassiter v. Northampton Cty. Bd. of Elections, 360 U.S. 45, 45, 53-54 (1959) (upholding a literacy test as reasonably designed "to raise the standards for people of all races who cast the ballot"), *with Harper*, 383 U.S. at 670 (striking down a poll tax because "wealth or fee paying has, in our view, no relation to voting qualifications").

440. *See, e.g.*, *Harper*, 383 U.S. at 670 ("[T]he right to vote is too precious, too fundamental to be so burdened or conditioned."); *see also* ELY, *supra* note 11, at 87, 117.

441. *See supra* Part III.B.

442. *See, e.g.*, CONG. GLOBE, 40th Cong., 1st Sess. 168 (1867) (statement of Sen. Morton) ("Republican government may go on for awhile with half the voters unable to read or write, but it cannot long continue."); 2 CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA, *supra* note 34, at 695 (Mr. R.B. Elliott discussing education as a precursor to exercising the duties of citizenship, including voting).

War allowed Southern elites to maintain power and pursue political agendas at odds with the interests of the majority.[443]

The point of constitutionalizing education as a right of citizenship is to cure manipulations of this sort. The state education clauses' efforts to isolate education, in nearly every structural aspect, from the normal political process[444] only further confirm this point. Ely's theory of rights likewise demonstrates the necessity of constitutional limits under circumstances of this sort.[445] Absent limits on educational policies that undermine or disregard the education of certain classes and communities, political factions could undermine the normal functioning of democracy or subvert the rights of groups that cannot protect themselves.[446]

These precedential, historical, and logical principles dictate a simple prohibition against education policies that target classes or groups for disadvantage in the education system. The point, again, is that a procedural or negative right that does not rest on an assessment of the qualitative effects of the disadvantaging legislation. The simple act of targeting a particular class itself represents an anomaly the Fourteenth Amendment should limit.[447] Consider, for instance, legislation targeting supplemental support programs for low-income students for elimination. This type of legislation should be presumptively invalid, regardless of the actual substantive effect on low-income students. Group-based disfavor is facially inconsistent with the concept

443. *See, e.g.*, CONG. GLOBE, 40th Cong., 1st Sess. 167 (1867) (statement of Sen. Sumner) ("It is not too much to say that had these States been more enlightened they would never have rebelled. The Barbarism of Slavery would have shrunk into insignificance, without sufficient force to break forth in blood."); 2 CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA, *supra* note 34, at 694-95 (Mr. R.B. Elliott arguing that compulsory education would eliminate the "danger of . . . a second secession" and that "ignorance . . . was the sustainer of the late gigantic slaveholder's rebellion"); *see also* Leviton & Joseph, *supra* note 43, at 1155.

444. *See supra* Part IV.B.

445. *See* ELY, *supra* note 11, at 75-76.

446. *See* NEWMAN, *supra* note 11, at 10-11, 14-20 (explaining why the affirmative right to education is necessary to ensure a deliberative democracy and why that right must be shielded from majoritarian manipulations); *see also* ELY, *supra* note 11, at 82-86 (reasoning that our constitutional protections are designed to ensure "virtual representation" so that no single group can seize power and manipulate the process).

447. The primary value of a prohibition on class- or group-based disadvantage, however, may be more theoretical than practical in the modern context. As a practical matter, targeted class-based disadvantage is more infrequent today. Class disadvantage surely still occurs, but more indirectly. Nonetheless, the principle serves an important anchoring value. The notion that targeted group-based legislation is impermissible has spillover value in substantiating a final point: Legislation that systematically disadvantages groups, by design or effect, is also constitutionally suspect. *See infra* Part IV.C.3.

of a citizenship-based right.[448] While the state may, under certain circumstances, justify the disfavor as serving some important or compelling goal, the act itself is sufficiently anomalous that it is presumptively invalid.

While principally a race discrimination case, the Supreme Court's decision in *Griffin v. County School Board*[449] likewise demonstrates the constitutional vacuum that exists absent a right to education and restrictions on the manner in which the state delivers that right. *Griffin* involved a Virginia county that simply closed its schools in the wake of *Brown v. Board of Education*[450] rather than integrating them.[451] Later, the county subsidized private education, but minority families did not avail themselves of the subsidies.[452] Under accepted equal protection doctrine of the time, the Court faced a difficult case. The Supreme Court of Appeals of Virginia had held that "the Constitution and laws of Virginia have given to its localities an option to operate or not to operate public schools."[453] Even in *Brown*, the Court had acknowledged that equal protection applied only insofar as the state voluntarily chose to provide education.[454] With no affirmative theory of a federal education right, the U.S. Supreme Court reasoned in *Griffin* that it lacked the authority to prevent school closings as a general matter.[455]

Instead, the Court enjoined the school closing because "Virginia law, as here applied, unquestionably treats the school children of Prince Edward

448. *See* Karst, *Equal Citizenship*, *supra* note 156, at 6 ("[T]he principle [of equal citizenship] presumptively forbids the organized society to treat an individual either as a member of an inferior or dependent caste or as a nonparticipant."). The Supreme Court already recognizes that even under rational basis review, certain forms of group-based disadvantage are prohibited. *See, e.g.*, U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) ("For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." (quoting U.S. CONST. amend. XIV, § 1)). In other words, malevolent group-based disadvantage is prohibited as a general principle. Targeted disadvantage in education, however, would go further. It would not matter whether the targeted group was unpopular or whether the government had some additional legitimate or benign reason for its policy. Because education is constitutionally required, any targeted disadvantage of a group would trigger judicial skepticism.

449. 377 U.S. 218, 232 (1964).

450. 347 U.S. 483 (1954).

451. *See Griffin*, 377 U.S. at 221-22.

452. *See id.* at 221-23.

453. *See* Cty. Sch. Bd. v. Griffin, 133 S.E.2d 565, 580 (Va. 1963).

454. *See* 347 U.S. at 493 (holding that the "opportunity [of education], *where the state has undertaken to provide it*, is a right which must be made available to all on equal terms" (emphasis added)).

455. *See Griffin*, 377 U.S. at 229-30 (accepting as "a definitive and authoritative holding of Virginia law, binding on" the Supreme Court, that "each county had 'an option to operate or not to operate public schools'" (quoting *Griffin*, 133 S.E.2d at 580)).

differently from the way it treats the school children of all other Virginia counties. Prince Edward children must go to a private school or none at all; all other Virginia children can go to public schools."[456] The Court then added that the effect of this policy weighed more heavily on black students and was motivated by discrimination.[457]

While the case's outcome is compelling, its logic is tenuous. If as *Griffin* assumes there is no right to education,[458] denying it to everyone is permissible, even if the motive for denying it to everyone is racial. The Court relied on this exact logic in *Palmer v. Thompson* a few years later.[459] In *Palmer*, the Court upheld a city's decision to close its public swimming pools rather than integrate them.[460] The Court in *Griffin* offered a distinction from the facts that would later arise in *Palmer* by arguing that the school closure bore more heavily on minorities.[461]

This logic has two flaws. First, the disparate burden Prince Edward students suffered in comparison to students in other counties—a principal point of the Court—is largely irrelevant unless one accepts the premise of a state duty to deliver education. All students in Prince Edward were treated differently from students in other counties. Thus, the unequal treatment was based on geography, not race. Geography, however, does not give rise to any particular constitutional concern.[462] Second, even if subsidizing private education produces a racially motivated disparate burden within the county, the appropriate remedy would presumably be to enjoin the private subsidy, not the school closure. Yet the Court held that the district court could order the public schools to reopen.[463]

The case would have been simple had it been analyzed through the lens of a citizenship-based right to education. The Fourteenth Amendment obligates the state to provide education, and the closure breached this duty. On this

456. *Id.* at 230; *id.* at 234 (remanding to the district court with instructions to enter injunctive relief).

457. *See id.* at 230-31.

458. *See id.* at 229-30.

459. *See* 403 U.S. 217, 227 (1971) (recognizing that Congress lacked the authority to compel local jurisdictions to operate swimming pools and therefore upholding a jurisdiction's decision to close all its pools after being ordered to desegregate them).

460. *See id.* at 219, 227.

461. *See Griffin*, 377 U.S. at 230-31.

462. *See* Fort Smith Light & Traction Co. v. Bd. of Improvement of Paving Dist. No. 16, 274 U.S. 387, 391 (1927) ("The Fourteenth Amendment does not prohibit legislation merely because it is special, or limited in its application to a particular geographical or political subdivision of the state."); Ocampo v. United States, 234 U.S. 91, 98 (1914) ("[I]t was long ago decided that [equal protection] does not require territorial uniformity.").

463. *See Griffin*, 377 U.S. at 233-34.

ground alone, the Court could have ordered the reopening of the schools. The Court also could have ordered the reopening because the closure targeted a particular group for disadvantage. The very act of manipulating educational opportunity—to disadvantage a county or to disadvantage minorities—is enough to justify striking down the closure. It does not matter whether everyone in the county was equally disadvantaged. Moreover, one need not assess the effects of the policy—substantive or otherwise—to reach this conclusion.

To the extent equal protection is insufficient to resolve *Griffin*, the case's outcome requires a citizenship-based education right to be theoretically defensible. Taking the facts one step further in *Griffin* makes this point clear. A state might, for instance, decide to allow poor counties to close their schools. This would save those counties and the state a lot of money. Citizenship-based education would bar this policy as a breach of the state's general duty and a targeted disadvantage imposed on particular groups, whereas *Griffin* would treat it as a legitimate state policy so long as it were not racially motivated.

The absurdity of this possibility offers some explanation as to why the Court consistently refers to the possibility of a right to a minimally adequate education in other cases.[464] This hypothetical right would presumably prevent school closures and the parade of horribles the Court is also careful to avoid sanctioning.[465] Yet the Court's references to a minimally adequate education are unsubstantiated and, like *Griffin*, are best explained by a theory of citizenship-based education. For that matter, the explicit terms of Virginia's readmission to the Union—the final embodiment of the Fourteenth Amendment's citizenship-based intent to recognize education as a right of state citizenship—prohibited Virginia from closing schools based on race or wealth.[466]

3. Systemic disadvantage

A citizenship-based right to education also warrants a bar against policies that have the effect of systematically disadvantaging groups across time. This bar is a logical and practical corollary of the prohibition on targeting groups

464. *See, e.g.*, Papasan v. Allain, 478 U.S. 265, 285 (1986) ("[T]his Court has not yet definitively settled the question[] whether a minimally adequate education is a fundamental right . . . .").

465. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 230 (1982) (striking down the targeted disadvantage of undocumented students because sanctioning it would create a permanent underclass).

466. *See* Act of Jan. 26, 1870, ch. 10, 16 Stat. 62, 63 (conditioning readmission on the promise that "the constitution of Virginia shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the constitution of said State").

for disadvantage. The bar against targeted disadvantage blocks facially objectionable policies, while the bar against systemic disadvantage prohibits policies that in practical effect undermine democracy or citizenship rights. The point of a facial bar is to prevent this democratic harm before it occurs. A facial bar alone, however, is insufficient to prevent this harm.[467]

An astute political actor could undermine education through subtle and facially neutral mechanisms. Even absent illegitimate motivations, a state might over time disadvantage certain groups or communities through education to such an extent that they are effectively disenfranchised and lack the ability to protect themselves through the democratic process.[468] Absent the ability to participate effectively in the democratic process, political logjams may occur that only judicial intervention can unclog.[469] But limiting systemic disadvantage serves equal citizenship ends beyond preventing covert political manipulation or democratic logjams.

Systemic disadvantage is problematic principally because it amounts to a system of state-sponsored unequal citizenship. State government should not create classes of citizens,[470] particularly through its primary governmental function of education.[471] At some point, education gaps become so large as to create two classes of citizens.[472] When the gaps are the result of systemic

467. This type of problem is well documented in literature with regard to racial discrimination. The bar on explicit and intentional discrimination has done relatively little to remedy the effects of past intentional discrimination or prevent new, less obvious forms of racial discrimination. *See, e.g.*, Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052-57 (1978) (arguing that intentional discrimination standards under the "perpetrator perspective"—which "sees racial discrimination not as conditions, but as actions . . . inflicted on the victim by the perpetrator"—leaves victims without effective remedies); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 387 (1987) (arguing that modern doctrine should account for subconscious racial bias).

468. *See* GUTMANN, *supra* note 313, at 44-46; NEWMAN, *supra* note 11, at 15-20.

469. *See* ELY, *supra* note 11, at 83-87, 103; *see also supra* text accompanying notes 384-86.

470. *Cf.* Karst, *Equal Citizenship*, *supra* note 156, at 12-17 (arguing that if the Fourteenth Amendment was intended to do anything, it was to eliminate castes and classes among citizens). As Justice Harlan wrote in his famous dissent in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954):

> [I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.

Id. at 559 (Harlan, J., dissenting).

471. *See supra* notes 366-70 and accompanying text.

472. In contrast to housing and other social benefits, "education is directly tied to deliberative influence, and it is not possible to neutralize educational inadequacies to

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educational disadvantage, the blame lies with the state—regardless of the state's motivations[473]—because the state is obligated to provide for those citizens' education. That the democratic process might have the capacity to correct the disadvantage is irrelevant. The fact remains that the state has maintained the disadvantage, and the longer it continues, the closer it marches toward an actual democratic logjam. If the raison d'être for mandating public education is to secure full and equal citizenship, systemically unequal education subverts that promise, rendering the public education system itself self-contradictory, if not pointless.[474]

The point at which systemic disadvantage becomes constitutionally intolerable, however, may not be obvious and could require evaluations at the margins that some might critique as substantive.[475] But as with the concept of unstable funding, line drawing is not the equivalent of substantive judgment. The line would be drawn not based on some specific or substantive level of guaranteed educational opportunity, but rather based on systematic processes that over time create subclasses of citizens and produce democratic logjams. This disadvantage could theoretically be measured through educational inputs, educational outputs, or both.

As to inputs, consider small randomly occurring inequalities in student-teacher ratios. Small inequalities would be constitutionally irrelevant. They could stem from local choices regarding how to most effectively deliver education, year-to-year changes in supply and demand, or several other reasonable explanations. Moreover, small variations have no discernible effect on educational opportunity.[476] In contrast, evidence that state policy has

restore political equality without addressing educational deficits head on. The political disadvantage that follows . . . is hard to remedy." NEWMAN, *supra* note 11, at 17-18.

473. *See, e.g.*, Sheff v. O'Neill, 678 A.2d 1267, 1275, 1277-78 (Conn. 1996) (rejecting the argument that the state's lack of intent to create segregation excused it from its responsibility for curing the segregation).

474. By analogy, systemic school segregation reinforced overall social segregation and sociopolitical inequality. *Cf.* Charles J. Ogletree, Jr., *From* Brown *to Tulsa: Defining Our Own Future*, 47 HOW. L.J. 499, 516-17 (2004) (discussing Charles Hamilton Houston's understanding of segregation and his strategy for dismantling it).

475. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42 (1973) (expressing concern that judicial intervention in school financing would require courts to make substantive policy judgments).

476. The social science on class size is nuanced. *See, e.g.*, Black, *supra* note 63, at 1609-12 (explaining that the positive effects of class size vary depending on a number of other factors). Class size can be important for disadvantaged students. *See* DIANE WHITMORE SCHANZENBACH, NAT'L EDUC. POLICY CTR., UNIV. OF COLO. BOULDER SCH. OF EDUC., DOES CLASS SIZE MATTER? 1 (2014), https://perma.cc/5KLW-HNFL (finding that "students in the early grades perform better in small classes" and that "[t]his is especially the case for students who come from disadvantaged backgrounds"). That research, however, does not conclusively establish that small size variations have discernible effects for all students in all circumstances. *See, e.g.*, Spyros Konstantopoulos & Vicki Chung, *What*

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created a circumstance in which many fewer teachers in low-poverty districts are qualified than are teachers in high-poverty districts would raise serious concerns.[477] Teacher quality is generally recognized as one of the most important factors affecting educational opportunity.[478] And as such, states mandate quality and certification standards for teachers.[479]

State polices that systematically cause or perpetuate disparate inputs of this sort contradict any reasonable notion of education as a basic right of citizenship in which all share equally. They achieve indirectly what a political manipulation principle would prevent states from achieving directly. Indirection, however, is not defense. If education is a right of citizenship, systemic disadvantage, even if not facial, is constitutionally suspect.[480]

The disparate inputs described above represent one form of systemic disadvantage, but that disadvantage might also be demonstrated through outputs. The most relevant outputs for this Article's thesis would be those related to democratic participation itself. Evidence might show that some systemic educational disadvantages are so severe that they deny citizens participation in the democratic process and have an entrenching effect.[481]

Are the Long-Term Effects of Small Classes on the Achievement Gap?: Evidence from the Lasting Benefits Study, 116 AM. J. EDUC. 125, 131-32 (2009).

477. *Cf., e.g.*, Charles Clotfelter et al., *High-Poverty Schools and the Distribution of Teachers and Principals*, 85 N.C. L. REV. 1345, 1354-59 (2007) (analyzing differential access to quality teachers).

478. *See, e.g.*, James H. Stronge et al., *What Is the Relationship Between Teacher Quality and Student Achievement?: An Exploratory Study*, 20 J. PERSONNEL EVALUATION EDUC. 165, 167 (2007) (discussing studies "offer[ing] dramatic evidence regarding the influence of the classroom teacher on student learning"); *see also* Linda Darling-Hammond, *Teacher Quality and Student Achievement: A Review of State Policy Evidence*, EDUC. POL'Y ANALYSIS ARCHIVES 2, 31-32 (2000), https://perma.cc/52LF-WCSE (finding, based in part on a fifty-state survey and the National Assessment of Educational Progress, that "teacher quality variables appear to be more strongly related to student achievement than class sizes, overall spending levels, teacher salaries . . . , or such factors as the statewide proportion of staff who are teachers").

479. *See, e.g.*, MOLLY M. SPEARMAN, S.C. DEP'T OF EDUC., REQUIRED CREDENTIALS FOR PROFESSIONAL STAFF MEMBERS IN THE INSTRUCTIONAL PROGRAMS OF SOUTH CAROLINA'S PUBLIC SCHOOLS 18-50 (n.d.), https://perma.cc/R6FG-N2BG (outlining detailed certification and training requirements for teachers from prekindergarten through high school); *see also* EDUC. COMM'N OF THE STATES, ECS REPORT TO THE NATION: STATE IMPLEMENTATION OF THE NO CHILD LEFT BEHIND ACT 69 (2004), https://perma.cc/9T55-XREK (tracking states' implementation of high-quality teacher objectives).

480. By analogy, state courts examining the affirmative duty to provide education have held that the distinction between intentional and unintentional disadvantage is largely irrelevant. *See, e.g.*, Sheff v. O'Neill, 678 A.2d 1267, 1274, 1277-78 (Conn. 1996).

481. To be clear, this claim is distinct from the one made in *Rodriguez* regarding democratic participation. The claim here is that the disadvantage *denies* participation, whereas the claim in *Rodriguez* was that education is a fundamental right because it *affects* participation. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) ("[Plaintiffs]

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Consider, for instance, evidence that students simply lack the basic skills necessary to engage in democratic self-government.[482] When students lack these skills, their futures rest upon the political preferences of others in better-educated communities. Those well-educated communities will be free to leave or expand the education gap between themselves and disempowered communities. The Michigan lawsuit identifies literacy as one such basic skill, arguing that students will never exercise their full rights as citizens unless they become literate.[483] Thus, one output measure of systemic educational disadvantage that entrenches political power could be illiteracy.

Other more nuanced measures may also exist. Recent voting rights litigation demonstrates, for instance, that statisticians can develop neutral principles with which to assess whether communities are participating equally in the political process or whether a government policy has locked in a structural disadvantage.[484] That litigation has focused on partisan gerrymandering in voting districts,[485] but an analogous inquiry might be made of education. An education analysis might ask whether a statistically significant correlation exists between the quality of education students receive in the state and voter participation and, if so, whether the voting gap associated with educational inequality effectively disempowers certain communities. In short, the claim would be that the educational opportunities provided in some communities are so deficient that those communities no longer have the power to reasonably influence state or local government policy.

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insist that education is itself a fundamental personal right because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote.").

482. Plaintiffs in New York made this type of argument in their attempt to establish the constitutional floor for an adequate education under their state's constitution. *See* Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 664, 666 (N.Y. 1995) (explaining that a "sound basic education" under the state constitution "should consist of the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury").

483. *See Gary B.* Complaint, *supra* note 15, ¶ 45.

484. *See, e.g.*, Recent Case, 130 HARV. L. REV. 1954, 1957-58 (2017) (citing Whitford v. Gill, 218 F. Supp. 3d 837 (W.D. Wis. 2016), *stay granted*, 137 S. Ct. 2289, *and jurisdiction postponed*, 137 S. Ct. 2268 (2017)) (discussing statistical analyses designed to identify the impermissible entrenchment of political power through partisan gerrymandering). The Supreme Court heard oral argument in *Whitford* in October 2017. *See* Transcript of Oral Argument, Gill v. Whitford, No. 16-1161 (U.S. Oct. 3, 2017), 2017 WL 4517131. The Court had not issued a decision by the time this Article went to print.

485. *See* Adam Liptak, *Justices to Hear Major Challenge to Partisan Gerrymandering*, N.Y. TIMES (June 19, 2017), https://perma.cc/XJ53-JLZP. The outcome in the case, however, will have no direct effect on this Article's theory. The reference to the case is to demonstrate the possibility and plausibility of statistically based thresholds, not that any particular method is constitutionally appropriate in voting or education.

Regardless of the measure, it also bears noting that systemic disadvantage is potentially more dangerous than targeted disadvantage. Targeted disadvantage may not achieve its goal. But systemic disadvantage, by its nature, is likely to be more serious and successful in its effect.[486] If maintained across time, systemic disparate opportunity can create two classes of citizens: one in schools where most students meet state academic expectations and participate in civic life, and another in schools where most students do not.[487] Systemic disadvantage of this sort and the effect it has on democracy is the core evil a citizenship-based right to education was intended to cure.

D. Causes of Action and Congressional Power

If a citizenship-based right to education exists, the next set of questions relates to the practical and legal implications of the right. The first question is whether a private cause of action exists to enforce the right. The second question relates to the scope of Congress's power to enact legislation to enforce the right. A private federal cause of action would allow individuals to challenge policies that violate educational rights or run afoul of the limitations articulated in Part IV.C above. No matter its scope, such a federal cause of action would be significant. For the past forty years, the Court's opinion in *Rodriguez* has created a strong presumption against nearly any theory that contemplates a constitutionally protected federal right to education.[488]

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486. *Cf., e.g.*, Kevin Barry, *Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights*, 31 BERKELEY J. EMP. & LAB. L. 203, 213-14 (2010) (distinguishing between isolated acts of discrimination resulting from minor or temporary physical impairments and the more systemic disadvantages faced by those who are disabled).

487. Entrenched disadvantage across a specific period of time has also proved important in *Whitford*. In voting, the fact that disadvantage is locked in for ten-year periods corresponding with the census and redistricting process provides courts with a definite framework for measuring disadvantage, avoiding the problem of indefinite and nebulous standards. *See* Recent Case, *supra* note 484, at 1959-60. While not as fixed as ten-year redistricting maps, educational opportunity occurs across a thirteen-year period corresponding with kindergarten through high school. The quality of education a student receives during that period will have lifelong effects. *See, e.g.*, Jackson et al., *supra* note 2, at 39 (finding that increasing educational spending across a sustained period of time "has meaningful causal effects on adult earnings, family income, and poverty status"); *see also* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.").

488. *See, e.g.*, Toledo v. Sánchez, 454 F.3d 24, 33 (1st Cir. 2006) (recognizing the importance of education but noting that "[n]onetheless, aside from outright exclusion, the Supreme Court continues to employ rational basis review for classifications that burden the educational opportunities of a non-suspect class"); Angstadt v. Midd-W. Sch. Dist., 377 F.3d 338, 343 (3d Cir. 2004) (writing simply that "the right to education is not constitutionally protected" based on *Rodriguez*).

Without even seriously considering the facts of a complaint, lower courts have strong precedent upon which to dismiss it. The recognition of a citizenship-based right to education would not make all educational inequalities and inadequacies actionable, but it would establish a constitutional limit on state education policy that requires courts to evaluate the factual merits of claims.

The realistic threat of accountability through federal litigation could also have its own effect on state and local education policy.[489] States and local districts currently operate with relatively few external equity or adequacy constraints. The Fourteenth Amendment's Equal Protection Clause prohibits intentional discrimination against suspect classes but does not limit policies that simply have a discriminatory effect.[490] And discrimination based on socioeconomic status, for instance, is generally permissible.[491] State constitutions place limits on many of the equity gaps ignored by federal law,[492] but separation of powers principles have constrained courts in securing legislative compliance.[493] Potentially recognizing this weakness, legislatures

489. *Cf.* Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1074-82 (2004) (analyzing the destabilizing effects that reform litigation has on the status quo).

490. *See, e.g.*, Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272, 281 (1979) ("[E]ven if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose."); Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270-71 (1977) (holding that the plaintiffs' failure to "prov[e] that discriminatory purpose was a motivating factor" in the defendant's decision "ends the constitutional inquiry"). The Court has also extended the requirement of proving intentional discrimination (rather than mere discriminatory effects) to several federal civil rights statutes. *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275, 280-81 (2001) (noting that it was "beyond dispute" that section 601 of Title VI of the Civil Rights Act of 1964 "prohibits only intentional discrimination" (citing Pub. L. No. 88-352, tit. VI, § 601, 78 Stat. 241, 252 (codified at 42 U.S.C. § 2000d (2016))).

491. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (refusing to apply heightened scrutiny to the "large, diverse, and amorphous class" of people "in districts that happen to have less taxable wealth than other districts").

492. *See* Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1500-02 (2007) (discussing successful school finance litigation in state courts following *Rodriguez*).

493. *See, e.g.*, Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 408 (Fla. 1996) (faulting the plaintiffs for failing to articulate "an appropriate standard for determining 'adequacy' that would not present a substantial risk of judicial intrusion into the powers and responsibilities assigned to the legislature"), *superseded by constitutional amendment*, FLA. CONST. art. IX, § 1; McDaniel v. Thomas, 285 S.E.2d 156, 167-68 (Ga. 1981) (indicating that decisions regarding school finance belong to the legislature, not the courts); *see also* William S. Koski, *The Politics of Judicial Decision-Making in Educational Policy Reform Litigation*, 55 HASTINGS L.J. 1077, 1082 (2004) ("[T]he judicial decisions in [school funding] cases are affected by the policy preferences of state supreme court justices and the institutional constraints on a judiciary venturing into the complex thicket of educational policy.").

have increasingly disregarded their constitutional obligations and even openly defied court orders.[494] A federal cause of action would both impose protection beyond current antidiscrimination norms and move litigation into a federal venue in which states are less able to resist.[495]

Maybe more important is the congressional power a citizenship-based education right would trigger. Congress's power to enact general education legislation is currently limited. In *United States v. Lopez*, the Court rejected congressional regulation of education through the Commerce Clause.[496] Congress can, of course, prohibit discrimination pursuant to its Section 5 power,[497] but under current precedent, the exercise of that power must be premised on remedying intentional discrimination.[498] Thus, racial inequity alone is generally insufficient to authorize Congress's Fourteenth Amendment enforcement power.

494. *See, e.g.*, McCleary v. State, No. 84362-7, slip op. at 1-2 (Wash. Aug. 13, 2015) (noting the state's "repeated[]" failure to comply with court orders and its need to "take immediate action to enforce its orders"); Andrew Ujifusa, *Kansas Lawmakers OK Shift to Block-Grant Funding, but Court Fight Looms*, EDUC. WK.: ST. EDWATCH (Mar. 17, 2015, 10:14 AM), https://perma.cc/PXD4-3Q5V (describing an ongoing dispute in Kansas between the state legislature and state courts); *see also* Black, *supra* note 7, at 456-58 (describing the issues in Kansas and Washington in greater detail).

495. The Supremacy Clause provides federal courts greater authority than that given to state courts, which are at best coequal branches with their legislatures. *Compare, e.g.*, Cooper v. Aaron, 358 U.S. 1, 4, 17 (1958) (emphasizing, in an opinion cosigned by all nine Justices, that state officials may neither openly nullify nor indirectly evade constitutional orders issued by federal courts), *with, e.g.*, Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 213-14 (Ky. 1989) (emphasizing the limits on state judicial power in relationship to the legislative branch).

496. *See* 514 U.S. 549, 565-67 (1995) (reasoning that while "Congress has authority under the Commerce Clause to regulate numerous commercial activities that substantially affect interstate commerce and also affect the educational process," that power "does not include the authority to regulate each and every aspect of local schools"); *see also* U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power "[t]o regulate Commerce . . . among the several States").

497. *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 80-81 (2000) (noting that Section 5 of the Fourteenth Amendment "is an affirmative grant of power to Congress" and that such power "includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct").

498. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 626-27 (2000); *see also* WILLIAM D. ARAIZA, ENFORCING THE EQUAL PROTECTION CLAUSE: CONGRESSIONAL POWER, JUDICIAL DOCTRINE, AND CONSTITUTIONAL LAW 99-101 (2015) (explaining the historical connection between the Court's intentional discrimination standards and Section 5 precedent). *But see* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 730 (2003) (upholding legislation at least in part based on private sector evidence of statistical disparities rather than solely on findings of intentional discrimination).

This leaves the Spending Clause as Congress's only authority to promote general educational improvement and equity.[499] While the Spending Clause has been instrumental in incentivizing certain education reforms,[500] it is not a unilateral power. Congress can secure only the educational quality and equity for which there is sufficient money and political capital to pay.[501] Even then, states are free to reject the funds.[502] Congress can incentivize education reform but cannot mandate it.

A citizenship-based right to education under the Fourteenth Amendment would change this paradigm. Section 5 of the Fourteenth Amendment would authorize Congress to pass legislation to enforce that right,[503] which could transform educational opportunity in a way that case-by-case litigation never could. Congress could legislate protections beyond the boundaries of the core principles articulated above and create agencies to enforce them. The Supreme Court has recognized Congress's authority to enact prophylactic legislation to prevent rights violations.[504] So long as Congress can present evidence of substantial constitutional violations that warrant a remedy,[505] the particular

499. *See* U.S. CONST. art. I, § 8, cl. 1 (granting Congress the power "to pay the Debts and provide for the common Defence and general Welfare of the United States").

500. *See, e.g.*, GARY ORFIELD, THE RECONSTRUCTION OF SOUTHERN EDUCATION: THE SCHOOLS AND THE 1964 CIVIL RIGHTS ACT 46, 77 (1969) (describing the role of federal funding in creating incentives for desegregation).

501. States and districts have gone so far as to argue that Congress cannot even force compliance with mandates in federal education statutes such as the No Child Left Behind Act unless Congress provides the money for states to comply. *See, e.g.*, Connecticut v. Spellings, 453 F. Supp. 2d 459, 474 (D. Conn. 2006), *aff'd sub nom.* Connecticut v. Duncan, 612 F.3d 107 (2d Cir. 2010); Sch. Dist. of Pontiac v. Spellings, No. Civ.A. 05-CV-71535-D, 2005 WL 3149545, at *1 (E.D. Mich. Nov. 23, 2005), *aff'd by an equally divided court sub nom.* Sch. Dist. of Pontiac v. Sec'y of the U.S. Dep't of Educ., 584 F.3d 253 (6th Cir. 2009) (en banc). For the Supreme Court's articulation of the limits on Congress's Spending Clause authority, see South Dakota v. Dole, 483 U.S. 203, 206-08 (1987).

502. *See Dole*, 483 U.S. at 211 (indicating that Congress cannot coerce states into participating in federal spending programs).

503. *See* Liu, *supra* note 19, at 335.

504. *See* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 727-28 (2003) ("Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.").

505. The Court increasingly imposed rigorous evidentiary requirements on Congress in the 1990s and 2000s. *See, e.g.*, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 368-74 (2001) (asking whether Congress had "identified a history and pattern of unconstitutional . . . discrimination" before legislating); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 89-91 (2000) (criticizing Congress for its failure to develop a record of discrimination and suggesting that its legislation "was an unwarranted response to a perhaps inconsequential problem"); City of Boerne v. Flores, 521 U.S. 507, 530-32 (1997) (finding that a legislative record "lack[ed] examples of modern instances" of discrimination). But in the context of the right to education, Congress could likely make this showing

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policies Congress adopts are subject only to something akin to a rational relation test.[506] The key advantage here would be that Congress need not resolve the difficult threshold questions raised above regarding unstable funding and systemic inequality. So long as Congress was responding to core constitutional violations, the Court would defer to Congress's approximation of the appropriate enforcement mechanism.[507] Thus, Congress might, for instance, prohibit funding gaps between school districts in excess of 15% (after factoring in demographic and geographic cost variances) or funding dips in excess of 10% in any given year.

E. A Response to Doctrinal and Political Reservations

While a new cause of action and legislative power would represent major expansions, those expansions are not substantively intrusive in ways that have frequently concerned courts and Congress in the past. The *Rodriguez* Court articulated three major objections to affording education special protection under the federal Constitution. First, the Court was reluctant to intervene based "only [on] relative differences in spending levels."[508] Because no "perfect" education financing system exists, taking up these claims would inevitably force courts to second-guess varying nuances of every state financing system.[509] Absent evidence that the state was failing to "provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process," the Court was unwilling to scrutinize the inequalities.[510] Second, recognizing a right to education would be the first step toward a slippery slope of recognizing innumerable fundamental rights because education is impossible to "distinguish[] from [other] significant personal interests," such as food and shelter, that are also very important to speech and voting.[511] Third,

relatively easily based on recent trends in education. For a full discussion of evidentiary demands the Court has placed on Congress, see ARAIZA, *supra* note 498, at 113-38; and William D. Araiza, *Deference to Congressional Fact-Finding in Rights-Enforcing and Rights-Limiting Legislation*, 88 N.Y.U. L. REV. 878, 899-905 (2013).

506. *See, e.g.*, Shelby County v. Holder, 133 S. Ct. 2612, 2627-30 (2013) (focusing on the rationality of Congress's assessment of which jurisdictions to cover with the Voting Rights Act's preclearance coverage formula (citing Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(a), 79 Stat. 437, 438 (codified as amended at 52 U.S.C. § 10303 (2015)))); *Hibbs*, 538 U.S. at 735 (requiring merely that "the States' record of unconstitutional participation in, and fostering of, . . . discrimination . . . [be] *weighty enough* to justify the enactment of prophylactic § 5 legislation" (emphasis added)).

507. *See, e.g.*, *Hibbs*, 538 U.S. at 735.

508. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973).

509. *See id.* at 41.

510. *See id.* at 37.

511. *See id.*

federal courts lack the "specialized knowledge and experience" necessary to evaluate educational quality claims.[512]

A state citizenship-based concept of education would not raise these particular concerns. First, relative differences in spending levels alone would generally be of no concern to this right. As discussed above, most education financing and other value-based choices a state might make would fall squarely within the state's discretion and would thus be beyond the purview of federal judicial review.[513] Close judicial review would only be warranted if states were to abuse that discretion to manipulate educational opportunity by design or effect.[514] Thus, rather than settling equity debates or identifying optimal funding schemes, courts might still generally presume that spending differences are constitutionally permissible.

Second, recognizing a citizenship-based right to education would not create a slippery slope. Unlike other important personal interests like food and shelter, the Framers intentionally sought to protect education.[515] Thus, recognizing the right would not rest on its relative importance in relation to other rights, and it would not establish precedent or logic for other rights. The facts justifying the recognition of a citizenship-based right to education are, in short, sui generis.

Third, enforcing the boundaries of the right as described in Part IV.D above would not require specialized education knowledge or experience. Courts would not need to identify an optimal financing system, adequate educational opportunities, or the best way to secure quality teachers. Instead, courts (or Congress) would be tasked with identifying procedural, structural, and group-based anomalies in the delivery of education. State courts have demonstrated that education cases focusing on these types of questions are relatively easy to resolve and do not require courts to make policy-based judgments.[516] It would be enough, for instance, to establish that a financing

512. *See id.* at 42.

513. *See supra* Part III.C.6.

514. Some state school financing formulas, for instance, are specifically designed in ways that benefit wealthier school districts and significantly disadvantage poorer ones. *See, e.g.*, Phil Kadner, *Illinois Schools Have Biggest Funding Gap in Nation*, CHI. TRIB. (Mar. 26, 2015, 9:17 PM), https://perma.cc/3VA2-B6UG ("Using the property tax to primarily finance public education allows a school district with the greatest property wealth . . . to spend more on teacher salaries and extracurricular programs, while forcing districts with a comparatively small property tax base to cut corners. . . . [N]one of [this] happened by accident."); s*ee also* BAKER ET AL., *supra* note 60, at 17 (finding that as of 2010 Illinois, Nevada, and New Hampshire were funding high-poverty districts at 78%, 74%, and 64%, respectively, of the funding level for low-poverty districts).

515. *See supra* Part III.C.

516. *See, e.g.*, Bush v. Holmes, 919 So. 2d 392, 412 (Fla. 2006) (striking down a voucher program because it diverted funds from the public school fund); Schwartz v. Lopez, 382

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scheme was adopted because it would advantage particular demographic groups and leave others to fend for themselves. Whether it actually produced a substantive educational deficit would be beside the point.[517] The key is that the state, in carrying out its primary state function, enacted a policy to advantage some and disadvantage others. Inquiries of this sort are ones in which courts are particularly expert.[518]

Congressional power to protect the citizenship-based right to education is also distinct from other exercises of congressional power over education that have recently created controversy. This new power would not be a license to heavily regulate the substance or practicalities of education. Congress's authority would be limited to stopping certain types of abuses. So long as states avoid these abuses, they would remain free to deliver and evolve education any way they see fit. This regulatory power stands in stark contrast to the reform Congress has promoted through Spending Clause legislation in recent years.

Through the No Child Left Behind Act of 2001,[519] for instance, Congress and the Department of Education mandated specific substantive, qualitative, statistical, and methodological policies for academic standards, testing regimes, test results, teacher quality, teacher evaluation, and school intervention.[520] To make matters worse, Congress has routinely changed its expectations over time[521]— which has resulted in chaos.[522] Each of these substantive policies,

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P.3d 886, 891, 902 (Nev. 2016) (striking down legislation that funded private education savings accounts from public education funds); League of Women Voters of Wash. v. State, 355 P.3d 1131, 1141 (Wash. 2015) (striking down a charter school statute because it drew funds that were constitutionally required to go to traditional public schools).

517. *Cf., e.g.*, *Schwartz*, 382 P.3d at 891 ("We must emphasize that the merit and efficacy of the [state education savings account] program is not before us, for those considerations involve public policy choices left to the sound wisdom and discretion of our state Legislature."); *League of Women Voters*, 355 P.3d at 1135 (emphasizing that its decision was based on constitutional requirements, not on the merits of the policy itself).

518. Although they make the case for courts to make far more substantive judgments, Michael Rebell and Arthur Block have detailed courts' general factfinding expertise in the context of school cases. *See* MICHAEL A. REBELL & ARTHUR R. BLOCK, EDUCATIONAL POLICY MAKING AND THE COURTS: AN EMPIRICAL STUDY OF JUDICIAL ACTIVISM 205-10 (1982).

519. Pub. L. No. 107-110, 115 Stat. 1425 (repealed 2015).

520. *See* Black, *supra* note 9, at 1324-25.

521. *See, e.g.*, Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015) (codified as amended in scattered sections of the U.S. Code); No Child Left Behind Act of 2001, 115 Stat. 1425; Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (codified as amended in scattered sections of the U.S. Code); Goals 2000: Educate America Act, Pub. L. No. 103-227, 108 Stat. 125 (1994) (codified as amended in scattered sections of 20 U.S.C.).

522. *See* Robert E. Slavin, *Stop the Churn: How Federal Policy Adds Chaos to Schools*, HUFFPOST (updated June 23, 2013), https://perma.cc/6S94-WS4N; *see also* Black, *Federalizing*

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along with the possibility of revolving change, has given rise to serious debates regarding the appropriate federal role in education and who is best suited to make these decisions.[523] Congress's authority to protect the citizenship-based right to education would not implicate this type or level of intrusion. Congress would need to hew to a core set of constitutional principles that are not susceptible to the same subjectivity or fluctuation.

None of this, however, is to suggest that a private cause of action and new legislation would be free from controversy. Courts and Congress would set limits about which reasonable minds could disagree. And no matter what limits they imposed, states would object to demands that they alter their current inequitable practices.[524] The point of the foregoing rejoinders is not to discount these objections, but simply to emphasize that a citizenship-based education right would not pose the same concerns that have militated against federal intervention in the past. Those who would oppose the right would need to identify more than raw political qualms. They would need to identify new substantive objections.

Conclusion

On any number of metrics, educational inequalities have increased significantly in recent years. Dwindling financial commitments to education have only made matters worse, placing basic educational opportunity in jeopardy in many locations. Plaintiffs in Detroit, for instance, claim that their schools are crumbling around them and fail to offer even basic literacy skills. State courts and federal agencies once provided a check against the most egregious abuses in education, but recent events suggest that they no longer will. These troubling trends, however, cannot on their own justify federal judicial intervention.

Education, *supra* note 324, at 647-59 (detailing the major federal education policy changes occurring during the Obama Administration).

523. *See, e.g.*, Black, *Federalizing Education*, *supra* note 324, at 658 (recounting congressional objections to federal overreach during the process of extending statutory waivers to states); Robinson, *supra* note 323, at 322-30 (examining how federalism debates shaped the No Child Left Behind Act); Michael D. Barolsky, Note, *High Schools Are Not Highways: How* Dole *Frees States from the Unconstitutional Coercion of No Child Left Behind*, 76 GEO. WASH. L. REV. 725, 736-46 (2008) (arguing that the No Child Left Behind Act violated a number of federalism norms in the Constitution).

524. States have, for example, resisted state supreme court demands to reform their school finance systems. *See, e.g.*, McCleary v. State, No. 84362-7, slip op. at 1-2 (Wash. Aug. 13, 2015); Sonja Ralston Elder, Note, *Standing Up to Legislative Bullies: Separation of Powers, State Courts, and Educational Rights*, 57 DUKE L.J. 755, 757 (2007) (discussing states, in particular Ohio, that have resisted court orders to reform unconstitutional education policies); Ujifusa, *supra* note 494.

Federal judicial intervention requires an affirmative constitutional theory. This Article does not purport to offer the only plausible theory. To the contrary, the history this Article details could be equally applicable to theories grounded in substantive due process, equal protection, privileges and immunities, or a republican form of government. This Article's aim is to explore the possibility that those doctrinal thickets might be avoided altogether. Of course, even if those thickets *can* be avoided, judicial concerns over recognizing a right to education remain, especially the concern that courts will eventually be asked to oversee too many aspects of education, which would raise serious problems of federalism and judicial competency.

Conceptualizing the ratification of the Fourteenth Amendment as a constitutional compromise focused in part on education provides a solution to these problems. The Fourteenth Amendment explicitly guaranteed state citizenship, which as a matter of original intent and prevailing practices included education. This framing offers an affirmative theory for affording constitutional protection to education. Yet by situating the right in state citizenship, the Constitution can leave the actual delivery of and discretion over education to states, limiting the scope of federal oversight. Consistent with our overall constitutional structure, a citizenship-based concept of education limits only procedural manipulations of education. This procedural policing, however, can serve as a mechanism for limiting today's abuses in education.