



ESSAY

The Compromised Right to Education?

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Introduction

Indiana Jones's quest to discover the holy grail in *The Last Crusade* leads him to a hidden grotto lined with chalices, a Nazi, and a medieval knight. The Nazi sips from an ornate, gold chalice accented with jewels, convinced he has chosen the true grail. He is mistaken and pays for it with his life, disintegrating into a heap of ash. Jones, the archaeologist, selects a humble, dusty goblet, surely the cup of a first-century carpenter. The knight confirms that Jones has "chosen wisely," but warns the grail cannot be taken far from the vault, for "that is the boundary and the price of immortality."¹ Oddly enough, that memorable scene replayed in my mind as I read Derek Black's absorbing article, *The Constitutional Compromise to Guarantee Education*.²

Black takes us on a quest to discover another elusive grail—a federal right to education—which has captured the imagination of the likes of Erwin Chemerinsky and Cass Sunstein, among scores of other scholars.³ Their ornate legal theories accent the right with laudatory dicta, evolving precedent, dynamic constructs of substantive due process, or refurbished equal protection doctrine, all of which Black eschews. The Supreme Court swiftly dispatched the latter equality-based theory to the ash heap of misguided precedents.⁴ And

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1. *INDIANA JONES AND THE LAST CRUSADE* (Paramount Pictures 1989).

2. Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 *STAN. L. REV.* 735 (2018).

3. See *id.* at 756 n.99 (citing, *inter alia*, Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 *LOY. U. CHI. L.J.* 111, 123 (2004)); *id.* at 757-61; see also CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 99-100 (2004).

4. See Black, *supra* note 2, at 755-56 (discussing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973)).

Black worries that educational adequacy- or liberty-based theories would meet the same fate.⁵ So, he dusts off the pages of the congressional record circa 1866 and posits a more humble origin of the right, arising from the ratification of the Fourteenth Amendment, specifically its Citizenship Clause.⁶ What emerges from this “originalist theory” is a compromise: education as a *federal* right of *state* citizenship.⁷ That right—entailing a federal “process-based’ oversight” of a state guarantee—is “narrowly constrained by historical facts” and the boundary of federalism, Black admits, but such is the price for the immortality of his theory that “avoids the political and judicial skepticism other theories occasion.”⁸

Behind his theory’s plainly historical façade is a “structural originalism” that frames the original intent and understanding of the terms of ratification around the placement of a federal right to education in state constitutions.⁹ Though nuanced, Black’s argument here is fairly straightforward: If Congress intended to guarantee education as a federal right of state citizenship through the ratification of the Fourteenth Amendment, then it would have conditioned the readmission of Southern states on rewriting their state constitutions to mandate the provision of education to all children. In fact, the Southern states eventually ratified the Fourteenth Amendment and approved state constitutions with education clauses affirmatively obligating them to provide education to all children.¹⁰ Therefore, Congress intended to guarantee education as a federal right of state citizenship through the ratification of the Fourteenth Amendment.

There is a seductive force to this revisionist history, but as with any conditional argument of this sort, the truth of its premises does not ensure the truth of its conclusion.

Start with the first premise, that Congress conditioned Southern states’ readmission on rewriting their state constitutions to mandate the provision of education to all their citizens. The Reconstruction Acts of 1867 and 1868 included no such condition. An amendment to include it “failed by the narrowest margin, by a vote of 20 to 20.”¹¹ Still, Black contends that the condition was made implicit by a belief among some senators that an educated

5. See *id.* at 756-59, 764.

6. 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.”).

7. See Black, *supra* note 2, at 746-47.

8. *Id.* at 747-48.

9. Cf. Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 401 (2009) (explaining that, when courts invoke “structural originalism,” the “structural arguments . . . have all been deeply grounded in and intertwined with history, and history has typically played the lead role in the structural interpretations”).

10. See Black, *supra* note 2, at 788-89, 792-93.

11. *Id.* at 779.

citizenry was indispensable to preserving Article IV's guarantee of a republican form of government—a form that the Reconstruction Acts required Southern states' constitutions to conform to as a condition for their readmission. What's more, Black marshals evidence from Southern state constitutional conventions that delegates well understood that education was necessary to cultivate citizenship and maintain a republican form of government.

And here is the kicker: When three holdouts, Virginia, Mississippi, and Texas, had yet to rewrite their state constitutions for readmission, Congress made the once-implicit condition explicit in statutes requiring these states to affirm that they would never amend their constitutions "to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the [state] constitution."¹² All three joined the other Southern states in adopting education clauses affirmatively obligating them to provide education to all children—the second, manifestly true premise of Black's argument.

So then, if both premises are true, how can the conclusion possibly be false? Because the legislative history and state action are susceptible to another plausible inference that situates education as a right of both state and national citizenship. Otherwise, if education is solely a guarantee of state citizenship, I question whether its recognition as a "process-based" federal right risks the unintended consequence of devaluing the more substantive state right, rendering the right to education, in total, compromised.

I. A Federal Right of State *and* National Citizenship?

That Congress intended to guarantee education as a federal right of *state* citizenship through the Fourteenth Amendment is questionable because other facts suggest that Congress intended such a right to secure *national* citizenship.

Then-professor Goodwin Liu reached that very conclusion after also mining the nineteenth century congressional record, before and after ratification. Liu insisted a fair reading of the legislative history reveals that Congress vested itself with "broad authority to legislate directly to secure substantive rights of national citizenship."¹³ Among those substantive rights was education, Liu claimed, as evident from congressional debates in the decades that followed Reconstruction. "Between 1870 and 1890, members of Congress repeatedly sought to effectuate the guarantee of national citizenship through ambitious efforts to provide funding, leadership, and support for public education."¹⁴ Although that education legislation failed to pass, despite broad bipartisan support in some instances, the congressional record is replete

12. *Id.* at 783 (quoting Act of Jan. 26, 1870, ch. 10, 16 Stat. 62, 63; Act of Feb. 23, 1870, ch. 19, 16 Stat. 67, 68; and Act of Mar. 30, 1870, ch. 39, 16 Stat. 80, 81).

13. Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 363 (2006).

14. *Id.* at 369.

with references to universal education being a responsibility of the federal government to secure national citizenship.¹⁵

Black cautions that Liu's "broad conception of national citizenship" is "too bold" given the current legal and political landscape.¹⁶ "It implicates the longstanding judicial reticence toward affirmative constitutional rights, implicates the doctrinal complexities that accompany the Privileges or Immunities Clause, and upsets the entire state-federal relationship with education."¹⁷ Although "none of these hurdles is fatal," overcoming them would take a seismic doctrinal shift creating "extensive new federal power over education."¹⁸ Significantly, however, Black does not take issue with Liu's historical analysis nor does he take the opportunity to integrate it with his own. Committed as Black is to the theory that a compromise was forged over state citizenship, we cannot expect him to square his claims about the pre-ratification and ratification history with Liu's claims about the pre- and post-ratification history.¹⁹ So, assuming we have two credible interpretations of the relevant history, which are we to believe?

That question exposes the problem with vintage Robert Bork originalism. Trying to discern the collective, original intent of a diverse group of lawmakers who may have had an "indeterminate intent" or "no intent" whatsoever²⁰ based on fragmented, contradictory records more than a century later is a dubious venture. Take, for example, Congress's implicit condition for Southern states' readmission. Black adduces it from ideals of citizenship and a republican form of government he attributes to a handful of senators and an unspecified group of other senators, neither of whom were sufficient in number to make that condition explicit in the first place. All of this, in turn, is based on selected statements made in response to various pieces of legislation before the Senate, only one of the two chambers of Congress.

In fairness, neither Black nor Liu advocates for old school originalism.²¹ Although Black emphasizes Congress's original *intent*, his argument seems to

15. See *id.* at 375-95.

16. Black, *supra* note 2, at 760 & n.122.

17. *Id.* at 760 (citations omitted).

18. *Id.*

19. See *id.* at 745 (contending ratification "secured a sort of constitutional compromise" in "situating education within state citizenship—as opposed to national citizenship").

20. See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 214 (1980).

21. See Black, *supra* note 2, at 747, 772, 837 (characterizing his "citizenship-based theory of education" as "originalist" and emphasizing "the original intent of the Fourteenth Amendment," but noting his theory is not "the only plausible theory" and that other "theories grounded in substantive due process, equal protection, privileges and immunities, or a republication form of government" could be supported by the relevant history); Liu, *supra* note 13, at 370 ("[M]y point is not to reveal a singular 'original understanding' of the Citizenship Clause (there likely was none), but rather to highlight a sustained and coherent

rely more on the original *understanding* of citizenship and a republican form of government shared by members of Congress and state convention delegates. Bork took a similar approach in later modifying his originalist theory: “Secret reservations or intentions count for nothing. All that counts is how the words used in the Constitution would have been *understood* at the time [as] manifested in the words used and in secondary materials, such as debates at the conventions, public discussion, [etc.]”²² Yet this move merely compounds the interpretative difficulties of original intent originalism, attempting to discern the original understanding “not of one group of Framers, but of many groupings of persons meeting in a number of ratifying conventions.”²³

To typecast Black’s argument as hinging on original understanding originalism, however, is to miss the nuance of his citizenship theory. At bottom, his argument that the federal right to education guarantees state (as opposed to national) citizenship is structural. Black argues the right “fits more accurately in state citizenship because that is exactly where Congress and the states placed it”—in state constitutions.²⁴ We should therefore understand his claims about original intent and understanding in the context of the original action taken by the Southern states and Congress to advance education for citizenship while preserving federalism.²⁵

To be sure, education was a right of state citizenship appearing in a majority of state constitutions when the Fourteenth Amendment was ratified in 1868. Thirty of the thirty-seven states in 1868 required their legislatures to establish a system of public schools, according to originalists Steven Calabresi and Michael Perl.²⁶ They contend that number satisfies the Article V threshold to amend the Constitution, and thus, the right to education “is a strong candidate to be a Fourteenth Amendment fundamental right,” one “deeply rooted in American history and tradition.”²⁷ Locating the right explicitly in state constitutions therefore would not be determinative of its scope provided it otherwise emanates implicitly from “the Fourteenth Amendment [which]

constitutional perspective urged by legislators as an alternative to the judicially elaborated constitutional order of *Slaughter-House* and the *Civil Rights Cases*.”).

22. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 144 (1990) (emphasis added).

23. Ronald Turner, *On Brown v. Board of Education and Discretionary Originalism*, 2015 UTAH L. REV. 1143, 1154.

24. Black, *supra* note 2, at 767.

25. Cf. Michael D. Ramsey, *Beyond the Text: Justice Scalia’s Originalism in Practice*, 92 NOTRE DAME L. REV. 1945, 1947-52 (2017) (contending that adherence to structural imperatives implied from constitutional design, e.g., federalism, even when “not exclusively text-based,” is consistent with Justice Scalia’s strand of originalist methodology).

26. Steven G. Calabresi & Michael W. Perl, *Originalism and Brown v. Board of Education*, 2014 MICH. ST. L. REV. 429, 450-51.

27. *Id.* at 443, 560-61.

makes all of us both national citizens and citizens of the state wherein we reside.”²⁸

Southern states’ collective actions to include education clauses likewise could be viewed as an effort to constitutionalize an emerging norm of national citizenship.²⁹ Although Black asserts that “no Southern state constitution affirmatively obligated the state to deliver education” before the Civil War,³⁰ that is a matter of interpretation. Louisiana’s 1845 constitution included obligatory language.³¹ Arguably so did North Carolina’s 1776 constitution³² and Georgia’s 1777 constitution.³³ The point being that “education for citizenship” had been trending steadily decades before ratification, forming a consensus among states who frequently borrowed each other’s education clause language. Black makes this point forcefully himself: “The new and revised state constitutions of the 1860s drastically reshaped the national consensus regarding education.”³⁴

Hence, Black’s structural originalist argument based on Southern state constitutions need not exclude recognition of education as a right of both *state and national* citizenship. Nor should Congress’s original action exclude that plausible construction. The one unmistakable action Congress took—not dependent on a theory of the original understanding of “citizenship” or a “republican form of government”—was to enact statutes requiring Virginia, Mississippi, and Texas to affirm that they would never amend their constitutions “to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the [state constitution].”³⁵ If, as Black contends, this was Congress’s way of making the once-implicit condition for readmission explicit, then it is telling that Congress chose to characterize “the school rights and privileges secured by [the state] constitution” as being held by “citizens of the United States.”³⁶

28. *See id.* at 517.

29. *See* Black, *supra* note 2, at 744 n.38 (“[A]ffirmative education mandates in [state] constitutions . . . creat[ed] a new national norm.”).

30. *Id.* at 788.

31. LA. CONST. of 1845, tit. VII, art. 134 (“The Legislature shall establish free Public Schools throughout the State, and shall provide means for their support by taxation on property or otherwise.”).

32. N.C. CONST. of 1776, art. XLI (“That a school or schools shall be established by the Legislature, for the convenient instruction of youth . . .”).

33. GA. CONST. of 1777, art. LIV (“Schools shall be erected in each county, and supported at the general expense of the State, as the legislature shall hereafter point out.”).

34. Black, *supra* note 2, at 790-91.

35. Act of Jan. 26, 1870, ch. 10, 16 Stat. 62, 63 (Virginia); Act of Feb. 23, 1870, ch. 19, 16 Stat. 67, 68 (Mississippi); Act of Mar. 30, 1870, ch. 39, 16 Stat. 80, 81 (Texas).

36. *See supra* note 35.

II. A Federal Right that Devalues State Education Rights?

Why should it matter whether a federal right to education is a guarantee of national as well as state citizenship, so long as it is a guarantee of citizenship nonetheless? In a word, federalism.

Black sees it as a net positive for his constitutional compromise that a federal right of state citizenship “fits naturally with prevailing federalism concepts.”³⁷ Still, he concedes it would mean that federal courts can police the procedural boundaries of only the state guarantee “without mandating any specific substantive policy” and “without wading into a substantive assessment of the quality or adequacy of education.”³⁸ Black identifies at least three “procedural” areas for federal courts to police: (1) unstable funding mechanisms, (2) educational disadvantages targeted to certain classes or groups, and (3) systemic disadvantages in educational opportunity across time.³⁹ Although potentially fertile ground for federal private rights of action, an unintended consequence may be that this federal, procedural, negative right to education would eventually supplant state, substantive, positive rights to education.

In a majority of jurisdictions, state constitutional rights to education already provide a basis for challenging the procedural areas Black identifies *and* the substantive educational inequities and inadequacies that would otherwise not be actionable under the federal right Black envisions.⁴⁰ The trouble with the state right is that too many state high courts are now reluctant to enforce that right, after decades of school finance litigation: Many encounter legislative resistance to their orders and worry that judicial remedies breach state separation of powers principles.⁴¹ Black proposes that state courts overcome this self-inflicted crisis of confidence through proactive interventions.⁴² But perhaps anticipating that state courts will continue to struggle regardless, he thinks a process-based federal right to education would at least “move litigation into a federal venue in which states are less able to resist.”⁴³

If so, a surge in litigation under a newly-recognized federal right seems likely to deter enforcement of the state right. Legislators would probably discount the political costs of resisting state court orders, figuring they can live to fight another day in federal court. If unsuccessful in that forum, legislators could reengage their defiance, albeit in more subtle, though possibly equally

37. Black, *supra* note 2, at 796.

38. *Id.* at 803-04, 808-09, 816.

39. *Id.* at 816.

40. See generally Joshua E. Weishart, *Equal Liberty in Proportion*, 59 W.M. & MARY L. REV. 215, 231-41 (2017) (summarizing history of state constitutional education rights litigation as yielding “a claim for equal liberty”).

41. See *id.* at 268-70.

42. See Derek W. Black, *Averting Educational Crisis: Funding Cuts, Teacher Shortages, and the Dwindling Commitment to Public Education*, 94 WASH. U. L. REV. 423, 468 (2016).

43. Black, *supra* note 2, at 831 & n.495.

effective, ways. More problematic, the restricted scope of a negative, procedural federal right to education would disempower federal courts of authority to compel any specific state action or substantive education policy. We might thus replay the history of desegregation litigation, only this time with relatively anemic federal courts. Meanwhile, a federal right to education may be just the excuse reluctant and beleaguered state judges need to stay their hands, on the prevailing view that state courts are bound to treat federal law as supreme.

Any resulting devaluation of the state right might be mitigated if a federal “citizenship-based right to education” triggered Congress’s power under Section 5 of the Fourteenth Amendment.⁴⁴ Black suggests that paradigm shift alone “could transform educational opportunity in a way that case-by-case litigation never could.”⁴⁵ But it is difficult to see how Congress’s Section 5 remedial power—which the Supreme Court has tightly cabined to protect federalism values—could justify *uniform* legislation when the underlying guarantee is one of state, not national, citizenship.

Would then the constitutional compromise to guarantee education leave us with a compromised right to education? And, if the constitutional compromise really is compelled by the Fourteenth Amendment’s ratification 150 years ago, are we better off leaving that history in the past? The Court in *Brown v. Board of Education* seemed to think so: “In approaching this problem [of educational inequality], we cannot turn the clock back to 1868 when the Amendment was adopted We must consider public education in the light of its full development and its present place in American life throughout the Nation.”⁴⁶

Conclusion

Black’s affirmative constitutional theory might be the type of originalist thinking needed to convince a court to recognize a federal right to education. I hope that court will also be pragmatic, appreciating that a federal right to education should no more be a relic of 1868 than a dogma of 2018. Rather than rely on a single, grand constitutional theory, a court should effectuate a collection of theories—based on the text, the history, first principles, doctrine from a half-century of federal and state court precedent, and, yes, even social science—all of which invariably lead to the same conclusion: An equitable and adequate education is essential to equal citizenship. If a court reaches that conclusion on its way to recognizing a federal right to education, it will be due in part to the pathbreaking work of scholars like Derek Black. And, just as

44. *Id.* at 832.

45. *Id.*

46. *Brown v. Bd. of Educ.*, 347 U.S. 483, 492-93 (1954).

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Indiana Jones's *Last Crusade* was not his last, *The Constitutional Compromise* will not be Black's final word on this subject.⁴⁷

47. See Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. (forthcoming 2019) (on file with author).