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## Education, Equality, and National Citizenship

**ABSTRACT.** For disadvantaged children in substandard schools, the recent success of educational adequacy lawsuits in state courts is a welcome development. But the potential of this legal strategy to advance a national goal of equal educational opportunity is limited by a sobering and largely neglected fact: the most significant component of educational inequality across the nation is not within states but between states. Despite the persistence of this inequality and its disparate impact on poor and minority students, the problem draws little policy attention and has evaded our constitutional radar. This Article argues that the Fourteenth Amendment authorizes and obligates Congress to ensure a meaningful floor of educational opportunity throughout the nation. The argument focuses on the Amendment's opening words, the guarantee of national citizenship. This guarantee does more than designate a legal status. Together with Section 5, it obligates the national government to secure the full membership, effective participation, and equal dignity of all citizens in the national community. Through a novel historical account of major proposals for federal education aid between 1870 and 1890, I show that constitutional interpreters outside of the courts understood the Citizenship Clause to be a font of substantive guarantees that Congress has the power and duty to enforce. This history of legislative constitutionalism provides a robust instantiation of the social citizenship tradition in our constitutional heritage. It also leaves a rich legacy that informs the contemporary unmet duty of Congress to ensure educational adequacy for equal citizenship.

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## INTRODUCTION

In recent decades, the educational plight of disadvantaged schoolchildren, once an absorbing concern of federal constitutional law,<sup>1</sup> has managed to draw sustained legal attention mainly in the state courts. Relying on education clauses in state constitutions, lawyers working together with school experts have filed suits in forty-five states arguing for fairer distribution of educational opportunity. Educational adequacy claims, in particular, have lately found a receptive audience,<sup>2</sup> and the available evidence shows that successful litigation has resulted in a modest reduction of inequality between school districts within states.<sup>3</sup>

The momentum behind these efforts is a welcome development in education law and policy. But its potential to advance a national goal of equal educational opportunity is limited by a sobering and largely neglected fact: the most significant component of educational inequality across the nation is not inequality within states but inequality *between* states. As economists Sheila Murray, William Evans, and Robert Schwab have observed, “[D]ifferences in spending between . . . New Jersey, California, and Texas are much more important than differences in spending between Trenton, Sacramento, and Austin and their suburbs.”<sup>4</sup> Based on school finance data from 1972 to 1992,

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1. See *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Green v. County Sch. Bd.*, 391 U.S. 430 (1968); *Griffin v. County Sch. Bd.*, 377 U.S. 218 (1964); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).
  2. See, e.g., *Montoy v. State*, 102 P.3d 1160 (Kan. 2005); *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326 (N.Y. 2003); *Hoke County Bd. of Educ. v. State*, 599 S.E.2d 365 (N.C. 2004); see also Michael A. Rebell, *Adequacy Litigations: A New Path to Equity?*, in *BRINGING EQUITY BACK: RESEARCH FOR A NEW ERA IN AMERICAN EDUCATIONAL POLICY* 291, 297 (Janice Petrovich & Amy Stuart Wells eds., 2005) (“[Sixteen] of the 18 plaintiff victories in the past 14 years have involved substantial or partial adequacy considerations.”). For up-to-date information on school finance litigation in all fifty states, see National Access Network, Teachers Coll., Columbia Univ., *Litigation Overview* (Aug. 10, 2006), <http://www.schoolfunding.info/litigation/litigation.php3>.
  3. See Sheila E. Murray et al., *Education-Finance Reform and the Distribution of Education Resources*, 88 AM. ECON. REV. 789, 806-07 (1998) (finding that court-ordered reform has reduced intrastate inequality by increasing spending in districts at the bottom and middle of the state distribution, while leaving spending in top districts constant); David Card & A. Abigail Payne, *School Finance Reform, the Distribution of School Spending, and the Distribution of SAT Scores* (Nat’l Bureau of Econ. Research, Working Paper No. 6766, 1998), available at <http://www.nber.org/papers/w6766> (same).
  4. Murray et al., *supra* note 3, at 798. In 2000-2001, for example, half of all school districts in New Jersey spent at least \$10,317 per pupil, whereas 90% of districts in Texas spent \$9695 or less. FRANK JOHNSON, NAT’L CTR. FOR EDUC. STATISTICS, REVENUES AND EXPENDITURES

they found that “roughly two-thirds of nationwide inequality in [district] spending is between states and only one-third is within states.”<sup>5</sup> In other words, even if we were to eliminate disparities between school districts within each state, large disparities across states would remain. Moreover, the burden of such disparities tends to fall most heavily on disadvantaged children with the greatest educational needs.<sup>6</sup>

These facts speak clearly to the need for a *national* approach to the distribution of educational opportunity. Yet our current policies do virtually nothing to ensure adequacy or equality of opportunity according to a national standard. The No Child Left Behind Act of 2001 (NCLB), for example, expressly permits each state to decide what its students should learn and how well they should learn it.<sup>7</sup> Further, as Congress’s researchers have observed, “virtually all current debate over school finance equalization in the United States is focused on equalization among [districts] within states, not on expenditure disparities across states.”<sup>8</sup>

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BY PUBLIC SCHOOL DISTRICTS: SCHOOL YEAR 2000-2001, at 11 tbl.4 (2004), *available at* <http://nces.ed.gov/pubs2004/2004319.pdf>. Ninety percent of districts in California spent \$9077 or less per pupil, while the same proportion of districts in New Jersey spent \$8650 or more per pupil. *Id.*

5. Murray et al., *supra* note 3, at 808. State-court school finance litigation “is able to attack only a small part of [educational] inequality,” and “it seems unlikely that further litigation will yield large reductions in national inequality in the future.” *Id.*
6. See DAVID GRISSMER ET AL., IMPROVING STUDENT ACHIEVEMENT: WHAT STATE NAEP TEST SCORES TELL US, at xxx (2000), *available at* [http://www.rand.org/pubs/monograph\\_reports/MR924/index.html](http://www.rand.org/pubs/monograph_reports/MR924/index.html) (“[B]etween-state, rather than within-state, differences in resources are the main reason for inequitable resource levels for lower-SES students.” (emphasis omitted)); Ross Rubenstein, *National Evidence on Racial Disparities in School Finance Adequacy*, in NAT’L CTR. FOR EDUC. STATISTICS, DEVELOPMENTS IN SCHOOL FINANCE: 2001-02, at 93, 104 (William J. Fowler, Jr. ed., 2003), *available at* <http://nces.ed.gov/pubs2003/2003403.pdf> (finding that “[minority] children are not systematically overrepresented in the lowest spending districts in most states,” but that “[m]inority children, particularly Hispanics, are often heavily concentrated in lower spending states”).
7. Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.); *see infra* notes 339-342 and accompanying text.
8. WAYNE RIDDLE & LIANE WHITE, CONG. RESEARCH SERV., PUBLIC SCHOOL EXPENDITURE DISPARITIES: SIZE, SOURCES, AND DEBATES OVER THEIR SIGNIFICANCE 19 (1995); *see* Richard Rothstein, *Equalizing Education Resources on Behalf of Disadvantaged Children*, in A NOTION AT RISK: PRESERVING PUBLIC EDUCATION AS AN ENGINE FOR SOCIAL MOBILITY 31, 62 (Richard D. Kahlenberg ed., 2000) (“Because the financing of public education has always been primarily a state and local, not a federal, matter, very little policy attention has been devoted to [interstate] inequality. Yet this might be the most serious financing problem in American education.”). In a companion article, I analyze the policy dimensions of this problem and propose recommendations for expanding the federal role in education. *See* Goodwin Liu,

The lack of policy attention to this problem mirrors the absence of legal theory that treats the national distribution of educational opportunity as a matter of constitutional concern. Given the history of state and local practices relegating minority children to inferior schools, it is unsurprising that lawyers and scholars have often turned to the injunction against officially sanctioned discrimination in the Equal Protection Clause. But equal protection has been less potent in addressing disadvantage that cannot readily be traced to official design or that affects a diffuse or amorphous class. In such circumstances, the “substantive” dimension of disadvantage—the practical importance of an absolute or relative deprivation, apart from its causal origin—has had only a shadowy presence in equal protection doctrine.<sup>9</sup> Although the constitutional text does not compel this result,<sup>10</sup> the Equal Protection Clause is easily read to suggest mere evenhandedness as its core principle. Indeed, *Brown v. Board of Education* itself stated that educational “opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms”<sup>11</sup>—as if each state were free to decide what level of opportunity, if any, to provide.

This Article argues that the Fourteenth Amendment authorizes and obligates Congress to ensure a meaningful floor of educational opportunity throughout the nation. But instead of parsing the Equal Protection Clause, the perspective I aim to develop focuses on the Fourteenth Amendment’s opening

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*Interstate Inequality in Educational Opportunity*, 81 N.Y.U. L. REV. (forthcoming Dec. 2006) (on file with author). Here I focus on the constitutional dimensions of the problem.

9. See *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966); *Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956). *But cf.* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973) (“It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws.”); *Shapiro*, 394 U.S. at 662 (Harlan, J., dissenting) (“I know of nothing which entitles this Court to pick out particular human activities, characterize them as ‘fundamental,’ and give them added protection under an unusually stringent equal protection test.”). See generally Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659 (discussing these cases).
10. See ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT* 39 (1994) (construing the Equal Protection Clause as a “charter of positive liberty”); Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 17 (1969) (“[The] injunction against ‘denying’ the ‘equal protection of the laws’ is not so clearly void of a requirement that the quiescent state must ‘act’ (i.e., cease denying protection) in certain circumstances . . . .”); see also JACOBUS TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* 205-06 (1951).
11. 347 U.S. 483, 493 (1954) (emphasis added).

words, the Citizenship Clause.<sup>12</sup> Before the Fourteenth Amendment mandates equal protection of the laws, it guarantees national citizenship. This guarantee is affirmatively declared; it is not merely protected against state abridgment. Moreover, the guarantee does more than designate a legal status.<sup>13</sup> Together with Section 5,<sup>14</sup> it obligates the national government to secure the full membership, effective participation, and equal dignity of all citizens in the national community. This obligation, I argue, encompasses a legislative duty to ensure that all children have adequate educational opportunity for equal citizenship.

For familiar reasons, the constitutional guarantee of national citizenship has never realized its potential to be a generative source of substantive rights. It was neutered by a reactionary Supreme Court that perverted the essential meaning of the Civil War Amendments and helped undermine Reconstruction.<sup>15</sup> Nevertheless, contemporaneous interpreters beyond the five-Justice majority in the *Slaughter-House Cases* recognized national citizenship as a font of substantive guarantees that Congress had the power and duty to enforce. Justice John Marshall Harlan elaborated this view in his lone dissent in the *Civil Rights Cases*, describing the fundamental transformation of nationhood wrought by the Citizenship Clause.<sup>16</sup> Moreover, this understanding of national citizenship undergirded a series of proposals in Congress between 1870 and 1890 seeking to establish a strong federal role in public education that would, among other things, narrow educational disparities among the reunified states. These early proposals, which Congress vigorously debated and nearly passed, illuminate what many leaders of the Framing generation believed to be the scope of federal authority and responsibility to secure full and equal national citizenship. Their perspective bears directly on the maldistribution of educational opportunity across the nation today.

By recovering this strand of constitutional thought, this Article aims to instantiate what William Forbath has called the “social citizenship tradition” in

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12. 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 . . .”).

13. See *id.* (referring to “the privileges or immunities of citizens of the United States”).

14. *Id.* § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

15. See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872).

16. See *The Civil Rights Cases*, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting).

our constitutional heritage.<sup>17</sup> At its core, the tradition holds that there is a “basic human equality associated with the concept of full membership of a community” and that it is the duty of government to ensure the civil and political as well as social and economic prerequisites for the realization of this equality.<sup>18</sup> In pursuit of these commitments, the tradition challenges two aspects of how we typically understand constitutional law.

First, contrary to the conventional wisdom that “the Constitution is a charter of negative rather than positive liberties,”<sup>19</sup> the social citizenship tradition assigns equal constitutional status to negative rights against government oppression and positive rights to government assistance on the ground that both are essential to liberty. The concept of positive rights, while disfavored in Supreme Court doctrine,<sup>20</sup> has never been far from the core ideals of the nation’s transformative moments. It was part of the ideology of emancipation and Reconstruction.<sup>21</sup> It animated the New Deal constitutional vision and President Franklin Roosevelt’s call for a “Second Bill of Rights.”<sup>22</sup> And it found brief expression in the fundamental rights strand of equal protection doctrine during the Great Society.<sup>23</sup> Moreover, as Cass Sunstein and

17. William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 1 (1999); see Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 59-64 (1977).
18. T.H. Marshall, *Citizenship and Social Class*, in T.H. MARSHALL & TOM BOTTOMORE, *CITIZENSHIP AND SOCIAL CLASS* 2, 6 (Pluto Press 1992) (1950); see CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* (2004).
19. *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (Posner, J.).
20. See *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796 (2005) (finding no right to police enforcement of a domestic abuse restraining order); *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189 (1989) (finding no right to state protection against private violence); *Harris v. McRae*, 448 U.S. 297 (1980) (finding no right to government assistance for a medically necessary abortion); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (finding no fundamental right to education).
21. See Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL’Y 37 (1990); James W. Fox, Jr., *Citizenship, Poverty, and Federalism: 1787-1882*, 60 U. PITT. L. REV. 421, 479-577 (1999). Professor Charles Black has located the nation’s commitment to positive rights even earlier, in the Declaration of Independence. See CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED* 6 (1997); *id.* at 133 (reading the Constitution in light of the Declaration to infer an “affirmative constitutional duty of Congress diligently to devise and prudently to apply the means necessary to ensure, humanly speaking, a decent livelihood for all”).
22. See SUNSTEIN, *supra* note 18; Forbath, *supra* note 17, at 68-75.
23. See *supra* note 9. For discussion of this doctrine, see Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1, 37-38 (1987); and Michelman, *supra* note 10, at 25-33, 40-47.

David Currie have observed, positive rights to government assistance inhere in a variety of traditionally “negative” constitutional protections, although this reality is obscured by baseline “assumptions about . . . the natural or desirable functions of government.”<sup>24</sup> Neither the text nor the history of the Constitution forecloses a reading of its broad guarantees to encompass positive rights, and the experiences of other nations suggest that the existence of such rights is compatible with constitutionalism.<sup>25</sup>

The near absence of social and economic rights in our constitutional law implicates a second assumption about constitutional meaning that the social citizenship tradition rejects. The general assumption of lawyers and lay people alike is that the meaning of the Constitution is fixed by the courts. Our legal culture treats constitutional questions as questions of ordinary law, and as such, constitutional questions are quintessentially *adjudicative* questions, i.e.,

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24. Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 889 (1987); see David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986). The right to property, for example, cannot be reduced to a set of limitations on government regulation or interference. The right is meaningful because government has affirmatively created an elaborate system of laws, agencies, police, and courts on which property owners rely to enforce claims against private and public actors. See, e.g., *Truax v. Corrigan*, 257 U.S. 312, 328 (1921) (holding that a state law barring injunctions against striking workers deprived an employer of property without due process). The same is true of contract: like property, it “entails a right against third parties that is worthless without government help.” Currie, *supra*, at 876; see also Sunstein, *supra*, at 889 (“The contracts clause amounts to a right to state enforcement of contractual agreements; if the state fails to protect by refusing to enforce a contract, it is violating the clause.”). Even the right of free speech, a quintessential negative right, often requires positive action by government. See, e.g., *Schneider v. New Jersey*, 308 U.S. 147, 162 (1939) (holding that city officials must keep streets open for leafleting despite the burden of “cleaning and caring for the streets”); *Glasson v. City of Louisville*, 518 F.2d 899, 906 (6th Cir. 1975) (holding that the police “must take reasonable action to protect from violence persons exercising their constitutional rights” to speech and assembly).
25. See, e.g., Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 18, 1972, 33 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 303 (330-31) (F.R.G.), translated in DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 282-88 (2d ed. 1997) (interpreting a constitutional right to freely choose one’s place of training to imply positive rights to education); *Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC) (S. Afr.) (requiring reasonable government action to ensure the constitutional right of access to adequate housing); Trybunał Konstytucyjny [Pol. Constitutional Trib.], Determining Income Constituting the Basis for the Right to Family Allowance, [http://www.trybunal.gov.pl/eng/summaries/documents/P\\_3\\_05\\_GB.pdf](http://www.trybunal.gov.pl/eng/summaries/documents/P_3_05_GB.pdf) (last visited Oct. 13, 2006) (summarizing Judgment of Nov. 15, 2005, P 3/05 (Constitutional Trib.) (Pol.), which identified a constitutional right to a family allowance and invalidated a statutory formula governing income eligibility).



questions that are emphatically the province and duty of courts to decide.<sup>26</sup> Because the Supreme Court has refused to squarely recognize fundamental rights to education, welfare, and other government aid, we are taught to believe that no substantive obligations exist in these areas.

As a growing body of scholarship suggests, however, it is a mistake to equate the adjudicated Constitution with the full meaning of the Constitution itself.<sup>27</sup> Whatever answer a court might give to whether the Constitution guarantees minimum entitlements to social and economic welfare, it will be encumbered by considerations of judicial restraint arising from the countermajoritarian difficulty and limitations on institutional competence. The decision in *San Antonio Independent School District v. Rodriguez*, for example, exhibited many of these prudential concerns in holding that locally driven inequalities in public school funding do not violate the Constitution.<sup>28</sup> Moreover, as Robin West has explained, constitutional adjudication is constrained by the conservative methodology inherent to dispensing “legal justice” in narrowly framed disputes.<sup>29</sup> For these reasons, the adjudicated Constitution often falls short of exhausting the substantive meaning of the Constitution’s open-textured guarantees. Lawrence Sager captured the point when he wrote that judicial doctrine in many areas, including the Fourteenth Amendment, “mark[s] only the boundaries of the federal courts’ role of enforcement,” leaving the full scope of constitutional norms “underenforced.”<sup>30</sup>

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26. See Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 8-10 (2001); Robin West, *Unenumerated Duties*, 9 U. PA. J. CONST. L. (forthcoming 2006).
27. See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); WEST, *supra* note 10, at 290-318; Forbath, *supra* note 17; 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 (2003); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).
28. 411 U.S. 1, 41 (1973) (“[T]he Justices of this Court lack both the expertise and the familiarity with local problems . . . [involving] the raising and disposition of public revenues.”); *id.* at 42 (noting “this Court’s lack of specialized knowledge and experience” on “difficult questions of educational policy”); *id.* at 56 (questioning “the desirability of completely uprooting the existing system”).
29. WEST, *supra* note 10, at 311-14. Legal justice seeks “to guarantee some continuity between the past and the present” — “to treat like cases alike” — by conserving legal traditions through application of precedent and analogical reasoning. *Id.* at 311, 312; see also Post & Siegel, *supra* note 27, at 1966-71 (describing the different institutional perspectives of Congress and the Court in constitutional interpretation).
30. Sager, *supra* note 27, at 1213.

In this Article, I do not address whether the Supreme Court or any court should hold that the Fourteenth Amendment guarantees an adequate education. Although that question remains open in the case law,<sup>31</sup> my thesis is chiefly directed at Congress, reflecting the historic character of the social citizenship tradition as “a majoritarian tradition, addressing its arguments to lawmakers and citizens, not to courts.”<sup>32</sup> Whatever the scope of judicial enforcement, the Constitution—in particular, the Fourteenth Amendment—speaks directly to Congress and independently binds Congress to its commands. Thus the approach to constitutional meaning I take here is that of a “conscientious legislator”<sup>33</sup> who seeks in good faith to effectuate the core values of the Fourteenth Amendment, including the guarantee of national citizenship.

From this perspective, the language of *rights*, with its deep undertone of judicial enforceability, seems inapt to probe the full scope of a legislator’s constitutional obligations. As Professor Sager has observed, “[T]he notion that to be legally obligated means to be vulnerable to external enforcement can have only a superficial appeal.”<sup>34</sup> It is more illuminating to ask what positive *duties*, apart from corresponding rights, the Fourteenth Amendment entails for legislators charged with enforcing its substantive guarantees.<sup>35</sup> Framed this way, the inquiry proceeds from the standpoint that Congress, unlike a court, is neither tasked with doing legal justice in individual cases nor constrained by institutional concerns about political accountability. Instead, “Congress can draw on its distinctive capacity democratically to elicit and articulate the nation’s evolving constitutional aspirations when it enforces the Fourteenth

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31. See *Papasan v. Allain*, 478 U.S. 265, 285 (1986) (“[T]his Court has not yet definitively settled . . . whether a minimally adequate education is a fundamental right . . .”); *Rodriguez*, 411 U.S. at 36-37.

32. Forbath, *supra* note 17, at 1.

33. Paul Brest, *The Conscientious Legislator’s Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975). The classic statement of Congress’s independent responsibility to interpret and follow the Constitution is James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 134-44 (1893).

34. Sager, *supra* note 27, at 1221. Citing the example of state high court judges deciding matters of state law or Justices of the Supreme Court deciding federal law, Professor Sager noted that “[w]e are quite comfortable . . . in the belief that these judges are legally obligated to observe the norms of their legal system.” *Id.* at 1222. Although judges are subject to impeachment, “surely the presence of such rarely invoked enforcement devices is not essential to our perception that these judges are routinely and consistently bound to legal standards.” *Id.*

35. For a thoughtful discussion of the need to examine constitutional duties apart from judicially enforceable rights, see West, *supra* note 26.

Amendment.”<sup>36</sup> By mediating conflict and marshaling consensus on national priorities, including the imperatives of distributive justice, Congress can give effect to the Constitution in ways the judicial process cannot.

Thus the legislated Constitution, in contrast to the adjudicated Constitution, is not “narrowly legal” but rather dynamic, aspirational, and infused with “national values and commitments.”<sup>37</sup> As we shall see, the Reconstruction-era proposals for federal aid to public education exemplify this sort of legislative constitutionalism, featuring Congress in the role of apprehending and discharging its duty to enforce the guarantee of national citizenship.

This Article proceeds in four Parts. Part I provides some conceptual groundwork for the constitutional arguments that follow. It defines the term “citizenship” as I use it here, highlighting its civil and political as well as social and economic dimensions. From this definition, I infer a distributive principle for educational opportunity that I call educational adequacy for equal citizenship.

Part II places the concept of citizenship in constitutional context, beginning with a brief historical account of the Citizenship Clause and its transformative significance. I then argue that a proper reading of the Clause together with Section 5 yields three important insights. First, in addition to securing a legal status, the grant of national citizenship is rightly understood as a font of substantive guarantees. Second, the affirmative character of the Citizenship Clause means that Congress’s enforcement power is not limited to protecting national citizenship against state abridgment. Congress has broad authority to legislate directly to make the guarantee of national citizenship meaningful and effective. Third, the Section 5 grant of congressional power to enact appropriate legislation to enforce the citizenship guarantee implies a constitutional duty of enforcement.

Part III shows how, soon after ratification, this approach to the Fourteenth Amendment was implemented by legislators seeking to establish a robust federal role in support of public education. In a series of federal aid bills introduced between 1870 and 1890, members of Congress invoked the grant of

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36. Post & Siegel, *supra* note 27, at 2031; cf. Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1079 (1980) (arguing that representation-reinforcement theories of constitutional interpretation, while having some appeal to judges, have no relevance “to an elected representative—especially one who regards the Constitution as addressed to *all* who govern”).

37. Post & Siegel, *supra* note 27, at 2022, 2027; see WEST, *supra* note 10, at 312 (noting that the legislated Constitution embodies moral and political aspirations, including aspirations for distributive justice).

national citizenship as a basis of federal power and duty to ensure that children, white and black, in all states achieved basic literacy. The most well-developed proposals were national, not sectional, in scope, even as they were designed to disproportionately benefit poor states with high rates of illiteracy. The lengthy and learned congressional debates on these measures left a rich legacy informing both constitutional principle and education policy. That legacy identifies the guarantee of national citizenship as a source of federal responsibility to ensure a national floor of educational adequacy.

Part IV discusses policy implications of the constitutional perspective advanced here. The legislative duty I posit contemplates wide policymaking discretion for Congress. But the essential requirement is that Congress pursue a deliberate inquiry into the meaning of national citizenship and its educational prerequisites and that it take steps reasonably calculated to remedy conditions that deny children adequate opportunity to achieve those prerequisites. Current policies, including NCLB, fail to satisfy this basic account of legislative duty, highlighting the need for a stronger federal role within a continuing framework of cooperative federalism. I conclude with a few thoughts on the implications of my thesis for areas beyond education and on the questions of inclusion and exclusion raised by treating citizenship as a boundary of national membership.

## I. CONCEPTUAL GROUNDWORK

Before turning to constitutional text, structure, and history, it is useful at the outset to sketch two concepts that illuminate the basic contours of my thesis. The first is the idea of equality inherent to citizenship, and the second, following from the first, is the notion of educational adequacy for equal citizenship.

### A. *Citizenship and Equality*

In this Article, I understand citizenship to mean the condition of being a full member of one's society, with membership implying an essential degree of equality. As British social theorist T.H. Marshall observed in his classic essay on citizenship and social class: "Citizenship is a status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is endowed."<sup>38</sup>

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38. Marshall, *supra* note 18, at 18.

Professor Marshall usefully distinguished three dimensions of the equality implicit in citizenship. First, citizenship implies political equality, an equal “right to participate in the exercise of political power, as a member of a body invested with political authority or as an elector of the members of such a body.”<sup>39</sup> Second, all citizens enjoy civil equality, an equality of “rights necessary for individual freedom—liberty of the person, freedom of speech, thought and faith, the right to own property and to conclude valid contracts, and the right to justice.”<sup>40</sup> Third, citizenship implies a degree of social equality. Marshall understood the “social element” of citizenship to encompass “the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in the society.”<sup>41</sup>

The association of citizenship with important political and civil rights resonates with the familiar understanding of citizenship as a legal status. Thus legal citizenship entails nondiscrimination in voting and equal rights of participation in public institutions.<sup>42</sup> But the social rights of citizenship suggest a broader conception of membership characterized not only by “equality of legal status,” but also by “equality of that other kind of status which is a social fact—namely, one’s rank on a scale defined by degrees of deference or regard.”<sup>43</sup> On this account, citizenship implicates not only the civic republican values of political participation and democratic self-governance, but also the ethical values of mutual respect, personal responsibility, and equal dignity. To be a citizen is to have not only a set of legal rights and duties, but also a level of human “functionings and capabilities” essential to being regarded by oneself and by others as a full member of one’s society.<sup>44</sup> As Kenneth Karst has put it, citizenship “presumptively guarantees to each individual the right to be treated

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39. *Id.* at 11.

40. *Id.* at 8.

41. *Id.*

42. See U.S. CONST. amend. XV, § 1 (prohibiting racial discrimination by the states or federal government in the right of United States citizens to vote); *infra* notes 105-109 and accompanying text (arguing that the Fourteenth Amendment citizenship guarantee incorporates at least the rights contained in the Civil Rights Act of 1866, including rights to make and enforce contracts, to sue, to be parties, to give evidence, and to inherit, purchase, lease, sell, hold, and convey property).

43. Karst, *supra* note 17, at 5-6.

44. AMARTYA SEN, *INEQUALITY REEXAMINED* 39 (1992); see MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 70-96 (2000).

by the organized society as a respected, responsible, and participating member."<sup>45</sup>

Equality in political, civil, and social dimensions neither coincides with nor guarantees economic equality. The account of citizenship I offer here does not squarely challenge the competitive norms of the marketplace and its resulting hierarchies. However, not all degrees of economic inequality are compatible with the concept of citizenship. In our society, we need not look far to find conditions of economic deprivation or domination severe enough to frustrate the effective realization of political, civil, and social equality.<sup>46</sup> Thus, although citizenship is "not a charter for sweeping economic leveling,"<sup>47</sup> it includes an economic component. To be a citizen is to have a level of economic independence necessary for the meaningful exercise of civil and political freedoms and for the attainment of self-respect and the respect of others.<sup>48</sup>

The economic autonomy essential to citizenship depends not only on the existence of social insurance and safety nets. More importantly, it depends on the opportunity for self-sufficiency through decent work in the occupation of one's choice.<sup>49</sup> Work confers a measure of independence necessary for

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45. Karst, *supra* note 17, at 4. Although my understanding of citizenship is informed by Professor Karst's, an important difference is that he relies on the Equal Protection Clause as the constitutional foundation for substantive rights of citizenship, *see id.* at 42-46, whereas I rely on the Citizenship Clause of the Fourteenth Amendment. In this respect, my approach follows that of Professor Black, *see* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 51-66 (1969), whom Professor Karst also credits as a key influence, *see* KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION, at ix (1989).

46. *See* WILLIAM W. GOLDSMITH & EDWARD J. BLAKELY, SEPARATE SOCIETIES: POVERTY AND INEQUALITY IN U.S. CITIES (1992); WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR (1996).

47. Karst, *supra* note 17, at 11.

48. *See* ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA 12 (2001) (defining "economic citizenship" to mean "the achievement of an independent and relatively autonomous status that marks self-respect and provides access to the full play of power and influence that defines participation in a democratic society"); Amar, *supra* note 21, at 42 (arguing that a minimum entitlement to property that provides a foundation for productive labor is essential "to create *independent* citizens").

49. *See* KESSLER-HARRIS, *supra* note 48, at 10-13. Professor Kessler-Harris has noted that social citizenship and economic citizenship are not always mutually reinforcing. "For example, policies that enhance motherhood may offer social rights while closing paths to economic citizenship," as federal welfare programs once did when they "required female parents to restrict their access to the labor market or suffer a loss of benefits." *Id.* at 13. Professor Marshall similarly observed the "divorce of social rights from the status of citizenship" in poor laws that stigmatized their beneficiaries by "separat[ing] the community of citizens

participation in public affairs as well as the standing required for the enjoyment of social equality. As Professor Forbath has observed:

[T]he most salient border between minimum respect and degradation in today's class structure falls along the line between those who are recognized by organized society as working and providing a decent living for themselves and their families . . . and those men and women at the bottom of the class hierarchy who are not.<sup>50</sup>

Because dependence and stigma attach to joblessness and many forms of low-wage work, a vital prerequisite for equal citizenship is effective access to economic opportunity.

### *B. Educational Adequacy for Equal Citizenship*

Education bears obvious significance to each facet of citizenship described above. When the Court in *Brown* described education as “the very foundation of good citizenship,” it seemed to contemplate the political dimension of citizenship, for the phrase comes just after the Court’s “recognition of the importance of education to our democratic society” and its assertion that education “is required in the performance of our most basic public responsibilities.”<sup>51</sup> Yet the Court also alluded to social citizenship when it said that 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.”<sup>52</sup> In subsequent cases, the Court has noted the importance of education to personal dignity and social status,

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from the outcast company of the destitute.” Marshall, *supra* note 18, at 15. This tension, still apparent in the distinction between the “deserving” and “undeserving” poor, underscores the importance of work, and not merely concepts of minimum welfare, in the economic component of citizenship. See KESSLER-HARRIS, *supra* note 48, at 13 (“In modern democratic societies prevailing beliefs in the sanctity of the market make access to it the only practical route to empowerment as citizens.”); Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523, 532 (1997) (“Work is still seen as connected to the citizenship values of respect, independence, and participation.”).

50. Forbath, *supra* note 17, at 16.

51. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954); see also *Ambach v. Norwick*, 441 U.S. 68, 77 (1979) (noting that public schools “inculcat[e] fundamental values necessary to the maintenance of a democratic political system”); *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) (“[S]ome degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.”).

52. *Brown*, 347 U.S. at 493.

observing that “education prepares individuals to be self-reliant and self-sufficient participants in society”<sup>53</sup> and that “by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority.”<sup>54</sup>

Contemporaneous with *Brown*, Professor Marshall wrote that “[t]he education of children has a direct bearing on citizenship”—on the exercise of civil freedom, on the health of political democracy, and on qualification for employment.<sup>55</sup> In particular, he worried that unequal educational opportunity, by virtue of “its relation with occupational structure,” would cause citizenship to operate “as an instrument of social stratification.”<sup>56</sup> His concern was not that economic hierarchy per se would compromise “basic human equality associated with the concept of full membership of a community.”<sup>57</sup> Instead, his concern focused on inequality whose nature or severity deprives an individual of the minimum respect necessary for full membership in her society.<sup>58</sup>

Although minimum respect is violated by invidious discrimination of the sort readily detected by equal protection radar, official evenhandedness concerning race, gender, and religion is not alone sufficient to ensure full citizenship. As Philip Kurland put it, equality of educational opportunity “can be secured on a low level no less than a high one”; thus “[i]t is not equality but quality with which we are concerned.”<sup>59</sup> Focusing on citizenship rather than equal protection directs our attention to educational disadvantage that falls below a threshold essential for minimum respect. The relevant principle of distribution sounds in *adequacy* rather than equality.

In its broad outlines, the content of educational adequacy follows directly from citizenship’s several facets. Citizenship requires a threshold level of knowledge and competence for public duties such as voting, serving on a jury, and participating in community affairs, and for the meaningful exercise of civil liberties like freedom of speech. It also requires sufficient education for productive work and the self-reliance, respect, and autonomy that work entails.

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53. *Yoder*, 406 U.S. at 221.

54. *Plyler v. Doe*, 457 U.S. 202, 222 (1982).

55. Marshall, *supra* note 18, at 16; *see id.* at 26, 36-39.

56. *Id.* at 39.

57. *Id.* at 6. Hence his famous quip that “[e]quality of status is more important than equality of income.” *Id.* at 33.

58. *Cf.* Karst, *supra* note 17, at 40 (“[W]hen it comes to protecting the poor, equal citizenship and ‘minimum protection’ amount to much the same thing.”).

59. Philip B. Kurland, *The Privileges or Immunities Clause: “Its Hour Come Round at Last”?*, 1972 WASH. U. L.Q. 405, 419.



Beyond these thresholds, the concept of citizenship admits variation and inequality in educational opportunity. Not all citizens of a society will enjoy the same advantages as the relatively well-off. As a practical reality, some will have greater influence over public decision-making than others, some will have greater access to economic opportunity than others, and the field will be tilted in favor of those with better education. But these inequalities need not threaten equal dignity and full membership so long as they occur above a sufficiently high threshold.<sup>60</sup>

Importantly, educational adequacy, as I understand it here, is a *relational* concept whose content is contingent upon social norms. The essential substance of citizenship cannot be specified by a fixed or objective minimum that is independent of the range of human welfare and capabilities existing in a particular society. Because citizenship marks full participation and belonging “according to the standards prevailing in the society,”<sup>61</sup> the level of educational opportunity, civic competence, and material well-being necessary for equal dignity and mutual respect depends on what other members of the society have. Children in Mississippi, for example, have far better educational opportunities than children in Mozambique.<sup>62</sup> But the social meaning of a particular level of education—what it means to an individual’s ability to enjoy full membership in her society—must take into account the society’s circumstances and norms. Thus, adequacy is not distinct from, but rather informed by, the conditions of inequality in a given social context.<sup>63</sup> This relationship between adequacy and equality is what I have in mind when I say that the Fourteenth Amendment guarantees *educational adequacy for equal citizenship*.

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60. For similar perspectives in the philosophical literature, see Elizabeth Anderson, *Rethinking Equality of Opportunity: Comment on Adam Swift’s How Not To Be a Hypocrite*, 2 THEORY & RES. IN EDUC. 99, 105-07 (2004); and Debra Satz, *The Egalitarian Case for Educational Adequacy* 20-25 (Apr. 2005) (unpublished manuscript, on file with author).

61. Marshall, *supra* note 18, at 8.

62. See U.N. EDUC., SCIENTIFIC & CULTURAL ORG. [UNESCO], EFA GLOBAL MONITORING REPORT 2005: THE QUALITY IMPERATIVE 105 (2005), available at [http://portal.unesco.org/education/en/ev.php-URL\\_ID=35939&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/education/en/ev.php-URL_ID=35939&URL_DO=DO_TOPIC&URL_SECTION=201.html) (“[A] child in sub-Saharan Africa can expect to attend an average of five to six fewer years of primary and secondary schooling than a child in Western Europe or the Americas.”).

63. See AMARTYA SEN, THE STANDARD OF LIVING 18 (1987) (“To lead a life without shame . . . requires a more expensive bundle of goods and services in a society that is generally richer . . . .”); SUNSTEIN, *supra* note 18, at 191 (“What qualifies as enough, or a decent minimum, is affected by what other people possess.”); Michelman, *supra* note 10, at 18 (arguing that for some goods “the just minimum is understood to be a function (in part) of the existing maximum”).

In defining adequacy this way, I reject the sharp dichotomy between equality and adequacy that is often drawn in the education law and policy literature. The conventional view is that “equality is necessarily comparative or relational while sufficiency is not.”<sup>64</sup> Adequacy is thought to require only “a static, non-relational, non-comparative, definition of ‘proficiency’” in educational standards.<sup>65</sup> So conceived, adequacy is criticized for setting too low a standard for distributive justice and for failing to ensure fairness in competitive fora, such as university admissions and employment, that reward educational advantage.<sup>66</sup> But this criticism rests on a conception of adequacy that is artificially thin and unduly divorced from notions of equality. For in defining educational adequacy, it is impossible to avoid the question “adequate for what?” The answer necessarily vests adequacy with a relational quality.

If equal citizenship is the object, then several implications follow. First, the floor of educational opportunity must be sufficiently high to ensure not bare subsistence, but the achievement of the full range of human capabilities that constitute the societal norm. Second, the notion of educational adequacy must be dynamic, evolving as societal norms evolve. And third, adequacy must entail a limit to inequality, a point at which the maldistribution of educational opportunity puts too much distance between the bottom and the rest of society. Adequacy is thus a function of the range and contours of the overall distribution. It is a principle of bounded inequality.<sup>67</sup>

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64. William S. Koski & Rob Reich, *When “Adequate” Isn’t: The Retreat from Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. (forthcoming 2006) (manuscript at 39, on file with author); see Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 168 (1995) (asserting that adequacy “is not comparative”); Paul A. Minorini & Stephen D. Sugarman, *Educational Adequacy and the Courts: The Promise and Problems of Moving to a New Paradigm*, in EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 175, 188 (Helen F. Ladd et al. eds., 1999) (“[A]dequacy is not a matter of comparing spending on the complaining group with spending on others.”).

65. Koski & Reich, *supra* note 64 (manuscript at 62).

66. See Enrich, *supra* note 64, at 181 (“[W]hen we give up appeals to equality in favor of appeals to adequacy, we in all likelihood relegate vast groups of children to mediocre educational opportunities (or worse), and we ensure that they will face significant competitive disadvantages relative to their peers from privileged communities.”); Koski & Reich, *supra* note 64 (manuscript at 46-55).

67. Of course, even a high threshold of adequacy will not fully level the playing field for competitions that reward educational advantage. This point is central to Professors Koski and Reich’s thoughtful argument that equality, not adequacy, is the fairer distributive principle given education’s status as a “positional good.” Koski & Reich, *supra* note 64 (manuscript at 46). However, this argument has its bite primarily at the upper end of the educational distribution, where the positional features of education are most apparent. For example, Koski and Reich emphasize the importance of fairness in competition for college

Thus, in calling attention to educational disparities between states, my purpose is not to suggest a rigid requirement of national leveling, but instead to situate the concept of educational adequacy within a framework of national norms. The fact of interstate variation in educational opportunity does not itself offend the notion of equal citizenship. But the sheer magnitude of current disparities is at least strong evidence that an average education in many states does not adequately prepare students for equal citizenship in the national community.

With this conceptual groundwork, let us examine in greater detail the text and history of the Fourteenth Amendment guarantee of national citizenship and its early application to the goal of educational adequacy.

## II. THE GUARANTEE OF NATIONAL CITIZENSHIP

The Fourteenth Amendment opens with the declaration that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States.”<sup>68</sup> It then acknowledges that citizens of the United States possess certain “privileges” and “immunities.”<sup>69</sup> In this Part, I

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admission, *see id.* (manuscript at 48-49, 54-55), even though admission to the vast majority of colleges is not competitive, *see* ANDREA VENEZIA ET AL., BETRAYING THE COLLEGE DREAM: HOW DISCONNECTED K-12 AND POSTSECONDARY EDUCATION SYSTEMS UNDERMINE STUDENT ASPIRATIONS 14 (2003), available at <http://www.stanford.edu/group/bridgeproject/betrayingthecollegedream.pdf> (urging greater policy attention to student readiness for “broad access postsecondary institutions’ . . . that admit almost every student who applies,” which constitute “about 85 percent of all postsecondary schools and educate the majority of the nation’s college students”). The logic of equality leads Koski and Reich to conclude that students at the prestigious Palo Alto High School have a “ground to complain” that their peers at the even more prestigious Choate Rosemary Hall enjoy better and “unfair” chances at getting into top colleges. Koski & Reich, *supra* note 64 (manuscript at 54). Although Koski and Reich do not urge significant policy attention to this inequality, the example reveals a central difficulty with the equality principle, namely, its inability to distinguish which inequalities along a spectrum deserve the greatest remedial priority. *See* Michelman, *supra* note 10, at 37-38. Adequacy may not fully level the playing field for elite college admission. But it targets inequality at an especially salient and injurious line of social division—the “border between minimum respect and degradation.” Forbath, *supra* note 17, at 16. In the end, Koski and Reich propose an equity policy that they admit resembles “a high *adequacy* standard.” Koski & Reich, *supra* note 64 (manuscript at 62 & n.187).

68. U.S. CONST. amend. XIV, § 1.

69. *Id.* As I explain *infra* Subsection II.B.2, my argument that national citizenship encompasses substantive rights focuses on the Citizenship Clause rather than the Privileges or Immunities Clause because I believe such rights are granted affirmatively by the first sentence of the Fourteenth Amendment and not merely protected against state abridgment. The reference to “privileges or immunities of citizens of the United States” in the second

argue that the national citizenship guarantee, read together with Section 5, entails substantive rights that Congress is both authorized and duty-bound to enforce, regardless of state action. In Part III, I show that shortly after the adoption of the Fourteenth Amendment, leading members of Congress recognized that effective realization of the citizenship guarantee required a substantial federal role in supporting public education and narrowing interstate disparities. I begin with some historical background on the Citizenship Clause.

### A. *The Emergence of National Citizenship*

The history of the Fourteenth Amendment is among the most well-studied topics in constitutional law. While much of the literature since *Brown* has focused on the Equal Protection Clause, many scholars locate the primary significance of the Fourteenth Amendment in the guarantee of national citizenship.<sup>70</sup> On the narrowest reading, the Citizenship Clause overruled *Dred Scott*'s holding that black people, whether free or slave, could not be citizens of a state or of the United States.<sup>71</sup> However, to read the Clause only as a remedy for the type of legal disability at issue in *Dred Scott*—the precise holding of which was that Scott lacked standing to sue in diversity in federal court<sup>72</sup>—is to miss much of its transformative significance. Beyond granting legal status to newly freed blacks, the Citizenship Clause established a *national political community* and made allegiance to it the primary aspect of our political identity. Although the Citizenship Clause's enactment history is somewhat thin,<sup>73</sup> its

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sentence of the Fourteenth Amendment is compelling textual evidence that the opening grant of national citizenship was meant to secure substantive rights, not only a legal status.

70. See, e.g., BLACK, *supra* note 45, at 51-66; Daniel A. Farber & John E. Muench, *The Ideological Origins of the Fourteenth Amendment*, 1 CONST. COMMENT. 235 (1994); Fox, *supra* note 21; Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863 (1986); Arthur Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387 (1967).
71. See *Scott v. Sandford (Dred Scott)*, 60 U.S. (19 How.) 393, 404-05 (1857). In *Slaughter-House*, the Court acknowledged that the Clause "overturns the *Dred Scott* decision by making *all persons* born within the United States and subject to its jurisdiction citizens of the United States. That its main purpose was to establish the citizenship of the negro can admit of no doubt." *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 73 (1872).
72. *Dred Scott*, 60 U.S. (19 How.) at 427.
73. The language that became the Citizenship Clause was added by the Senate in May 1866 after the proposed constitutional amendment had emerged from the Joint Committee on Reconstruction and passed the House. See CONG. GLOBE, 39th Cong., 1st Sess. 2560, 2768-69, 2869 (1866); HORACE EDGAR FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 83-84, 88-89 (1908). But the late addition of the language does not suggest its

central role in reconstituting the nation after the Civil War is evident against a broader historical backdrop.

The gravity of the accomplishment was put into context by Justice Field shortly after ratification of the Fourteenth Amendment:

Before its enactment there was much diversity of opinion among jurists and statesmen whether there was any . . . citizenship [of the United States] independent of that of the State, and, if any existed, as to the manner in which it originated. With a great number the opinion prevailed that there was no such citizenship independent of the citizenship of the State.<sup>74</sup>

As Justice Field observed, pro-slavery defenders of states' rights like John Calhoun believed that "every citizen is a citizen of some State or Territory" and that any independent citizenship rooted in natural law or national law was illusory.<sup>75</sup>

The diversity of opinion also included Justice Curtis's dissent in *Dred Scott*, which undertook a careful and extensive inquiry into the existence and source of national citizenship.<sup>76</sup> In determining that Scott was a citizen under Missouri law, Justice Curtis observed that the Constitution, while recognizing "citizens of the United States" as a category,<sup>77</sup> neither defined which native-born persons were United States citizens nor empowered Congress to do so.<sup>78</sup> His conclusion was that national citizenship was derivative of state citizenship: "[I]t is left to each State to determine what free persons, born within its limits,

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insignificance. Rather, the inclusion of the Clause memorialized the key assumptions that the Framers believed to be implicit in the amendment process—namely, that blacks would be guaranteed citizenship, that national citizenship would have primacy over state citizenship, and that certain privileges and immunities would attach to national citizenship. See TENBROEK, *supra* note 10, at 71-93; Howard Jay Graham, *Our "Declaratory" Fourteenth Amendment*, 7 STAN. L. REV. 3, 23-24 (1954).

74. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 94 (Field, J., dissenting).

75. *Id.* (quoting an 1833 speech by John Calhoun).

76. See *Dred Scott*, 60 U.S. (19 How.) at 577-88 (Curtis, J., dissenting).

77. See U.S. CONST. art. I, § 2, cl. 2 (requiring that members of the House of Representatives have "been seven Years a Citizen of the United States"); *id.* § 3, cl. 3 (mandating that senators must have "been nine Years a Citizen of the United States").

78. See *Dred Scott*, 60 U.S. (19 How.) at 577-79 (Curtis, J., dissenting). In this passage, Justice Curtis distinguished between federal power to establish a uniform rule of naturalization, which exists under Article I, see *id.* at 578, and federal power "to enact what free persons, born within the several States, shall or shall not be citizens of the United States," *id.* at 577, which in his view did not exist in 1857.

shall be citizens of such State, and *thereby* be citizens of the United States.”<sup>79</sup> In support of this view, Justice Curtis looked to the Privileges and Immunities Clause of Article IV:

‘The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.’ . . . [H]ere, privileges and immunities to be enjoyed throughout the United States, under and by force of the national compact, are granted and secured. In selecting those who are to enjoy these national rights of citizenship, how are they described? As citizens of each State. It is to them these national rights are secured. The qualification for them is not to be looked for in any provision of the Constitution or laws of the United States. They are to be citizens of the several States . . . .<sup>80</sup>

According to Justice Field in *Slaughter-House*, Justice Curtis’s analysis was “generally accepted by the profession of the country as the one containing the soundest views of constitutional law” before the Fourteenth Amendment was adopted.<sup>81</sup> Ironically, however, instead of clarifying the meaning of national citizenship, Justice Curtis’s opinion highlighted the confused nature of the issue by literally misreading the Privileges and Immunities Clause of Article IV. The last five words of that Clause do not read “Citizens *of* the several States,” as the block quotation from his opinion states, but rather “Citizens *in* the several States.”<sup>82</sup> This textual distortion undergirds Justice Curtis’s insistence that national citizenship rights flow only from one’s status as a citizen *of* a particular state.<sup>83</sup>

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79. *Id.* at 577.

80. *Id.* at 580.

81. The *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 94 (1872) (Field, J., dissenting).

82. U.S. CONST. art. IV, § 2, cl. 1 (emphasis added).

83. The *Slaughter-House* Court made the same textual error—substituting the words “*of* the several States” for “*in* the several States”—in discussing both the Article IV Privileges and Immunities Clause and the interpretation of the Clause in *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230). See *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 75-76; BLACK, *supra* note 21, at 83-84 (criticizing *Slaughter-House* on this ground); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1306 (3d ed. 2000) (same). The Article IV language is quoted correctly in *Corfield*, leading to a different construction. See *infra* text accompanying notes 85-86.

A correct reading of the text yields different interpretive possibilities, as Justice Washington's opinion in the 1825 case *Corfield v. Coryell* illustrates.<sup>84</sup> In deciding whether a state law that reserved fishing rights in state waters to state residents violated Article IV, Justice Washington, sitting as Circuit Justice, posed the question, "[W]hat are the privileges and immunities of citizens in the several states?"<sup>85</sup> His answer was that the words denote "those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments."<sup>86</sup> *Corfield* implied that national citizenship was tantamount to a kind of general citizenship, giving rise to fundamental rights inherent to membership in a free society.

In *Dred Scott*, Chief Justice Taney similarly understood "Citizens in the several States" to possess national citizenship independent of state citizenship, but with a distinctively nationalist, not universalist, gloss.<sup>87</sup> Unlike Justice Washington, Chief Justice Taney located the source of national citizenship rights not in concepts of natural law but in the legal authority of the duly constituted United States. The Constitution, according to Taney, memorialized

the union of those who were at that time members of distinct and separate political communities into one political family . . . . And it gave to each citizen rights and privileges outside of his State which he did not before possess, and placed him in every other State upon a perfect equality with its own citizens as to rights of person and rights of property; it made him a citizen of the United States.<sup>88</sup>

Taney believed that no state could "introduce a new member into the political community" of the United States "by making him a member of its own."<sup>89</sup> While the rights and privileges of state citizenship remained subject to state law, the rights of national citizenship were held "under the paramount authority of the Federal Government."<sup>90</sup> Because the government at the Founding had granted blacks "no rights which the white man was bound to

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84. See *Corfield*, 6 F. Cas. 546 (upholding a trespass action against an out-of-state resident dredging for oysters in New Jersey waters in violation of a New Jersey statute limiting fishing rights to state residents).

85. *Id.* at 551.

86. *Id.*

87. See *Scott v. Sandford (Dred Scott)*, 60 U.S. (19 How.) 393, 405-06 (1857).

88. *Id.* at 406-07.

89. *Id.* at 406.

90. *Id.* at 423.

respect,"<sup>91</sup> it was easy for Taney to conclude that blacks could not have been citizens under the Federal Constitution.

These early perspectives on national citizenship help to illuminate the import of the disarmingly simple Citizenship Clause. Justice Field offered this summary in *Slaughter-House*:

The first clause of the fourteenth amendment changes this whole subject, and removes it from the region of discussion and doubt. It recognizes in express terms, if it does not create, citizens of the United States, and it makes their citizenship dependent upon the place of their birth, or the fact of their adoption, and not upon the constitution or laws of any State or the condition of their ancestry. A citizen of a State is now only a citizen of the United States residing in that State. The fundamental rights, privileges, and immunities which belong to him as a free man and a free citizen, now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any State.<sup>92</sup>

In short, the first sentence of the Fourteenth Amendment effected a dramatic transformation of American political identity. Whereas national citizenship was ill-defined and largely subordinate to state citizenship before the Civil War, the Fourteenth Amendment inverted the membership hierarchy. It established United States citizenship as the primary site of political allegiance and mutual obligation.

#### B. Securing the Citizenship Guarantee

It is familiar history that the substance of this great accomplishment was undone by the Supreme Court when the ink was barely dry. In 1873, on the Court's first occasion to interpret the Fourteenth Amendment, a five-Justice majority in the *Slaughter-House Cases* held that the Citizenship Clause did not bring the essential attributes of national and state citizenship under federal protection, but rather served to keep state citizenship distinct from national

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91. *Id.* at 407.

92. The *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 95 (1872) (Field, J., dissenting); see Farber & Muench, *supra* note 70, at 276-77 ("Before the Civil War, American citizenship was an ill-defined and largely insignificant concept. . . . The Civil War changed all that by establishing that a citizen's primary allegiance was to the federal government. . . . The creation of American citizenship was one of the great accomplishments of the fourteenth amendment.").



citizenship and thereby preserve state authority over civil rights.<sup>93</sup> The Court narrowed the rights of national citizenship to an anemic and eclectic array, including the right to interstate travel, the right to federal protection when on the high seas or in a foreign nation, the right to use the nation's navigable waters, the right to peaceably assemble and petition for redress of grievances, and the right to habeas corpus.<sup>94</sup> Yet those rights existed *before* the adoption of the Fourteenth Amendment. To refer to them as exemplifying national citizenship rights effectively rendered the new guarantee "a vain and idle enactment, which accomplished nothing."<sup>95</sup> At the heart of the Court's opinion was its unwillingness to accept that the Fourteenth Amendment "radically change[d] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people."<sup>96</sup>

Ten years later, in the *Civil Rights Cases*, the Court ignored the Citizenship Clause in striking down the Civil Rights Act of 1875 and establishing the state action doctrine.<sup>97</sup> It held that Section 1 of the Fourteenth Amendment "is prohibitory in its character, and prohibitory upon the States,"<sup>98</sup> and treated the prohibitions on the states as the only enforceable mandate in Section 1. Without examining the first, affirmative sentence of the Fourteenth Amendment, the Court construed Congress's enforcement power under Section 5 to apply only to the second sentence of Section 1:

[T]he last section of the amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it.<sup>99</sup>

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93. See *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 74, 77-78.

94. See *id.* at 79-80 (limiting the privileges or immunities of national citizenship to rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws").

95. *Id.* at 96 (Field, J., dissenting).

96. *Id.* at 78 (majority opinion).

97. See *The Civil Rights Cases*, 109 U.S. 3 (1883). The Civil Rights Act of 1875, ch. 114, 18 Stat. 335, banned racial discrimination in public accommodations. It was a precursor to Title II of the Civil Rights Act of 1964. 42 U.S.C. § 2000a (2000).

98. *Civil Rights Cases*, 109 U.S. at 10.

99. *Id.* at 11.

Although *Slaughter-House* and the *Civil Rights Cases* remain on the books, they have been widely and vigorously condemned.<sup>100</sup> Here I aim to advance a different understanding of the Fourteenth Amendment that is more faithful to its text and history than the Court's constricted view. The perspective I will develop is well articulated by Justice Harlan's lone dissent in the *Civil Rights Cases*. There, Justice Harlan faulted the Court for failing to treat innkeepers and railroad companies as state actors and for failing to find state action in the unwillingness of state authorities to protect black citizens.<sup>101</sup> But these concerns were secondary. His primary argument in construing the Fourteenth Amendment was that the guarantee of national citizenship gave rise to affirmative rights that Congress had the power to enforce, irrespective of state action. The Court's narrow focus on state action defeated the intent of "[c]onstitutional provisions, adopted . . . for the purpose of securing, through national legislation, if need be, rights inhering in a state of freedom, and belonging to American citizenship."<sup>102</sup>

Justice Harlan elaborated this thesis in an instructive passage, unrefuted by the Court, describing the scope of Section 1 and its relationship to Section 5. The passage is worth a careful read:

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100. Black described "the footless scramble to judgment" in *Slaughter-House* as "one of the most outrageous actions of our Supreme Court." BLACK, *supra* note 21, at 87; see also TRIBE, *supra* note 83, at 1303-11; *id.* at 1324 & n.17 (collecting sources and noting that "several members of the Court . . . and a host of academic commentators have candidly and persistently questioned the correctness of the *Slaughter-House* decision"); Graham, *supra* note 73, at 25 ("To reach the conclusion of Justice Miller and the majority, one must disregard not only all antislavery from 1834 on, but one must ignore virtually every word said in the debates of 1865-66."); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 998-1000 (1995) (describing *Slaughter-House's* reading of the Fourteenth Amendment as "implausible" for "nearly incontrovertible reasons"). Black also criticized the *Civil Rights Cases* as "cut off the same bolt of historical cloth as *Plessy v. Ferguson*." Charles L. Black, Jr., *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 13*, 81 HARV. L. REV. 69, 97 (1967); see also Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503 (1985); Kinoy, *supra* note 70; Ira Nerken, *A New Deal for the Protection of Fourteenth Amendment Rights: Challenging the Doctrinal Bases of the Civil Rights Cases and State Action Theory*, 12 HARV. C.R.-C.L. L. REV. 297 (1977). See generally FLACK, *supra* note 73, at 7 (observing in 1908 that *Slaughter-House* and the *Civil Rights Cases* had been criticized for "giv[ing] to the Fourteenth Amendment a meaning quite different from that which many of those who participated in its drafting and ratification intended it to have").

101. See *Civil Rights Cases*, 109 U.S. at 57-60 (Harlan, J., dissenting).

102. *Id.* at 26 (emphasis added). In this quotation, Justice Harlan's reference to rights "inhering in a state of freedom" as well as "belonging to American citizenship" signaled his reliance on Section 2 of the Thirteenth Amendment as well as Section 5 of the Fourteenth Amendment in sustaining the validity of the Civil Rights Act of 1875. See *id.* at 32-37 (discussing the Thirteenth Amendment).

The assumption that [the Fourteenth Amendment] consists wholly of prohibitions upon State laws and State proceedings in hostility to its provisions, is unauthorized by its language. The first clause of the first section—"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"—is of a distinctly affirmative character. . . . It introduced all of [the colored] race, whose ancestors had been imported and sold as slaves, at once, into the political community known as the "People of the United States." They became, instantly, citizens of the United States, *and* of their respective States. . . . The citizenship thus acquired, by that race, in virtue of an affirmative grant by the nation, may be protected, not alone by the judicial branch of the government, but by congressional legislation of a primary direct character; this, because the power of Congress is not restricted to the enforcement of prohibitions upon State laws or State action. It is, in terms distinct and positive, to enforce "the *provisions of this article*" of amendment; not simply those of a prohibitive character, but the provisions—*all* of the provisions—affirmative and prohibitive, of the amendment. It is, therefore, a grave misconception to suppose that the fifth section of the amendment has reference exclusively to express prohibitions upon State laws or State action. If any right was created by that amendment, the grant of power, through appropriate legislation, to enforce its provisions, authorizes Congress, by means of legislation, operating throughout the entire Union, to guard, secure, and protect that right.<sup>103</sup>

As Justice Harlan went on to explain, the Civil Rights Act of 1875 was an appropriate means of enforcing Section 1's citizenship guarantee, a guarantee that subsumes "equality of civil rights."<sup>104</sup>

As I discuss below, Harlan's exposition of the Fourteenth Amendment helps to frame three important features of the guarantee of national citizenship and Congress's enforcement power. First, the citizenship guarantee entails substantive rights. Second, Congress has authority to act directly to enforce the citizenship guarantee; it is not limited to deterring or remedying state abridgment. Third, I argue, the grant of enforcement power to Congress implies a corresponding duty of enforcement.

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103. *Id.* at 46-47.

104. *Id.* at 48. For an excellent discussion of the theory of national rights, powers, and responsibilities underlying Justice Harlan's dissent in the *Civil Rights Cases*, see Kinoy, *supra* note 70.

1. *National Citizenship as a Source of Substantive Rights*

In addition to defining the political identity of the American people, the citizenship guarantee encompasses substantive rights necessary to make citizenship meaningful and effective. As Justice Harlan put it, the Citizenship Clause “necessarily imports” rights “fundamental in American citizenship.”<sup>105</sup> His thesis echoed one of the core concepts animating the Civil Rights Act of 1866, whose declaration of national citizenship was the precursor to the Fourteenth Amendment’s Citizenship Clause.<sup>106</sup> Senator Lyman Trumbull of Illinois, the main author of the 1866 Act, explained:

To be a citizen of the United States carries with it some rights; and what are they? They are those inherent, fundamental rights which belong to free citizens or free men in all countries, such as the rights enumerated in this bill, and they belong to them in all the States of the Union. The right of American citizenship means something.<sup>107</sup>

Both Harlan and Trumbull had in mind a set of natural rights essential to republican citizenship and belonging to all free persons, and the Fourteenth Amendment was intended to secure at the very least the specific rights enumerated in the 1866 statute. But, as many scholars have observed, the Framers of the Fourteenth Amendment “understood that citizenship was an evolving concept” and “chose to employ broad rather than specific language” in defining it, thereby “enabl[ing] future generations, and particularly a future Congress acting under Section 5, to develop further the privileges and immunities of citizenship.”<sup>108</sup> In Part III, we will see what the Reconstruction Congress had to say about education and national citizenship. The point here is that national citizenship from its inception was understood as more than a legal

105. *Civil Rights Cases*, 109 U.S. at 48 (Harlan, J., dissenting).

106. Section 1 of the Civil Rights Act of 1866 provided:

[A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property . . . as is enjoyed by white citizens . . .

Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. § 1981 (2000)).

107. CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866).

108. Fox, *supra* note 21, at 504; see Farber & Muench, *supra* note 70, at 274-75; Kaczorowski, *supra* note 70, at 923-26; see also *infra* notes 159-164 and accompanying text.

status. It has substance—it “means something”—and is thus a proper object of congressional enforcement under Section 5. Congress is authorized to enforce “all of the provisions of the [Fourteenth Amendment], including the provisions, *express and implied*, in the first clause of the first section of the article granting citizenship.”<sup>109</sup>

## 2. Federal Enforcement Through Primary, Direct Legislation

Moreover, by virtue of its affirmative character, the substantive protections of the Citizenship Clause are guaranteed not merely against state abridgment but as a matter of positive right. Accordingly, Congress’s Section 5 power is “not restricted to the enforcement of prohibitions upon State laws or State action” and instead may be used to enact “legislation of a primary direct character” to secure citizenship rights.<sup>110</sup>

This reading of the Citizenship Clause and Section 5—authorizing direct federal enforcement of the citizenship guarantee—parallels the well-established interpretation of Congress’s power to enforce Section 1 of the Thirteenth Amendment. The latter “is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.”<sup>111</sup> As the Court explained in upholding a federal antipeonage law, the Thirteenth Amendment “denounces a status or condition, irrespective of the manner or authority by which it is created.”<sup>112</sup> Conversely, the Citizenship Clause guarantees a status or condition, irrespective of the manner or authority by which its realization is impeded. In both instances, Congress’s enforcement power is correspondingly broad. Just as the Thirteenth Amendment authorizes primary and direct federal legislation to secure “those fundamental rights which are the essence of civil freedom,”<sup>113</sup> the Fourteenth Amendment authorizes similar legislation to secure rights “fundamental in American citizenship.”<sup>114</sup>

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109. *Civil Rights Cases*, 109 U.S. at 54 (Harlan, J., dissenting) (emphasis added).

110. *Id.* at 46.

111. *Id.* at 20 (majority opinion).

112. *Clyatt v. United States*, 197 U.S. 207, 216 (1905).

113. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441 (1968) (quoting *Civil Rights Cases*, 109 U.S. at 22); *see also* *People v. Washington*, 36 Cal. 658, 664 (1869) (stating that the Thirteenth Amendment authorizes Congress to secure rights “essential to the full enjoyment of personal liberty”).

114. *Civil Rights Cases*, 109 U.S. at 48 (Harlan, J., dissenting); *see id.* at 52 (arguing that the Fourteenth Amendment does not “stay[] the hands of the nation, until [citizenship rights are] assailed by State laws or State proceedings”); *cf.* *United States v. Given*, 25 F. Cas. 1328,

Objections to this expansive view of congressional authority largely rest on inferences from the text and history of the Fourteenth Amendment that do not withstand close scrutiny. Textually, it is said that Section 1 expressly protects “the privileges or immunities of citizens of the United States” from *state* abridgment and nothing more.<sup>115</sup> Thus Congress has no obligation or authority under Section 5 to secure the rights of national citizenship except against state invasion.<sup>116</sup> This inference is bolstered, the argument goes, by the Fourteenth Amendment’s legislative history—in particular, the decision by the Joint Committee on Reconstruction to discard a February 1866 draft amendment in favor of the language that was ultimately ratified. The February 1866 draft read:

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.<sup>117</sup>

This language assigned Congress the role of securing substantive rights of citizenship regardless of state action. According to the Supreme Court in *City of Boerne v. Flores*, the February 1866 proposal “encountered immediate opposition” on the ground that it “would give Congress a power to intrude into traditional areas of state responsibility.”<sup>118</sup> After the House voted to postpone consideration of the proposal—an action the Court described as

1329 (C.C.D. Del. 1873) (No. 15,211) (“Congress [under the Fifteenth Amendment] . . . can select any means it deems appropriate to render available and secure th[e] constitutional right . . . and is not limited to such measures as may be directed to a denial or abridgement of the right by the general government or the states.”). *Given* addressed Congress’s enforcement power under Section 2 of the Fifteenth Amendment, whose scope “has always been treated as coextensive” with the scope of Congress’s power under Section 5 of the Fourteenth Amendment. *City of Rome v. United States*, 446 U.S. 156, 208 n.1 (1980) (Rehnquist, J., dissenting).

115. U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .”).
116. See Michael W. McConnell, *McConnell, J., Concurring in the Judgment*, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* 158, 166 (Jack M. Balkin ed., 2002) (“There is no provision of the Constitution preventing Congress from making or enforcing laws that abridge the privileges or immunities of citizens, except insofar as they are enumerated in the Bill of Rights or deducible from other provisions of the Constitution.”).
117. CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866).
118. 521 U.S. 507, 520-21 (1997) (citing statements of members of Congress opposing the February 1866 draft).

“marking [its] defeat”<sup>119</sup>—the Joint Committee reported a new draft on April 30, 1866 that began with what is now the second sentence of Section 1 and that included Section 5.<sup>120</sup> The revision was approved, according to the *Boerne* Court, because it made “Congress’ power . . . no longer plenary but remedial” and “did not raise the concerns expressed earlier regarding broad congressional power to prescribe uniform national laws with respect to life, liberty, and property.”<sup>121</sup>

However, this reading of the Fourteenth Amendment has several weaknesses. First, the idea that the Privileges or Immunities Clause limits rather than augments the scope of protection for national citizenship rights cannot be squared with prior understandings of the federal government’s authority and responsibility in relation to such rights. Although rights of national citizenship were not clearly defined before the Civil War, the notion had unmistakable resonance in one area: the preservation of slavery. In upholding the Fugitive Slave Act of 1793, the Court in *Prigg v. Pennsylvania* determined that Congress had power under the Fugitive Slave Clause to enforce by primary legislation “a positive, unqualified right on the part of the owner of the slave.”<sup>122</sup> The Court described the right as “uniform in remedy and operation throughout the whole Union . . . however many states [the owner] may pass with his fugitive slave in his possession.”<sup>123</sup> The right belonged to the slave owner as a national citizen; as such, it implied “the power and duty of the national government” to protect it.<sup>124</sup> Moreover, in *Dred Scott*, the Court made clear that this right was secure against federal abridgment.<sup>125</sup>

Against this legal backdrop, it is incongruous to read the Fourteenth Amendment as remitting the privileges or immunities of national citizenship to state control. To do so, as Justice Harlan explained, would be to hold that “the rights of freedom and American citizenship cannot receive from the nation that efficient protection which heretofore was unhesitatingly accorded to slavery

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119. *Id.* at 522.

120. See CONG. GLOBE, 39th Cong., 1st Sess. 2286 (1866).

121. *Boerne*, 521 U.S. at 522-23.

122. 41 U.S. (16 Pet.) 539, 612 (1842).

123. *Id.* at 624.

124. *Id.* at 616; see also *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1859) (upholding the Fugitive Slave Act of 1850).

125. See *Scott v. Sandford (Dred Scott)*, 60 U.S. (19 How.) 393 (1857) (invalidating the Missouri Compromise).

and the rights of the master.”<sup>126</sup> The more sensible view is that the Privileges or Immunities Clause, read together with the Citizenship Clause, does not circumscribe but rather “*expands* the protection that American citizens would otherwise have the right to expect.”<sup>127</sup> In other words,

the prohibition upon State laws in hostility to rights belonging to citizens of the United States, was intended . . . only as an express limitation on the powers of the States, and was not intended to diminish, in the slightest degree, the authority which the nation has always exercised, of protecting, by means of its own direct legislation, rights created or secured by the Constitution.<sup>128</sup>

Moreover, the Court’s assertion in *Boerne* that the February 1866 draft amendment was revised to assuage concerns about federal overreaching is likely wrong and at best debatable. As James Fox has observed, “[T]he debates over the *adopted* proposal demonstrate that its opponents continued to express concerns about federal power identical to those put forward earlier.”<sup>129</sup> Its proponents likewise maintained a broad reading of federal power under the revised language<sup>130</sup>—a position consistent with Republican resolve galvanized by President Johnson’s veto of the Civil Rights Act of 1866 on March 27 of that year.<sup>131</sup> Given Congress’s desire to put the Civil Rights Act on a firm

126. The Civil Rights Cases, 109 U.S. 3, 57 (1883) (Harlan, J., dissenting). For a full exposition of this point, see Robert J. Kaczorowski, *The Supreme Court and Congress’s Power To Enforce Constitutional Rights: An Overlooked Moral Anomaly*, 73 FORDHAM L. REV. 153 (2004).

127. Bruce Ackerman, *Ackerman, J., Concurring*, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID*, *supra* note 116, at 100, 115.

128. *Civil Rights Cases*, 109 U.S. at 55 (Harlan, J., dissenting).

129. Fox, *supra* note 21, at 507; *see id.* at 507, 508 & n.317 (citing statements of Rep. Rogers, Rep. Shanklin, and Sen. Hendricks opposing the final proposal because of overexpansion of federal power).

130. *See id.* at 508 & n.318 (citing statements of Rep. Broomall, Rep. Thayer, and Rep. Bingham).

131. President Johnson’s veto was accompanied by a lengthy message expressing alarm that the Act was a stride “toward centralization and the concentration of all legislative power in the national Government.” CONG. GLOBE, 39th Cong., 1st Sess. 1681 (1866). Dissatisfaction with Johnson’s veto led Congress to “a realization that the constitutional assertion of congressional power was essential to [Reconstruction].” Fox, *supra* note 21, at 510. According to Professor Fox, this realization likely explains why at least two House members, Representatives Davis and Hale, who opposed the February 1866 draft on federalism grounds, *see City of Boerne v. Flores*, 521 U.S. 507, 521 (1997), but voted to override Johnson’s veto in April 1866, *see infra* note 133, eventually voted in favor of the Fourteenth Amendment, *see Fox, supra* note 21, at 510 n.323. Fox further observed that Senator William Stewart of Nevada, though still worried that the Amendment would pose “increasing



constitutional footing<sup>132</sup> and its determination to override President Johnson's veto,<sup>133</sup> it is improbable that the revision between February and April of 1866 was intended to reduce federal power to act directly to secure the rights of national citizens.

In addition, the Court in *Boerne* ignored an alternative explanation for the revision that is apparent in the legislative history. Toward the end of debate on the February 1866 draft, Representative Giles Hotchkiss of New York complained that the proposal, by merely authorizing Congress to secure national citizenship rights, left open the possibility that a future Congress might leave those rights unprotected.<sup>134</sup> Calling the draft "not sufficiently radical," Hotchkiss urged the use of self-executing language that would protect citizenship rights while expressing support for broad congressional enforcement power too.<sup>135</sup>

Furthermore, passage of the Ku Klux Klan Act of 1871, which criminalizes conspiracies to violate the Constitution or federal laws,<sup>136</sup> showed that a contemporary Congress understood the Fourteenth Amendment to grant broad federal power to protect national citizens, including the power to "ma[ke] conduct unlawful irrespective of the existence of state action."<sup>137</sup> In the debate on the Act, Representative Bingham, when asked about the difference between the February 1866 draft of the Fourteenth Amendment and its final

danger of a consolidated and despotic Government," CONG. GLOBE, 39th Cong., 1st Sess. 2964 (1866), voted in favor of the Amendment anyway, see Fox, *supra* note 21, at 509 n.321.

132. Representative Bingham, among others, had worried that the Thirteenth Amendment did not provide Congress with adequate authority to enact the Civil Rights Bill of 1866. See CONG. GLOBE, 39th Cong., 1st Sess. 1290-93 (1866) (statement of Rep. Bingham).
133. The Civil Rights Act was adopted over the President's veto by the necessary two-thirds majority in the Senate on April 6, 1866 and in the House on April 9, 1866. See *id.* at 1809, 1861.
134. See *id.* at 1095 (statement of Rep. Hotchkiss). Representative Hotchkiss addressed the right of national citizens to enjoy equal privileges at the hands of their respective states, see *id.*, while Representative Bingham and others understood national citizenship also to encompass privileges and immunities whose substance is federally defined, see *id.* at 1090, 1094 (statements of Rep. Bingham); *id.* at 1088 (statement of Rep. Woodbridge).
135. *Id.* at 1095 (statement of Rep. Hotchkiss) ("I desire that the very privileges for which the gentleman [Representative Bingham] is contending shall be secured to the citizens; but I want them secured by a constitutional amendment that legislation cannot override. Then if the gentleman wishes to go further, and provide by laws of Congress for the enforcement of these rights, I will go with him."); see Kaczorowski, *supra* note 70, at 914 (discussing Hotchkiss's views).
136. 42 U.S.C. § 1985(3) (2000).
137. Ruth Colker, *The Supreme Court's Historical Errors in City of Boerne v. Flores*, 43 B.C. L. REV. 783, 814 (2002); see *id.* at 812-17.

language, confirmed that the ratified language was not meant to reduce federal power but to “embrace[] all and more than did the February proposition.”<sup>138</sup>

In sum, the Citizenship Clause together with Section 5 gives Congress broad authority to legislate directly to secure substantive rights of national citizenship. “When Congress was authorized to enforce the provisions of the Amendment, it was authorized to enforce national citizenship and its privileges and immunities, to act as the national legislative body over the basic aspects of citizenship.”<sup>139</sup>

### 3. *Federal Enforcement as a Constitutional Duty*

If the Fourteenth Amendment empowers Congress to legislate directly to enforce the substantive guarantees of national citizenship, does it also *obligate* Congress to do so? On its face, the text says “Congress shall have power to enforce” and makes no mention of duty, and there is obviously a semantic difference between power and obligation. One could readily treat the exercise of Section 5 power as a matter of public policy without also treating it as a matter of constitutional duty. At the same time, the concepts of power and duty—and authority and responsibility—do not always travel separately. When it comes to Section 5, there is more than a whiff of duty implicit in the grant of congressional enforcement power. This claim draws support from the concept of law enforcement at the heart of Section 5, from institutional differences between Congress and the courts with respect to the enforcement task, and from the historical understanding of Section 5 as a font of both power and affirmative duty.

To begin with, Section 5 differs from other fonts of congressional power in that it does not merely name a substantive field of permissible regulation, such as interstate commerce, copyright, or naturalization. It is a peculiar type of legislative authorization—an authorization to *enforce law*, specifically the guarantees of Section 1. In other contexts, we recognize law enforcement as a form of authority that combines elements of discretion and duty. Police officers, for example, have wide discretion in law enforcement, but the discretion is coupled with a legal duty to do what is prudent and reasonable to

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138. CONG. GLOBE, 42d Cong., 1st Sess. app. at 83 (1871) (statement of Rep. Bingham); see Fox, *supra* note 21, at 510 (“Although Bingham’s 1871 speech, which is more detailed than his 1866 discussions of the changes in the Amendment, has the character of a post-hoc explanation, it is entirely consistent with his prior position.”).

139. Fox, *supra* note 21, at 511; accord Kaczorowski, *supra* note 70, at 915.

protect the public at large.<sup>140</sup> Federal courts, too, have discretion (more discretion than is commonly realized) in deciding whether to exercise law enforcement authority conferred by statutory or constitutional grants of jurisdiction.<sup>141</sup> But the discretion exists against a presumption that courts must exercise the jurisdiction they are given, as “[a]uthority to act necessarily implies a correlative responsibility.”<sup>142</sup> The same reasoning seems applicable to Congress’s enforcement authority under Section 5. Why would the Fourteenth Amendment guarantee national citizenship and its privileges and immunities, and then vest Congress with power to enforce the guarantee—yet imply no correlative duty of enforcement? The absence of duty would suggest implausibly that congressional enforcement of Section 1’s mandates is simply discretionary or optional to the constitutional scheme.<sup>143</sup>

One might argue that congressional enforcement is designed to serve only as a means of facilitating judicial enforcement and is thus nonessential or at

140. Although the “well established tradition of police discretion” means there is generally no individual right to law enforcement, *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796, 2805 (2005), the police nevertheless owe a legal duty of protection to the public at large, taking into account available “resources,” “competing duties,” and “the circumstances of [a] violation,” *id.* at 2806; *see Warren v. District of Columbia*, 444 A.2d 1, 8 (D.C. 1981) (stating that police owe a “duty . . . to the public at large” enforceable through formal and informal mechanisms of accountability).

141. *See* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 545-70 (1985) (discussing judicial discretion based on doctrines of equitable discretion, abstention, justiciability, forum non conveniens, and exhaustion, as well as considerations of judicial administration, substantiality of the federal question, and degree of federal concern). After canvassing the various doctrines of discretion, Professor Shapiro explains that “a grant of jurisdiction should normally be (and indeed generally has been) read as an authorization to the court to entertain an action but not as an inexorable command.” *Id.* at 574-75.

142. *Id.* at 575; *see Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (“[F]ederal courts have ‘a virtually unflagging obligation . . . to exercise the jurisdiction given them . . . .’” (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 821 (1976))); *Mondou v. N.Y., New Haven & Hartford R.R.*, 223 U.S. 1, 58 (1912) (“The existence of the jurisdiction creates an implication of duty to exercise it . . .”).

143. Professor Amar similarly infers an affirmative congressional duty to provide minimum economic entitlements for equal citizenship from the enforcement authority granted by Section 2 of the Thirteenth Amendment. Although minimum entitlements may not be judicially enforceable under Section 1, he argues, “I would like to stress the obligation—not only a moral obligation, but a legal, a constitutional obligation—of Congress, under section two of the Thirteenth Amendment. Congress has both a constitutional right and a constitutional duty to implement this vision.” Amar, *supra* note 21, at 42; *see also* BLACK, *supra* note 21, at 132 (arguing that Congress’s “power to seek and to support the general welfare generate[s] a resulting duty to do these very things” given that the purpose of government, according to the Declaration of Independence and the Constitution’s preamble, is to secure the pursuit of happiness and to promote the general welfare).

least secondary in securing the Fourteenth Amendment's guarantees.<sup>144</sup> But by assuming the primacy of judicial enforcement, the argument ignores the distinct institutional purposes, constraints, and capacities that the courts and Congress bring to the task of elaborating and enforcing constitutional norms.<sup>145</sup> These institutional differences provide further reason to infer that Fourteenth Amendment enforcement is a matter of legislative as well as judicial duty. Indeed, the obligatory character of the legislative role is underscored by the phenomenon of judicial underenforcement. Because Section 1 norms remain "legally valid to their full conceptual limits" when judicially underenforced, legislators have a "legal obligation" to "fashion their own conceptions of these norms and measure their conduct by reference to these conceptions."<sup>146</sup> Thus, the Supreme Court has acknowledged "both congressional resourcefulness and *congressional responsibility* for implementing the [Fourteenth] Amendment" to address more than what "the judicial branch [is] prepared to adjudge unconstitutional."<sup>147</sup>

Moreover, the dual character of Section 5 as a font of power and affirmative duty accords with historical understandings. Although the Framers revised Section 1 so that its basic commands would be self-executing and susceptible to judicial enforcement, "their primary faith was in Congress"<sup>148</sup>—an unsurprising choice given their distrust of the Supreme Court after *Dred Scott*. The clearest statement of this faith appears in a May 1866 speech by Senator Jacob Howard of Michigan introducing the Fourteenth Amendment as it emerged from the Joint Committee on Reconstruction. Describing Section 5, Senator Howard said:

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144. Justice Scalia, for example, would limit Section 5 power to legislation providing a cause of action in the lower federal courts to hear Fourteenth Amendment claims and to measures "directly related to the *facilitation* of 'enforcement'—for example, reporting requirements that would enable violations of the Fourteenth Amendment to be identified." *Tennessee v. Lane*, 541 U.S. 509, 559-60 (2004) (Scalia, J., dissenting). He would allow greater leeway for legislation to remedy racial discrimination "principally for reasons of *stare decisis*." *Id.* at 564.

145. See *supra* notes 36-37 and accompanying text.

146. Sager, *supra* note 27, at 1221, 1227.

147. *Katzenbach v. Morgan*, 384 U.S. 641, 648-49 (1966) (emphasis added). Of course, later cases beginning with *Boerne* have eroded this view.

148. Colker, *supra* note 137, at 817; see WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 122 (1988) ("[T]he framing generation anticipated that Congress rather than the courts would be the principal enforcer of section one."); Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 174-83 (1997).

It gives to Congress power to enforce by appropriate legislation all the provisions of this article of amendment. . . . It casts upon Congress the *responsibility* of seeing to it, for the future, that all the sections of the amendment are carried out in good faith . . . . I look upon this clause as indispensable for the reason that it thus imposes upon Congress this power and *this duty*.<sup>149</sup>

As the Supreme Court has observed, “This statement of § 5’s purpose was not questioned by anyone in the course of the debate.”<sup>150</sup>

This coupling of power and duty in the context of Section 5 has deep resonance in view of the Supreme Court’s use of the same language in characterizing Congress’s implied authority under the Fugitive Slave Clause. Recall that *Prigg* declared protection of the master’s right to the return of fugitive slaves to be within “the power *and duty* of the national government.”<sup>151</sup> Senator Howard’s statement suggests an equitable symmetry between the antebellum era of slavery and the postbellum era of freedom and equal citizenship. In both periods, “[t]he character of . . . substantive rights . . . determine[d] both the extent of national responsibility for the protection of the rights and the existence of national power to meet this responsibility.”<sup>152</sup> To hold otherwise would suggest that Congress’s duty to secure national citizenship has less constitutional stature than the earlier, well-established duty to protect slavery.

In sum, for conceptual, structural, and historical reasons, the Section 5 grant of enforcement power is properly read to imply a corresponding duty of Congress to enforce the guarantees of Section 1. Whatever role, if any, the courts might play in enforcing the guarantee of national citizenship, Congress

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149. CONG. GLOBE, 39th Cong., 1st Sess. 2768 (1866) (statement of Sen. Howard) (emphasis added).

150. *Katzenbach*, 384 U.S. at 649 n.8 (citing FLACK, *supra* note 73, at 138). The duty implicit in Congress’s Section 5 power was later acknowledged in debates on voting rights legislation. See CONG. GLOBE, 40th Cong., 3d Sess. 559 (1869) (statement of Rep. Boutwell) (“[B]y the fifth section of the fourteenth article, Congress has power to enforce by appropriate legislation the provisions of the article. Does anybody doubt—in the presence of this provision of the Constitution, in view of the unlimited power under the fourteenth article to legislate so as to secure to citizens of the United States the privileges and immunities of citizens of any one of the States—does anybody doubt our duty?”).

151. 41 U.S. (16 Pet.) 539, 616 (1842) (emphasis added); see Kaczorowski, *supra* note 126, at 159–204 (describing slavery enforcement measures enacted by Congress and upheld by the Court pursuant to Congress’s powers and duties under the Fugitive Slave Clause from the Founding to the Civil War).

152. Kinoy, *supra* note 70, at 394–95.

has an independent duty to interpret and enforce this substantive guarantee. In Part IV, I take a closer look at what this legislative duty requires. But let us first examine how Congress sought to implement this reading of the Fourteenth Amendment soon after ratification through initiatives that recognized educational opportunity as an entailment of national citizenship.

### III. EDUCATION AND NATIONAL CITIZENSHIP

Broadly speaking, constitutional scholars have used two interpretive strategies to determine what substantive rights inhere in national citizenship. Both may be understood as species of originalism, one narrower and the other broader. The first inquires what specific rights the Framers had in mind when they established national citizenship.<sup>153</sup> Under this approach, there is general agreement that citizenship rights include all the rights contained in the Civil Rights Act of 1866. Beyond that, there is evidence that the Framers sought to incorporate the Bill of Rights into the protections that United States citizens could invoke against state power.<sup>154</sup> In addition, some thought national citizenship entailed protection of “fundamental rights” inhering in the very concept of citizenship, as Justice Washington described them in *Corfield*.<sup>155</sup> Although proponents of this view believed that the rights of national citizenship “are not and cannot be fully defined in their entire extent and precise nature,”<sup>156</sup> education was not widely regarded as among them at the time.<sup>157</sup>

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153. For examples of scholarship taking this approach, see FLACK, *supra* note 73, at 84-85; Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 456-64 (2004); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992); and Timothy S. Bishop, Comment, *The Privileges or Immunities Clause of the Fourteenth Amendment: The Original Intent*, 79 NW. U. L. REV. 142 (1984).

154. See CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (1866) (statement of Sen. Howard); FLACK, *supra* note 73, at 94. *But see* RAOUL BERGER, GOVERNMENT BY JUDICIARY 20-36 (1977) (arguing that the privileges and immunities of citizenship include only the rights specified in the 1866 Act).

155. 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230); see CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard) (quoting *Corfield*); *id.* at 1757 (statement of Sen. Trumbull) (“To be a citizen of the United States carries with it some rights; and what are they? They are those inherent, fundamental rights which belong to free citizens or free men in all countries . . .”); see also Barnett, *supra* note 153, at 458-62 (arguing that the Framers understood the Privileges or Immunities Clause to protect inalienable natural rights inherent to citizenship).

156. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard). Justice Washington’s opinion in *Corfield* suggested the open-ended nature of citizenship rights by listing a few examples and then stating that “[t]hese, and many others which might be

Yet the shortcomings of this narrow inquiry in construing the Fourteenth Amendment have been well recognized at least since *Brown*,<sup>158</sup> giving rise to a more dynamic interpretive approach often associated with Alexander Bickel.<sup>159</sup> While acknowledging that the specific rights contemplated by the Framers were limited, Professor Bickel distinguished between “congressional understanding of the immediate effect of the enactment on conditions then present” and “what if any thought was given to the long-range effect, under future circumstances, of provisions necessarily intended for permanence.”<sup>160</sup> Although “no specific purpose going beyond the coverage of the Civil Rights Act is suggested” by the legislative history of the Fourteenth Amendment, according to Bickel, there was “rather an awareness on the part of these framers that it was a *constitution* they were writing, which led to a choice of language capable of growth.”<sup>161</sup> The Framers neither indulged radical theories of rights and equality that would have roused opposition, nor did they limit themselves

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mentioned, are, strictly speaking, privileges and immunities” of citizenship. 6 F. Cas. at 551-52 (emphasis added).

157. See *Ward v. Flood*, 48 Cal. 36, 49 (1874) (stating that public education “is not a privilege or immunity appertaining to a citizen of the United States as such”); *Marshall v. Donovan*, 73 Ky. (10 Bush) 681, 688 (1874) (same); see also Kaczorowski, *supra* note 70, at 926-28; McConnell, *supra* note 100, at 1036-40.
158. 347 U.S. 483, 489 (1954) (describing the Fourteenth Amendment’s history as “[a]t best . . . inconclusive” on the question of segregation). As Michael Klarman has observed:

When Chief Justice Warren declared in *Brown* that evidence of the framers’ views on school segregation was “inconclusive,” he was being considerably less than candid. Evidence regarding the original understanding of the Fourteenth Amendment is ambiguous as to a wide variety of issues, but not school segregation. Virtually nothing in the congressional debates suggests that the Fourteenth Amendment was intended to prohibit school segregation, while contemporaneous state practices render such an interpretation fanciful; twenty-four of the thirty-seven states then in the union either required or permitted racially segregated schools.

Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 252 (1991) (citations omitted); see Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 58 (1955); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 800 (1983). But see McConnell, *supra* note 100 (defending *Brown* in originalist terms on the ground that legislators who voted to ratify the Fourteenth Amendment expressed opposition to school segregation in the context of passing the Civil Rights Act of 1875).

159. See Bickel, *supra* note 158, at 59-65.
160. *Id.* at 59.
161. *Id.* at 63; cf. *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (“[W]e must never forget, that it is a *constitution* we are expounding.”); *id.* at 415 (describing the Constitution as “intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs”).

to a mere enumeration of the specific guarantees of the Civil Rights Act of 1866. Instead, they chose generic language “sufficiently elastic to permit reasonable future advances” through legislation and judicial interpretation.<sup>162</sup> As Charles Fairman has explained, invoking Justice Bradley’s dissenting vision in *Slaughter-House* of

those conditions to which one is entitled by virtue of being a citizen of the United States—the protection and dignity that are his due, the opportunities, associations and relationships that ought to be open to him. The conception is not static. As the nation experiences change—in its transportation, commerce and industry—in its political practices—in the way in which people live and work and move about—in the expectations they entertain about the quality of American life—surely the privilege of membership in this national community must broaden to include what has become essential under prevailing circumstances.<sup>163</sup>

The open-textured quality of the Fourteenth Amendment renders the guarantee of citizenship susceptible to expansion if “a later generation should have a larger conception of what it means to belong to America, to be a citizen.”<sup>164</sup>

In this Part, I examine some of the first steps that the Reconstruction Congress took along the interpretive path described by Professor Bickel. 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. A broad coalition of legislators carefully studied and nearly enacted a series of proposals designed to benefit whites and blacks in the North and South, promising federal aid or

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162. Bickel, *supra* note 158, at 61; see JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 28 (1980) (“[T]he most plausible interpretation of the Privileges or Immunities Clause is, as it must be, the one suggested by its language—that it was a delegation to future constitutional decision-makers to protect certain rights that the document neither lists, at least not exhaustively, nor even in any specific way gives directions for finding.”).

163. 6 CHARLES FAIRMAN, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864-88 PART ONE* 1388 (1971).

164. KARST, *supra* note 45, at 54; see Kaczorowski, *supra* note 70, at 926 (“The Republicans’ understanding of the fourteenth amendment and the Civil Rights Act thus encompassed a developmental conception of these civil rights provisions. The conception permitted the future inclusion of rights within [its] protective guarantees that the framers might not have intended to protect in 1866.”).



intervention where state efforts were inadequate. These were the earliest proposals for the kind of federal role in public education we have today.<sup>165</sup>

The proposals were not free of controversy; indeed, they ultimately did not pass. In discussing them, my 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 constitutional perspective urged by legislators as an alternative to the judicially elaborated constitutional order of *Slaughter-House* and the *Civil Rights Cases*.<sup>166</sup> The education proposals, crafted during an era of constitutional transition and possibility, illuminate understandings of federal responsibility now lost among the “forgotten alternatives” of Reconstruction.<sup>167</sup> At that time, the grant of national citizenship, like other clauses of the Fourteenth Amendment, was an open-ended mandate, couched in generic terms with no specific entailments. The education bills show how Congress sought to particularize and enforce its substantive guarantees. By studying these early interpretations, we recover a piece of the social citizenship tradition and enlarge our vision of what the Fourteenth Amendment might mean today.

I begin with a brief discussion of the Freedmen’s Bureau and the creation of a Federal Department of Education. I then focus on three education aid bills—the first sponsored by Representative George Frisbie Hoar of Massachusetts in 1870, the second by Representative Legrand Perce of Mississippi in 1872, and the third by Senator Henry William Blair of New Hampshire in the mid-1880s. I conclude this Part by discussing the relevance of these proposals to the current imperative of educational adequacy for equal citizenship. The

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165. These Reconstruction-era proposals were quite different from the Northwest Ordinances of 1785 and 1787, which reserved sections of public lands for the support of common schools. Although these ordinances are often included in the legacy of federal involvement in public education, their primary purpose was to encourage westward settlement and to raise revenue through land sales after the Revolutionary War. Their “effect . . . on common schooling was almost nil,” owing to “speculation, mismanagement, and fraud” in the use of school funds derived from land sales. Carl F. Kaestle & Marshall S. Smith, *The Federal Role in Elementary and Secondary Education, 1940-1980*, 52 HARV. EDUC. REV. 384, 387-88 (1982). The Morrill Act of 1862, which provided land-based federal aid for agricultural and engineering colleges, was closer to the type of federal role contemplated during Reconstruction, although it did not address elementary or secondary education. See Morrill Act of 1862, ch. 130, 12 Stat. 503 (codified at 7 U.S.C. §§ 301-308 (2000)).

166. See Forbath, *supra* note 17, at 5 (noting that the social citizenship tradition before the New Deal “was chiefly an oppositionist tradition” expounded outside the courts); *id.* at 23-61.

167. C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 31 (4th ed. 2002); see Daniel W. Crofts, *The Black Response to the Blair Education Bill*, 37 J. S. HIST. 41, 44 (1971) (observing that the early federal education bills emerged “when some compromise between federal authority and state prerogative remained a practical possibility”).

postbellum generation spoke of education for citizenship primarily in civic republican terms because voting and self-governance, not economic well-being, were the primary spheres in which education was thought necessary for social equality. Today, the relationship between education and equal citizenship turns on the indispensability of education not only for civic participation but also for a decent livelihood.

*A. 1866-1870: The Freedmen's Bureau and the Department of Education*

Standard accounts of the federal role in education during Reconstruction focus on the Freedmen's Bureau.<sup>168</sup> From 1866 to 1870, under the leadership of General Oliver Otis Howard, the Bureau spent over two-thirds of its funds and leveraged the resources of private charities to educate approximately 100,000 students each year.<sup>169</sup> These efforts were substantial and had lasting significance, especially in higher education.<sup>170</sup>

Yet the Bureau's activities were driven less by a general theory of welfare provision for effective citizenship than by a specific interest in providing just compensation for slavery. While proposing to enable "all loyal refugees and freedmen . . . to become self-supporting citizens of the United States,"<sup>171</sup> the Freedmen's Bureau Act of 1866 limited educational programs to newly freed blacks,<sup>172</sup> and the Bureau in fact served very few white children.<sup>173</sup> During debate over the Act, opponents criticized its racial exclusivity, invoking the

168. For a short and lucid history of the Freedmen's Bureau, see Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754-83 (1985).

169. See *id.* at 780, 781 & n.146 (citing annual reports of the Commissioner of the Freedmen's Bureau for the years 1866 to 1870). The Bureau began under the authority of an 1865 law signed by President Lincoln. See Act of Mar. 3, 1865, ch. 90, 13 Stat. 507. The 1866 Freedmen's Bureau bill, which Congress passed over President Johnson's veto, extended the Bureau's operations until July of 1868. See Act of July 16, 1866, ch. 200, 14 Stat. 173. In July of 1868, Congress again extended the Bureau's activities but terminated its authority to collect funds from rental of abandoned lands, which had been its primary source of income. See Act of July 25, 1868, ch. 245, 15 Stat. 193; Act of July 6, 1868, ch. 135, 15 Stat. 83. The Bureau became insolvent in 1870 and finally closed in 1872.

170. The Bureau "provided funds, land, and other assistance to help establish more than a dozen colleges and universities for the education of black students," including half a million dollars to help build Howard University. Schnapper, *supra* note 168, at 781-82.

171. Act of July 16, 1866, ch. 200, § 2, 14 Stat. 173, 174.

172. See *id.* §§ 12-13, 14 Stat. 173, 176.

173. See Schnapper, *supra* note 168, at 781 & n.147 (observing that white children constituted less than 1% of enrollment in Bureau-operated schools, according to Bureau reports).

plight of poor and equally needy whites.<sup>174</sup> In response, its supporters “stressed the special needs of blacks,”<sup>175</sup> making clear that “[f]rom the beginning to the present time [blacks] have been robbed of their wages, to say nothing of the scourgings they have received”<sup>176</sup> and that “[w]e owe something to these freedmen.”<sup>177</sup> Proponents saw the bill as a necessary remedy authorized by Section 2 of the Thirteenth Amendment, lest the freedmen “be taken and reduced into slavery again.”<sup>178</sup>

When the Bureau ran out of money in 1870, it left an ambiguous legacy in the development of federal responsibility for education. As historian Gordon Lee has observed, the Bureau’s “basic reliance upon private and local support of educational effort” and its concern with only “one segment of the population suggest the question as to whether or not it should rightly be considered a measure of federal aid in the sense that the term has come to imply.”<sup>179</sup> For some, the Bureau’s work was “the beginning of recognition of federal responsibility,” while for others, it was “a military measure devoid of any status as precedent.”<sup>180</sup>

Although the work of the Freedmen’s Bureau is well known, a separate yet concurrent initiative—the creation of a Federal Department of Education in 1867—was “[c]onsiderably more important, in terms of both its influence on long-range educational developments and its effect upon immediate post-Civil War thinking.”<sup>181</sup> Most significantly, the Department helped stimulate

174. *See id.* at 765-67 (quoting statements by members of Congress opposed to the 1866 legislation).

175. *Id.* at 767.

176. CONG. GLOBE, 39th Cong., 1st Sess. 630 (1866) (statement of Rep. Hubbard).

177. *Id.* at 2779 (statement of Rep. Eliot); *see id.* at 365 (statement of Sen. Fessenden) (“[T]he Constitution has now been changed so that slavery no longer exists in this country. A large body of men, women, and children, millions in number, who had received no education, who had been laboring from generation to generation for their white owners and masters, able to own nothing, to accomplish nothing, are thrown, without protection, without aid, upon the charities of the world . . .”); *id.* at 939 (statement of Sen. Trumbull) (“[N]ever before in the history of this Government have nearly four million people been emancipated from the most abject and degrading slavery ever imposed upon human beings; never before has the occasion arisen when it was necessary to provide for such large numbers of people thrown upon the bounty of the Government, unprotected and unprovided for.”).

178. *Id.* at 939 (statement of Sen. Trumbull); *see id.* at 366 (statement of Sen. Fessenden) (invoking the Thirteenth Amendment); *id.* at 631 (statement of Rep. Moulton) (same).

179. GORDON CANFIELD LEE, THE STRUGGLE FOR FEDERAL AID, FIRST PHASE: A HISTORY OF THE ATTEMPTS TO OBTAIN FEDERAL AID FOR THE COMMON SCHOOLS, 1870-1890, at 21 (1949).

180. *Id.*

181. *Id.*; *see* Act of Mar. 2, 1867, ch. 158, 14 Stat. 434.

recognition of education as a national concern beyond the moral duty owed to the new freedmen. In Congress, the committee that drafted the authorizing bill was charged to conceive a department “whose duty it shall be to enforce education, without regard to race or color, upon the population of all such States as shall fall below a standard to be established by Congress.”<sup>182</sup> As it turned out, Congress limited the Department’s functions to collecting data and reporting on the condition of education throughout the country, and even this modest role elicited complaints about federal overreaching.<sup>183</sup> Nevertheless, its proponents stressed the national interest in “universal education” for whites and blacks<sup>184</sup> and the need for “a controlling head by which the various conflicting systems in the different States can be harmonized, by which there can be uniformity.”<sup>185</sup> The Department reflected an emerging concept of federal responsibility rooted in the idea that

every child of this land is, by natural right, entitled to an education at the hands of somebody, and . . . this ought not to be left to the caprice of individuals or of States so far as we have any power to regulate it. At least, every child in the land should receive a sufficient education to

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182. CONG. GLOBE, 39th Cong., 1st Sess. 60 (1865) (resolution introduced by Rep. Donnelly).
183. See CONG. GLOBE, 39th Cong., 2d Sess. 1843 (1867) (statement of Sen. Davis) (arguing that educational matters “belong peculiarly to the States, and were intended to be left exclusively to State management”); see *id.* at 1893 (statement of Sen. Hendricks) (same); CONG. GLOBE, 39th Cong., 1st Sess. 2968 (1866) (statement of Rep. Rogers) (urging that “towns, cities, and States” be allowed to “carry out and regulate the system of education without interference, directly or indirectly, . . . [by] the Federal Government”); *id.* at 3047 (statement of Rep. Pike) (“[H]ere we have . . . a scheme of governmental control of all the common schools.”). However, the idea of creating the Department was not “thrust upon this House without anybody desiring its passage,” but instead arose from the recommendation of “men who inaugurated the existing systems of education in their own States, and are at the head of those systems at the present time.” CONG. GLOBE, 39th Cong., 1st Sess. 3044 (1866) (statement of Rep. Moulton) (observing that the education chiefs of Illinois, Ohio, and Vermont, among others, supported the Department).
184. CONG. GLOBE, 39th Cong., 1st Sess. 3044 (1866) (statement of Rep. Moulton); see *id.* at 2967 (statement of Rep. Donnelly); *id.* at 3049 (statement of Rep. Garfield).
185. *Id.* at 3044 (statement of Rep. Moulton); see CONG. GLOBE, 39th Cong., 2d Sess. 1843-44 (1867) (statement of Sen. Yates) (“[W]e are a nation, not States merely . . . [W]e need a center for our educational system . . .”); *id.* at 1893 (statement of Sen. Stewart) (“The object of this bill is . . . to collect information as to the very good systems of the States, and lay it before the whole country, so as to enable the States that have not perfected their systems . . . to know what is being done in other parts of the country.”).

qualify him to discharge all the duties that may devolve upon him as an American citizen.<sup>186</sup>

In today's parlance, we might describe this as a call for a national standard of educational adequacy based on national citizenship. Within weeks of the Department's creation, the House of Representatives established its first standing committee on education, and two years later the Senate followed suit.<sup>187</sup> Moreover, as we will see, the data collection and analysis performed by the Department substantially informed early debates on federal education policy.

In its early years, the Department had limited capacity and was soon demoted to an "Office of Education" or "Bureau of Education" within the Department of the Interior.<sup>188</sup> But the larger ambitions behind the initiative did not fade. In 1870, President Grant appointed John Eaton, a brigadier general who had received thousands of black soldiers into the Union army, to head the Office of Education. In that capacity, Eaton pressed for an expanded federal role, echoing the sentiments of many state and local education leaders.<sup>189</sup> President Grant himself, in an unusual message to Congress on March 30, 1870, proclaiming the ratification of the Fifteenth Amendment, focused on the educational needs of newly enfranchised citizens and affirmed the Framers' belief that "a republican government could not endure without intelligence and education generally diffused among the people."<sup>190</sup> He concluded his message

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186. CONG. GLOBE, 39th Cong., 1st Sess. 3045 (1866) (statement of Rep. Moulton).

187. See THOMAS A. LINDSLEY, HISTORY OF THE COMMITTEE ON LABOR AND HUMAN RESOURCES, 1869-1979, S. DOC. No. 96-71 (1980); U.S. House of Representatives Comm. on Educ. & the Workforce, History of the Committee on Education and the Workforce and the Members Who Have Served as Chairman, [http://www.house.gov/ed\\_workforce/committee/history.htm](http://www.house.gov/ed_workforce/committee/history.htm) (last visited Oct. 13, 2006).

188. See CONG. GLOBE, 40th Cong., 2d Sess. app. at 521 (1868).

189. See LEE, *supra* note 179, at 37-38 (discussing Eaton); WARD M. MCAFEE, RELIGION, RACE, AND RECONSTRUCTION: THE PUBLIC SCHOOL IN THE POLITICS OF THE 1870S, at 105-06 (1998). According to Professor Lee, by 1870 support for "more nation-wide uniformity and standardization of educational activity" as well as for "equalizing the educational funds of the states" had come from the National Association of School Superintendents, the incipient National Education Association, and the *American Educational Monthly*, which was "the official organ of certain state teachers' associations and the most widely circulated periodical of its class at the time." LEE, *supra* note 179, at 24, 31, 41.

190. U.S. Grant, Message to the Senate and House of Representatives (Mar. 30, 1870), in 9 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 4009, 4010 (New York, Bureau of Nat'l Literature 1897) [hereinafter PAPERS OF THE PRESIDENTS], available at <http://www.heinonline.org/HOL/Index?index=presidents/ocmpp>. President Grant quoted the famous words of President Washington's Farewell Address: "Promote, then, as a matter

by “call[ing] upon Congress to take all the means within their constitutional powers to promote and encourage popular education throughout the country.”<sup>191</sup>

*B. 1870-1871: The Hoar Bill To Establish a National System of Education*

One month earlier, Representative George Hoar of Massachusetts had introduced the first major proposal for federal supervision of public education,<sup>192</sup> and he reported it out of the House Committee on Education and Labor on the same day as President Grant’s proclamation.<sup>193</sup> A graduate of Harvard Law School and a staunch opponent of slavery, Hoar cut his political teeth in the Free Soil movement and was elected to Congress in 1868 as a “self-acknowledged disciple of [Charles] Sumner.”<sup>194</sup> In his autobiography, he wrote that the debate over the Department of Education in his first term “led [him] to give special study to the matter of National education” and shaped his belief that “[a] complete system of education at the National charge was an essential element of . . . reconstruction policy.”<sup>195</sup> Titling his 1870 proposal “A bill to establish a system of national education,” Hoar observed that the legislation “for the first time sought to compel by national authority the establishment of a thorough and efficient system of public instruction throughout the whole country.”<sup>196</sup>

Under the bill, each state would be required to “provide for all the children within its borders, between the ages of six and eighteen years, suitable instruction in reading, writing, orthography, arithmetic, geography, and the history of the United States.”<sup>197</sup> The President of the United States was

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of primary importance, institutions for the general diffusion of knowledge. In proportion as the structure of a government gives force to public opinion, it is essential that public opinion should be enlightened.” *Id.* (quoting George Washington, Farewell Address (Sept. 17, 1796), in 1 PAPERS OF THE PRESIDENTS, *supra*, at 205, 212).

191. *Id.*

192. H.R. 1326, 41st Cong. (2d Sess. 1870).

193. See CONG. GLOBE, 41st Cong., 2d Sess. 2294 (1870). The thrust and language of President Grant’s proclamation appear to have been influenced by a letter that Hoar sent to Grant on March 29, 1870. See RICHARD E. WELCH, JR., GEORGE FRISBIE HOAR AND THE HALF-BREED REPUBLICANS 23 (1971) (quoting Hoar’s letter).

194. WELCH, *supra* note 193, at 21.

195. 1 GEORGE F. HOAR, AUTOBIOGRAPHY OF SEVENTY YEARS 256, 265 (1903).

196. CONG. GLOBE, 41st Cong., 2d Sess. app. at 478 (1870) (statement of Rep. Hoar); see H.R. 1326, 41st Cong. (2d Sess. 1870).

197. H.R. 1326, 41st Cong. § 19 (3d Sess. 1871) (amended bill) (emphasis omitted).

authorized to determine whether a given state had established “a system of common schools which provides reasonably for all the children therein.”<sup>198</sup> In states deemed unsatisfactory by the President, the bill proposed “national schools” run by the Commissioner of Education and several federally appointed administrators below him.<sup>199</sup> The schools, to be built on land secured through eminent domain, were to provide at least six months of education each year.<sup>200</sup> The bill gave the Commissioner wide authority to select schoolbooks and prescribe school regulations.<sup>201</sup> National schools were to be financed with a federal tax of fifty cents per person, with the revenue allocated to each state based on population.<sup>202</sup>

The bill’s heavy-handed approach prompted an array of objections.<sup>203</sup> Critics seized on the absence of standards by which the President would adjudge a state school system to be satisfactory.<sup>204</sup> The cadre of federal school officials contemplated by the bill was assailed as a “system of functionaryism”<sup>205</sup> involving “reckless expenditure”<sup>206</sup> and “patronage.”<sup>207</sup> Opponents also criticized the eminent domain provision as an invitation to abuse<sup>208</sup> and the federal authority to select schoolbooks as a means by which “[t]he very fountains of knowledge might be poisoned.”<sup>209</sup> Moreover, a recurring theme of the bill’s detractors was “the utter want of power in

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198. *Id.*

199. *Id.* §§ 1-3.

200. *Id.* §§ 4-5.

201. *Id.* §§ 6, 13.

202. *Id.* § 15 (as amended by Rep. Hoar).

203. For key speeches against the bill, see CONG. GLOBE, 41st Cong., 3d Sess. app. at 240-42 (1871) (statement of Rep. Dockery); *id.* at 1378-79 (statement of Rep. Booker); *id.* at 1374 (statement of Rep. Rogers); *id.* at 1370-72 (statement of Rep. Kerr); *id.* app. at 94-99 (statement of Rep. McNeely); and *id.* app. at 77-81 (statement of Rep. Bird).

204. *See id.* app. at 97 (statement of Rep. McNeely) (noting the lack of clarity on whether the President would evaluate state school systems based on state laws or on the actual condition of schools); *id.* app. at 78 (statement of Rep. Bird) (“Beware of politics in your schools.”).

205. *Id.* app. at 78 (statement of Rep. Bird).

206. *Id.* at 1372 (statement of Rep. Kerr).

207. *Id.* app. at 95 (statement of Rep. McNeely); *see id.* app. at 241 (statement of Rep. Dockery).

208. *See id.* at 1374 (statement of Rep. Rogers); *id.* at 1372 (statement of Rep. Kerr); *id.* app. at 79 (statement of Rep. Bird).

209. *Id.* at 1372 (statement of Rep. Kerr); *see id.* at 1374 (statement of Rep. Rogers). Opponents of the bill also condemned the tax to finance the schools as “oppressive in the extreme.” *Id.* app. at 241 (statement of Rep. Dockery); *see id.* at 1372 (statement of Rep. Kerr).

Congress to enforce the provisions of this bill.”<sup>210</sup> Nothing in the Constitution, they argued, authorized “Federal interference in the educational affairs of the States.”<sup>211</sup>

From a policy perspective, there is no doubt that the bill proposed an overbearing and unworkable approach. The enormous bureaucracy it authorized and the unfettered discretion it gave to the President and other federal officials were easy targets for criticism. Hoar himself, writing in 1872, said that he did not introduce the bill “with any confident expectation that it would get through Congress.”<sup>212</sup> Nevertheless, his proposal drew attention to the problem of education and also garnered many defenders.<sup>213</sup> Most importantly, for our purposes, it brought into focus the constitutional understandings that Hoar and his supporters believed to be the source of Congress’s power and duty to make education universally available. Their principal arguments did not sound in general welfare; they sounded in citizenship.

On June 6, 1870, Hoar gave his most extensive speech in support of the bill.<sup>214</sup> In discussing the constitutional authority for a substantial federal role in education, Hoar looked to the new guarantee of citizenship in the postbellum order and its nationalizing influence:

The Constitution, as now completed, provides that every person born or naturalized in the United States shall be a citizen thereof, and that the right of any citizen to vote shall not be abridged by reason of race, color, or previous servitude. By the system thus established all national questions are to be decided in the last resort by the opinion of the majority of the voters. . . . The vote of the humblest black man in Arkansas affects the value of the iron furnace in Pennsylvania, the wheat farm in Iowa, or the factory in Maine as much as does the vote of its owner.<sup>215</sup>

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210. *Id.* app. at 80 (statement of Rep. Bird).

211. *Id.* app. at 94 (statement of Rep. McNeely).

212. LEE, *supra* note 179, at 53 (quoting George F. Hoar, *Education in Congress*, OLD & NEW, May 1872, at 600).

213. For key speeches in support of the bill, other than Hoar’s, see CONG. GLOBE, 41st Cong., 3d Sess. app. at 189 (1871) (statement of Rep. Prosser); *id.* at 1375 (statement of Rep. Townsend); *id.* at 1243 (statement of Rep. Lawrence); *id.* at 1072 (statement of Rep. Clark); and *id.* at 100 (statement of Rep. Arnell).

214. See CONG. GLOBE, 41st Cong., 2d Sess. app. at 478 (1870) (statement of Rep. Hoar).

215. *Id.* app. at 479. This passage refers to the Fifteenth Amendment, an elaboration of national citizenship rights. U.S. CONST. amend. XV, § 1 (“The right of citizens of the United States



With this backdrop, Hoar asserted his central claim: “Now, if to every man in every State is secured by national authority his equal share in the Government surely there is implied the corresponding power and duty of securing the capacity for the exercise of that share in the Government.”<sup>216</sup> The following year, Hoar reiterated that “[t]he Constitution not only establishes a national Government, but since the [Fourteenth and Fifteenth Amendments] have been added to that instrument it establishes a Government which it declares shall be administered by the intelligent voice of every citizen within its borders.”<sup>217</sup> The “clear and direct” implication, according to Hoar, is that “if the Government cannot be administered in a constitutional way, to wit, by the intelligent voice of the people, unless that people is educated,” then “of direct logical necessity it becomes the constitutional duty of Congress to secure [public education].”<sup>218</sup> Importantly, the bill’s supporters made clear that the scope of constitutional concern went beyond the new freedmen. Among the 3.5 million people who could not read or write, blacks and whites comprised almost equal shares,<sup>219</sup> and among school-aged children who did not attend school in 1860, there were more than twice as many whites as blacks.<sup>220</sup> Unlike the racially targeted approach of the Freedmen’s Bureau, Hoar’s proposal sought to provide education for both whites and blacks. For either race, the principle was the same. Just as educational deprivation threatened to defeat the newly won citizenship of freedmen, there was “a terrible amount of illiteracy among the whites, especially in the southern States, whereby such are rendered unfit for the proper discharge of their political duties and are ignorant of their political

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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.”).

216. CONG. GLOBE, 41st Cong., 2d Sess. app. at 479 (1870) (statement of Rep. Hoar).

217. CONG. GLOBE, 41st Cong., 3d Sess. 1040 (1871) (statement of Rep. Hoar).

218. *Id.*; see also *id.* at 1041. With similar arguments, supporters of the bill also invoked the Guarantee Clause of Article IV, Section 4 as a source of congressional duty to secure public education. U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government . . . .”); see CONG. GLOBE, 41st Cong., 3d Sess. 808-09 (1871) (statement of Rep. Lawrence); *id.* at 1234-44; *id.* at 1377 (statement of Rep. Townsend).

219. See CONG. GLOBE, 41st Cong., 2d Sess. app. at 479 (1870) (statement of Rep. Hoar) (estimating that 1,777,779 whites and 1,734,551 blacks were illiterate in 1870 based on Bureau of Education data).

220. See CONG. GLOBE, 41st Cong., 3d Sess. 1377 (1871) (statement of Rep. Townsend) (citing Bureau of Education statistics showing that 3,821,972 white children and 1,707,800 black children were not attending school in 1860, and that the sum of these figures (5,529,772) was roughly equal to the total number of children who did attend school (5,680,356)).

rights.”<sup>221</sup> Noting the “last of the three great amendments” recently adopted, Hoar concluded his June 1870 speech by urging, “let us, in extending the charter of freedom over a new race, reaffirm that declaration with wider and more beneficent scope” by extending education “to every citizen in every State and in every locality.”<sup>222</sup>

Like the Freedmen’s Bureau, however, Hoar’s proposal in practice would have targeted the South, where none of the states had a well-developed school system in 1870.<sup>223</sup> In this respect, the Hoar bill was an essential step toward completing the work of Reconstruction but did not envision a truly *national* federal role in public education. Nevertheless, states’ rights objections to the bill pushed its proponents to articulate a notion of federal responsibility that could be applied beyond the South. Hoar’s basic belief was that illiteracy in the South was not merely a Southern problem but a national problem. His argument for federal responsibility, according to one commentator, called on Americans not to “slink back into their state boundaries and define themselves again as citizens of Massachusetts, Ohio, or Illinois,” but to “claim their common nationality and fully and finally become Americans, one people, indivisible.”<sup>224</sup> In response to a legislator opposed to federal interference “with educational matters belonging properly to the jurisdiction of the States,”<sup>225</sup> a supporter of the bill explained that “[m]y colleague, in his zeal for State rights, forgets that the citizens of a State are citizens of the nation as well [and] that the nation’s claims upon them are paramount to those of a State.”<sup>226</sup> If the nation “can call on [its citizens] to sit on its juries, to exercise offices of trust

221. *Id.*

222. CONG. GLOBE, 41st Cong., 2d Sess. app. at 486 (1870) (statement of Rep. Hoar).

223. See CONG. GLOBE, 41st Cong., 3d Sess. 1039-40 (1871) (statement of Rep. Hoar); *id.* app. at 101 (statement of Rep. Arnell) (stating that the Hoar bill “might well be entitled ‘A bill for the better reconstruction of the South’”). This sectional focus prompted cries of hypocrisy from Southern legislators who pointed to the North’s own educational failures. See *id.* app. at 96-97 (statement of Rep. McNeely) (observing that the use of child labor in Massachusetts impeded many school-aged children from obtaining an education). Some legislators also complained that Hoar gave Southern states too little credit for the educational efforts they were making. Representative Rogers of Tennessee reported that his state, though poor, “felt the need of education” and hence levied a fifty-cent “tax on dogs, exempting one for each family, to carry forward their school system.” *Id.* at 1375 (statement of Rep. Rogers); see *id.* at 1379 (statement of Rep. Booker) (reporting Virginia’s educational progress and declaring “our people are alive to the importance of education”). Hoar’s bill was supported by some Southern legislators, including Representative Clark of Texas and Representatives Arnell and Prosser of Tennessee. See *supra* note 213.

224. MCAFEE, *supra* note 189, at 107 (footnote omitted).

225. CONG. GLOBE, 41st Cong., 3d Sess. 1377 (1871) (statement of Rep. McNeely).

226. *Id.* at 1377 (statement of Rep. Townsend).

and profit, to become law-makers, and assist in discharging all governmental duties,” then “does it not impose on itself the obligation to qualify them for the work they may have to do?”<sup>227</sup>

In the end, Hoar put the point this way:

Among the fundamental civil rights of the citizen is, by logical necessity, included the right to receive a full, free, ample education from the Government, in the administration of which it is his right and his duty to take an intelligent part. We neglect our plain duty so long as we fail to secure such provision.<sup>228</sup>

Hoar summed up the federal role in a simple formula: “What, then, is the function of the national Legislature? It is twofold. It is to compel to be done what the States will not do, and to do for them what they cannot do.”<sup>229</sup> The duty of Congress was to secure adequate educational opportunity when states failed to do so “either through indifference, hostility to education, or pecuniary inability.”<sup>230</sup> As discussed below, this concept of national responsibility animated subsequent efforts to extend the federal role in education not only to the South but to the entire country.

### C. 1872: *The Perce Bill To Apply Public Land Proceeds to Education*

The Hoar bill died in 1871 without reaching a vote in the House. Apart from complaints of patronage, bureaucracy, and interference with states’ rights, an additional factor leading to its demise was the Senate’s contemporaneous consideration of a proposal by Senator Sumner to compel racial integration in the public schools of the District of Columbia.<sup>231</sup> Members of both parties opposed the idea, and resistance was not confined to the South.<sup>232</sup> Although the Hoar bill did not address mixed schooling, the fear that

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227. *Id.*

228. CONG. GLOBE, 42d Cong., 1st Sess. 335 (1871) (statement of Rep. Hoar). This remark came during consideration of the Ku Klux Klan Act of 1871, which authorized military force to protect blacks in their civil rights. While believing the Act to be a “necessary measure of relief,” Hoar took the occasion to emphasize that the only “permanent remedy for the evils at the South” was “general education.” *Id.*

229. CONG. GLOBE, 41st Cong., 2d Sess. app. at 485 (1870) (statement of Rep. Hoar).

230. CONG. GLOBE, 41st Cong., 3d Sess. 1377 (1871) (statement of Rep. Townsend).

231. *See id.* at 1055 (statement of Sen. Sumner).

232. *See* MCAFEE, *supra* note 189, at 111 (“Mixed schools were the logical extension both of the common school idea and the Republican civil rights movement. But the overwhelming

“[r]ules adopted for Washington, D.C., could later be grafted onto a national school system” could not have been far from legislators’ minds.<sup>233</sup>

Despite its failure to advance in Congress, the Hoar bill’s underlying notion of federal responsibility quickly took other forms. On January 15, 1872, Representative Legrand Perce, a Mississippi Republican who was then chairman of the House Education and Labor Committee, introduced a new proposal for federal education aid, this time avoiding any suggestion of national schools run by federal authorities.<sup>234</sup> The bill sought to apply the proceeds of public lands to education by dedicating half the annual revenue from land sales to a perpetual “national educational fund” and by allocating the other half, plus interest from the fund, on the basis of population to each state that provided free education to all children between the ages of six and sixteen.<sup>235</sup> The bill allowed states to spend 10% of the funds on teacher education and required the rest to be spent on teacher salaries.<sup>236</sup> Moreover, in response to continuing opposition to racially mixed schools,<sup>237</sup> the bill was amended to make clear that no state would lose funding “for the reason that the laws thereof provide for separate schools for white children and black children, or refuse to organize a system of mixed schools.”<sup>238</sup>

The Perce bill was an early version of federal aid through conditional grants. Although it was a clear improvement from the Hoar bill, its detractors characterized it as a “craftily and cunningly-devised” copy of the Hoar bill—“the old cat disguised in the mealbag”—that threatened “to take charge of the public-school system of the country.”<sup>239</sup> Opponents renewed the claim that “there is no authority in the Constitution to establish a general national system

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majority of whites at that time refused to consider sending their children to schools with significant numbers of black children.”).

233. *Id.* at 110.

234. See H.R. 1043, 42d Cong. (2d Sess. 1872); CONG. GLOBE, 42d Cong., 2d Sess. 862-63 (1872) (statement of Rep. Perce) (“[T]he question of the establishment of a national system is not in issue. We propose to aid and assist the educational systems adopted by the several States.”).

235. H.R. 1043 §§ 3-5.

236. See *id.* § 6.

237. See CONG. GLOBE, 42d Cong., 2d Sess. 569 (1872) (statement of Rep. Storm) (“[T]his bill is a Trojan horse. In its interior are concealed the lurking foe—mixed schools.”); *id.* at 791 (statement of Rep. Kerr) (worrying that Congress would require states, as a funding condition, to establish “mongrel schools, forced association, and resulting demoralization to my own race”).

238. *Id.* at 882 (statement of Rep. Kerr).

239. *Id.* at 569 (statement of Rep. Storm).

of education”<sup>240</sup> and accused the bill of trying “to do indirectly what we are not allowed to do directly.”<sup>241</sup>

In response, proponents of the bill invoked Article IV’s grant of congressional power “to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”<sup>242</sup> Perce himself looked to the Spending Clause of Article I as well as the Guarantee Clause of Article IV, offering arguments similar to Hoar’s thesis on federal responsibility for securing national citizenship.<sup>243</sup> But to the extent that the Guarantee Clause implied the necessity of education for state, not national, citizenship, it did not fully capture the constitutional import of Perce’s own proposal. Unlike the Hoar bill, the Perce bill had genuinely national scope. In addition to addressing the needs of whites and blacks,<sup>244</sup> the bill extended the federal role to the North as well as the South on the ground that insufficient education was “a national calamity, and not necessarily sectional.”<sup>245</sup> Moreover, Perce’s proposal sought to apply a common educational standard throughout the Union. Although the original bill allocated funds based on population, the

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240. *Id.* app. at 19 (statement of Rep. Herndon).

241. *Id.* at 569 (statement of Rep. Storm); *see id.* at 788 (statement of Rep. McHenry) (“This bill gives the proceeds of the sale of the lands to the States for school purposes, but reserves to the General Government a superintendence, through its officials, over the expenditure of the money. . . . Congress cannot thus go into the States and control their internal affairs.”); *id.* at 791 (statement of Rep. Kerr) (“[T]he logical effect of [the bill] will unquestionably be to transfer the ultimate control of education in the country to Federal tribunals.”); *id.* at 793 (statement of Rep. Parker) (“The bill permits Congress to take possession of the State governments.”).

242. U.S. CONST. art. IV, § 3, cl. 2; *see* CONG. GLOBE, 42d Cong., 2d Sess. 594 (1872) (statement of Rep. Burchard) (“The power to dispose of the public lands by the Congress of the United States, I do not suppose will be questioned by any one . . .”).

243. *See* CONG. GLOBE, 42d Cong., 2d Sess. 862 (1872) (statement of Rep. Perce) (“A republican Government, based upon the will of the people, . . . presupposes an amount of intelligence in the citizen necessary to grasp the various questions presented to him for action.”).

244. *See id.* at 863 (“[I]n the whole country the number of white persons unable to read or write exceed[s] the number of colored persons by over a hundred thousand.”).

245. *Id.* app. at 16 (statement of Rep. Rainey). Representative Joseph H. Rainey was the first black person elected to the House of Representatives. *See* MCAFEE, *supra* note 189, at 116-17 (discussing Rainey’s speech in support of the Perce bill); *see also* CONG. GLOBE, 42d Cong., 2d Sess. 863 (1872) (statement of Rep. Perce) (observing that the North had 1,356,302 illiterates while the South had 4,189,972).

final version proposed distributing funds on the basis of illiteracy, thereby directing more aid to states with greater need and less fiscal capacity.<sup>246</sup>

Thus the Perce bill in its final version reflected an underlying policy goal of ensuring that “the children of [each] State, who will be called on to discharge the duties of citizens of the United States, shall be educated” to a national standard of literacy, whatever the fiscal capacity of each state.<sup>247</sup> Urging Congress to “step in and lend us a helping hand,” Perce’s fellow Mississippian, Representative George McKee, reminded his colleagues that “[t]he children of the South, white and colored, are not the children of the South alone; they are the children of the nation.”<sup>248</sup> Similarly, echoing President Grant’s proclamation two years earlier, Representative Henry Dawes of Massachusetts described the bill as a means of securing rights of national citizenship guaranteed by the Fifteenth Amendment. As Dawes put it, the bill sought to discharge “the obligation we took upon ourselves” to ensure that “those we clothed with the ballot should have the means of casting that ballot intelligently”—an obligation now with special importance because “a ballot cast in Massachusetts or Arkansas, or upon the Pacific slope or in Pennsylvania, not only affected the locality where it was dropped, but the whole nation alike.”<sup>249</sup> Dawes saw federal aid to public education as consonant with emerging advances in commerce, transportation, and communications: “[W]e are becoming by means of these forces one people and one nation.”<sup>250</sup>

The Perce bill passed the House on February 8, 1872, by a vote of 117 to 98, with 12 Democrats voting for and 20 Republicans voting against the measure.<sup>251</sup> In December 1872, as the bill went to the Senate, President Grant hailed it as “a measure of such great importance to our real progress and [one] so unanimously approved by the leading friends of education that I commend it to the favorable attention of Congress.”<sup>252</sup> However, the bill never reached a vote in the Senate “mainly because Senator Morrill . . . insisted that the money should go to the agricultural colleges, in which he took great interest, and not

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246. See CONG. GLOBE, 42d Cong., 2d Sess. 795 (1872) (statement of Rep. McKee); *id.* at 882; *id.* at 861-62 (statement of Rep. Perce). But after the first ten years, allocations would be based on the population of those from age four to twenty-one in each state. See *id.* at 882.

247. *Id.* at 794 (statement of Rep. Townsend).

248. *Id.* at 795 (statement of Rep. McKee).

249. *Id.* at 861 (statement of Rep. Dawes).

250. *Id.*

251. See *id.* at 903. Twenty-four representatives did not vote. *Id.* See generally LEE, *supra* note 179, at 83-84 (analyzing the vote by party and region).

252. U.S. Grant, Fourth Annual Message (Dec. 2, 1872), in 9 PAPERS OF THE PRESIDENTS, *supra* note 190, at 4138, 4157.

to common schools.”<sup>253</sup> When the bill came up for consideration on February 11, 1873, Senator Morrill moved that it be “passed over,”<sup>254</sup> and it did not surface again.

The Perce bill was significant to the evolving conception of the federal role in several ways. First, it packaged federal aid in the form of conditional grants to the states. Second, its scope was truly national; it was intended to benefit blacks and whites in the North and South. Third, it sought to allocate funds based on a uniform standard of educational need. By targeting illiteracy, the bill served “the purpose of stimulating education to such portions of the country as most greatly need it.”<sup>255</sup> Its funding formula was designed to narrow inequality across states. Finally, the constitutional debate on federal aid to public education included a restatement of Congress’s power and duty to secure the guarantee of national citizenship.

*D. 1882-1890: The Blair Bills To Aid Public Schools Through Direct Appropriations from the National Treasury*

The Perce bill turned out to be the most vigorous effort in the 1870s to extend federal aid to public education. In 1873, Representative Hoar introduced legislation that attempted to revive the Perce bill,<sup>256</sup> and throughout the decade, Presidents Grant and Hayes supported measures to ensure universal education.<sup>257</sup> In 1875, Grant proposed a constitutional amendment whereby “the States shall be required to afford the opportunity of a good common-school education to every child within their limits.”<sup>258</sup> After the Perce bill, however, these initiatives failed to gain momentum for several reasons. First, the depression of 1873 ushered in a period of retrenchment, focusing the attention of legislators on “simple economic survival” and “away from patriotic consideration of national long-term needs.”<sup>259</sup> In this environment, new

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253. 1 HOAR, *supra* note 195, at 265; *see* MCAFEE, *supra* note 189, at 120 (“As the Republican father of federal aid to agricultural and industrial colleges, Morrill did not like the bill’s diversion of federal land proceeds to primary and elementary education.”).

254. CONG. GLOBE, 42d Cong., 3d Sess. 1250 (1873) (statement of Sen. Morrill); *see* MCAFEE, *supra* note 189, at 121.

255. CONG. GLOBE, 42d Cong., 2d Sess. 861 (1872) (statement of Rep. Perce).

256. *See* H.R. 477, 43d Cong. (1st Sess. 1873); 2 CONG. REC. 149-50 (1873) (statement of Rep. Hoar).

257. *See* LEE, *supra* note 179, at 72-74.

258. U.S. Grant, Seventh Annual Message (Dec. 7, 1875), in 10 PAPERS OF THE PRESIDENTS, *supra* note 190, at 4286, 4288.

259. MCAFEE, *supra* note 189, at 121.

expenditures by the federal government, and especially redistributive measures, were politically untenable. Second, the subject of mixed schools was brought to the fore by Senator Sumner's uncompromising advocacy for the inclusion of a ban on segregated schooling in the Civil Rights Act of 1875.<sup>260</sup> Although the Senate voted for the ban in 1874, the move was toxic and corroded consideration of the federal role in public education.<sup>261</sup> Third, the *Slaughter-House* decision in 1873 bolstered opponents of an enlarged federal role in securing rights of national citizenship.<sup>262</sup>

Yet the issue did not disappear, and it made a strong comeback in the following decade. In 1880, the Senate passed a bill sponsored by Senator Ambrose Burnside of Rhode Island that, like the Perce bill, proposed establishing a national education fund from the proceeds of public lands.<sup>263</sup> Similar constitutional issues were raised during the three-day debate on the bill, including appeals to national duty arising from the citizenship guarantees of the Civil War amendments.<sup>264</sup> Unlike the Perce bill in the House, the Burnside bill cleared the Senate with a wide bipartisan margin: twenty-two Republicans and nineteen Democrats voted in favor of the bill, while only six

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260. See *id.* at 125-49; McConnell, *supra* note 100, at 984-1092.

261. The Senate's vote to ban segregated schools was a key factor, along with the depression and political corruption within the Grant Administration, in the dramatic losses suffered by Republicans in the 1874 mid-term election. See WILLIAM GILLETTE, *RETREAT FROM RECONSTRUCTION, 1869-1879*, at 211-58 (1979); MCAFEE, *supra* note 189, at 166-67. The ban was stripped out of the civil rights bill before it was passed in 1875. See McConnell, *supra* note 100, at 1080-86. Sumner's strident advocacy on mixed schools could not have helped Hoar's 1873 effort to revive the Perce bill, especially given that Sumner and Hoar both hailed from Massachusetts and were close friends. See MCAFEE, *supra* note 189, at 123.

262. See MCAFEE, *supra* note 189, at 146 ("That spring [of 1874], Democrats enjoyed reminding Republicans that a Republican Court had ruled in the *Slaughterhouse Cases* of the year before that the privileges and immunities of United States citizens did not include public education.").

263. See S. 133, 46th Cong. (2d Sess. 1880). The Burnside bill differed from the Perce bill in two key respects. First, all proceeds from public lands, not merely half, were to be kept in a permanent fund, with only the interest available for annual distributions to the states. See *id.* § 3. Second, one-third of the money annually available would be distributed to land-grant colleges, see *id.*, a provision that ensured the support of Senator Morrill, who had earlier opposed the Perce bill, see 11 CONG. REC. 147 (1880) (statement of Sen. Morrill).

264. See 11 CONG. REC. 150 (1880) (statement of Sen. Morrill); *id.* at 153 (statement of Sen. Brown); *id.* at 185 (statement of Sen. Maxey); *id.* at 217 (statement of Sen. Blair). The bill was also defended as an exercise of Congress's power to dispose of public lands, see *id.* at 151 (statement of Sen. Morrill), and met limited opposition from senators concerned about states' rights and the possibility of federal prohibition of segregated schools, see *id.* at 184 (statement of Sen. Vest); *id.* at 226 (statement of Sen. Saulsbury).



Democrats opposed it.<sup>265</sup> As Professor Lee has noted, the lopsided majority was significant because the South by that time had reverted to Democratic control: “Southern Democrats had joined Northern Republicans in leading the campaign for federal aid to common schools.”<sup>266</sup> But the Burnside bill met “a ceaseless campaign of obstruction in the House” and never reached a vote.<sup>267</sup>

The Hoar, Perce, and Burnside bills, along with the early work of the Bureau of Education, set the stage for the most significant education aid proposal of the postbellum period. Sponsored by Senator Henry Blair of New Hampshire, chairman of the Committee on Education and Labor,<sup>268</sup> the proposal intensely engaged the Senate throughout much of the 1880s and won passage in that chamber in 1884, 1886, and 1888 before failing in 1890.<sup>269</sup> For several reasons, the Blair bill was the high-water mark in the early conceptualization of the federal role in public education.

First, the Blair bill introduced the idea of granting federal aid to the states (\$77 million over an eight-year period) in the form of direct appropriations from the national treasury, not from public lands.<sup>270</sup> Subsequent federal aid proposals have treated support for education as part of the general operations of the national government.

Second, like the Perce and Burnside bills, the Blair bill proposed a distribution of funds based on the illiteracy rate in each state among persons ten years of age and older.<sup>271</sup> This allocation envisioned an equalizing federal influence across the states. Southern states would have received over three-

<sup>265</sup>. See *id.* at 229.

<sup>266</sup>. LEE, *supra* note 179, at 85.

<sup>267</sup>. *Id.* at 86.

<sup>268</sup>. Henry William Blair, a Republican Senator from 1879 to 1891, is not to be confused with Francis Preston Blair, a Missouri Democrat who served in the Senate from 1871 to 1873. Francis Blair was an opponent of radical Republicanism who once advocated the removal of blacks from the United States and their resettlement “within the tropics of America.” CONG. GLOBE, 42d Cong., 2d Sess. 3252 (1872).

<sup>269</sup>. Senator Blair first introduced the bill in 1882, see 13 CONG. REC. 4820 (1882), but it did not receive thorough consideration until the next session in 1884, see 15 CONG. REC. 1999 (1884). In describing the bill, I will refer to the version passed by the Senate on April 7, 1884 (S. 398), and reintroduced by Blair in 1885 (S. 194) and in 1887 (S. 371). See S. 371, 50th Cong. (2d Sess. 1887) (as amended); S. 194, 49th Cong. (1st Sess. 1886) (as amended); S. 398, 48th Cong. (1st Sess. 1884), reprinted in 17 CONG. REC. 1282 (1886).

<sup>270</sup>. See S. 194 § 1. Senator Blair characterized his bill as a “temporary aid” measure intended to coexist with the perpetual education fund from public land sales proposed by the Burnside bill, whose passage Blair also urged in 1884. See S. REP. NO. 48-101 (1884), reprinted in 17 CONG. REC. 1240, 1248-49 (1886).

<sup>271</sup>. See S. 194 § 2.

fourths of the appropriations, which helped secure Southern support for the bill.<sup>272</sup>

Third, the Blair bill further developed the notion of state and local administration of public schools within a framework of conditions on federal aid.<sup>273</sup> While allowing racially segregated schools, the bill required participating states to provide “by law a system of free common schools for all of its children of school age, without distinction of race or color, either in the raising or distributing of school revenues or in the school facilities afforded.”<sup>274</sup> After the backlash against Sumner’s mixed-schools proposal, a separate-but-equal standard may have been the only viable option in the 1880s for “giving to each child, without distinction of race or color, an equal opportunity for education” or anything close to it.<sup>275</sup> In addition, the Blair bill required each state to spend at least as much from its own funds as it received from the federal government,<sup>276</sup> introducing a simple model of cooperative federalism. The bill also prohibited the use of federal funds for school construction or parochial schools,<sup>277</sup> and it required instruction in federally funded schools to include “reading, writing, and speaking the English language, arithmetic, geography, [and the] history of the United States.”<sup>278</sup>

272. See LEE, *supra* note 179, at 131-35 (describing support for the bill among Southern newspaper editors); *id.* at 157 (presenting a vote tally showing that a majority of Southern Democrats voting on the bill supported it in 1884, 1886, and 1888).

273. Distinguishing itself from the Hoar bill, the Blair bill described its “design” as “not being to establish an independent system of schools, but rather to aid for the time being in the development and maintenance of the school system established by local government.” S. 194 § 7.

274. *Id.* § 3; see *id.* § 15 (requiring participating states to “distribute the moneys raised for common-school purposes equally for the education of all the children, without distinction of race or color”).

275. *Id.* § 10. As historian Daniel Crofts has shown, the Blair bill garnered significant support from blacks. See Crofts, *supra* note 167, at 46 (“Implicit in their support for this legislation was the assumption – or at least the hope – that Redeemer governments could be trusted to treat black schools fairly and to supply them with an equitable share of any federal aid. Such an expectation may not have been completely farfetched when the Blair bill was drafted in the early 1880s.”). *But cf.* ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* 323-24 (1997) (taking a less sanguine view of Southern support for equal education for blacks).

276. S. 194 § 7.

277. *Id.* §§ 9-10.

278. *Id.* § 5. Like the Perce bill, the Blair bill also authorized states to use up to 10% of federal aid for teacher training. See *id.* § 8.

Fourth, the Blair bill is notable for the quality and thoroughness of the debates leading up to its passage by the Senate in three consecutive sessions.<sup>279</sup> Spanning hundreds of pages in the *Congressional Record*, the debates showed Blair and his colleagues on both sides of the bill to be formidable policy wonks and able constitutional lawyers.<sup>280</sup> In his opening remarks on the bill in 1884, Blair began by laying an empirical foundation for the consideration of public education as a national issue. This foundation took the form of twenty-seven tables of education statistics, mostly compiled by the Bureau of Education.<sup>281</sup> Altogether, the tables furnished “practically all the statistical information that exists in this country in the possession of the Government . . . bearing on the subject-matter of education.”<sup>282</sup>

This unprecedented compilation of data revealed large interstate variations in terms of educational needs, school expenditures, and revenue-raising capacity. The per capita value of real and personal property in New England, where enrollment rates were high and illiteracy rates low, was 40% greater than in the mid-Atlantic states, two times greater than in the Midwest and West, and four times greater than in the South, where enrollment rates were low and illiteracy rates high.<sup>283</sup> Disparities in education spending reflected these disparities in revenue-raising capacity, as New England states spent three or four times more per pupil than Southern states.<sup>284</sup> With these data, owing

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279. Although writing before passage of the Elementary and Secondary Education Act of 1965, historian Gordon Lee observed in 1949 that the debates on the Blair bill “[u]nquestionably . . . rank among the finest ever held in Congress on any legislation dealing with educational affairs.” LEE, *supra* note 179, at 147.
280. Blair himself was nominated by President Harrison to a federal judgeship at the end of his Senate term in 1891, but he declined the post. Biographical Directory of the United States Congress, Blair, Henry William, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=B000524> (last visited Oct. 13, 2006).
281. See 15 CONG. REC. 2013-29 (1884).
282. *Id.* at 2029 (statement of Sen. Blair). Among other things, Blair’s presentation included state-by-state data on the school-aged population, public school enrollment, average daily attendance, number of schools, number of teachers, length of school year, and extent of illiteracy in the general population and among school-aged children, broken down by race. It also included state-by-state data on per-pupil expenditures, property values, tax rates, indebtedness, and the expected distribution of funds based on illiteracy. See *id.* at 2014-29.
283. See *id.* at 2014-15 tbl.3; *id.* at 2016-17 tbl.5, 2017 tbl.6, & 2018 tbl.7; *id.* at 2022-23 tbl.15; see also S. REP. NO. 48-101 (1884), reprinted in 17 CONG. REC. 1240, 1246 (1886) (showing that, among the states, educational “necessity is most pressing where its ability to meet its requirements is least, making assistance from a central power indispensable”).
284. See 15 CONG. REC. 2014-15 tbl.3 (1884) (showing “[e]xpenditure in the year—per capita of pupils enrolled in public schools”).

largely to the creation of a federal education agency, Blair established a strong predicate for the necessity of federal aid.

In addition to policy details, constitutional considerations also received thorough treatment from the bill's supporters and opponents. Much of the debate addressed the Spending Clause, framing issues that would not be settled for another half-century.<sup>285</sup> Yet Blair made his arguments on a different constitutional axis. His committee report accompanying the bill began by invoking the "power" and "duty" of Congress to ensure that citizens, newly defined by the Citizenship Clause, have sufficient education for self-government:

Our leading proposition is that the General Government possesses the power and has imposed upon itself the duty of educating the people of the United States whenever for any cause those people are deficient in that degree of education which is essential to the discharge of their duties as citizens either of the United States or of the several States wherein they chance to reside.<sup>286</sup>

Blair elaborated on the necessity of education for citizenship by reference to the practical duties of public life:

I say public life with no reference to the incumbency of political office. By the public life of an American citizen I refer to his life as a sovereign; to his constant participation in the active government of his country; to the continual study and decision of political issues which devolve upon him whatever may be his occupation; and to his responsibility for the conduct of national and State affairs as the primary law-making, law-

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<sup>285</sup>. Opponents of the bill argued that Congress has no power "to tax the people of the United States in order to raise revenue to be expended on a subject, unless the Government of the United States has jurisdiction over that subject." *Id.* at 2373 (statement of Sen. Coke). Because the Constitution does not give Congress authority over education—"the common schools of this country pertain only to the jurisdiction of the States," *id.* at 2460—it "is not a proper object for the appropriation of money out of the Federal Treasury," *id.* at 2066 (statement of Sen. Saulsbury); *cf. id.* at 2213 (statement of Sen. Vest) (contending that Congress may aid the states in public education but may not "prescribe the details of the system of education in the State"). In response, the bill's supporters argued that the Spending Clause authorizes taxation and appropriation for "any purpose of a national and general character" as determined by Congress, *id.* at 2506 (statement of Sen. George), and cited the Morrill Act and other examples as precedent, *see id.* at 2205 (statement of Sen. Garland); *id.* at 2373-75 (statement of Sen. George). These debates were later resolved in favor of federal power. *See South Dakota v. Dole*, 483 U.S. 203 (1987); *United States v. Butler*, 297 U.S. 1 (1936).

<sup>286</sup>. S. REP. NO. 48-101, *reprinted in* 17 CONG. REC. at 1240.

construing, and law-executing power, no matter whether or not he is personally engaged in the public service as policeman or President, as any State official whatever, member of Congress, Chief-Justice of the United States, or a humble justice of the peace. In republics official stations are servitudes. The citizen is king.<sup>287</sup>

Thus, Blair argued, the nation must secure to each person a degree of education “commensurate with the character and dignity of the station which he occupies by the theory of the government of which he is a part.”<sup>288</sup> “We think it is clear,” he concluded, “that the nation has the power, which implies the duty of its exercise when necessary, to educate the children who are to become its citizens . . . .”<sup>289</sup>

Echoing this theme, Democratic Senator Joseph Emerson Brown of Georgia, a graduate of Yale Law School and former chief justice of the Georgia Supreme Court, described the Blair bill as an expression of Congress’s power and duty to secure the constitutional guarantee of national citizenship. Quoting the Citizenship Clause, Brown drew an analogy between the Blair bill and the voting rights enforcement acts recently passed by Congress and partially sustained by the Supreme Court.<sup>290</sup> “If Congress has power to protect the voter in the free exercise of the use of the ballot,” he argued, “it must have power to aid in preparing him for its intelligent use. And without educating the voter . . . without, in other words, preparing him for the duty of citizenship, he can not be a citizen, at least not a useful citizen.”<sup>291</sup>

Similarly, Senator Charles William Jones of Florida, also a Democrat and a lawyer, saw no need to anchor the bill in the Spending Clause, instead emphasizing the “revolution” and “great fundamental change” effected by the Civil War amendments and especially by the Citizenship Clause:

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287. 15 CONG. REC. 2000 (1884) (statement of Sen. Blair).

288. *Id.*

289. S. REP. NO. 48-101, reprinted in 17 CONG. REC. at 1248. Like Representative Perce before him, Senator Blair also invoked the Guarantee Clause as a ground of federal duty to aid the states in public education, although this argument, which spoke to state citizenship, was in Blair’s view secondary to the necessity of education for national citizenship. See *id.*, reprinted in 17 CONG. REC. at 1240; 15 CONG. REC. 1999-2000 (1884) (statement of Sen. Blair).

290. See *Ex parte Yarbrough*, 110 U.S. 651 (1884) (sustaining the conviction of a private individual under the Ku Klux Klan Act of 1871 for assaulting a black voter to deter his participation in a congressional election); *Ex parte Siebold*, 100 U.S. 371 (1879) (sustaining the application of the Enforcement Act of 1870 to convict local election officials of stuffing the ballot box in a federal election).

291. 15 CONG. REC. 2251 (1884) (statement of Sen. Brown).

The Constitution of the United States having made citizens and voters out of 5,000,000 of slaves and cast upon the people of the States the duty of educating them for the exercise of political power, surely there can be nothing very unreasonable in the Government of the United States aiding the States in educating these people.<sup>292</sup>

The Blair bill sought to discharge “the obligation that rests upon the Union to prepare those people who were made citizens for the preservation of the Union for the exercise of intelligent citizenship in the Union.”<sup>293</sup>

Although the citizenship argument called attention to the plight of the new freedmen, Blair conscientiously articulated the federal duty to secure education in more universal terms, thereby garnering support from both Northern Republicans and Southern Democrats.<sup>294</sup> As the Perce bill had shown, the use of illiteracy as the basis for distributing aid ensured that the scope of educational need, though most acute among Southern blacks, would radiate outward to the rest of the nation. Blair’s statistics made it difficult for legislators to ignore white illiteracy in the South or black illiteracy in the North.<sup>295</sup> Eager to avoid the sectionalism of the Hoar bill and the racial exclusivity of the Freedmen’s Bureau, Blair explained that his “bill endeavors carefully to avoid all recognition of distinctions of race or color. There is no appeal to Northern or Southern prejudice in the bill. Illiteracy is taken as the basis of distribution, because illiteracy is the only mathematical, available,

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292. *Id.* at 2151-52 (statement of Sen. Jones). Although *Slaughter-House* misconstrued the significance of the Citizenship Clause, Senator Jones put his best gloss on the case, reading the Court’s recognition that “a person could be a citizen of the United States without being a citizen of a State” to imply the primacy of national citizenship. *Id.* at 2151. Senator Blair simply ignored *Slaughter-House* in suggesting that education is a privilege of both state and national citizenship and is thus subject to state and federal authority concurrently. His bill did not threaten states’ rights, he argued, because

[t]he fact that the same individual child is to become a citizen of both governments does not deprive the National Government of its power to qualify that child to be its own citizen, to vote and act intelligently so far as the creation or the maintenance of the national powers [is] concerned.

*Id.* at 2063 (statement of Sen. Blair).

293. *Id.* at 2251 (statement of Sen. Brown).

294. See Crofts, *supra* note 167, at 43-44.

295. According to the 1880 census, the rate of illiteracy among Southern whites age ten or older, though lower than among Southern blacks, was still 20% or higher in Alabama, Arkansas, Georgia, Kentucky, North Carolina, South Carolina, and Tennessee. The illiteracy rate among Northern blacks, though lower than among Southern blacks, was at least 20% in almost all Northern states and, in some cases, higher than 30%. See 15 CONG. REC. 2017 tbl.6 (1884) (statement of Sen. Blair).

pertinent measure of the necessity of the case . . . .”<sup>296</sup> “Of course,” he acknowledged, “the necessity is less in the New England States . . . . Yet if the census is at all reliable it is a fact that there is a great deal of illiteracy prevailing even in New England . . . .”<sup>297</sup> Moreover, he declared,

I am not willing to stand here and say that the son of a confederate officer or soldier shall not be educated as well as the child of his former slave. Give them both equal privileges in the direction of education, give them both the same chance to prepare for the future of American citizenship.<sup>298</sup>

The citizenship argument drew few objections. Like Justice Bradley, writing for the Court in the *Civil Rights Cases*, Senator Randall Lee Gibson of Louisiana argued that the Civil War amendments “are limitations and restraints upon the power of the States” and “do not afford a basis for affirmative legislation.”<sup>299</sup> Senator Eli Saulsbury of Delaware complained that the authority to “educate for the purpose of qualification for citizenship” had “no limit” and might encompass “moral and perhaps religious training” if deemed necessary by Congress.<sup>300</sup> But these concerns were not amplified by other critics of the bill, who mainly worried that the measure would produce an

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296. *Id.* at 2069.

297. *Id.* at 2070; see also S. REP. NO. 48-101 (1884), reprinted in 17 CONG. REC. 1240, 1246 (1886) (showing that, in many Northern cities, over half the school-aged population was not enrolled in school and concluding that “there is as great danger to the future of the country from the Northern cities as from the Southern States”).

298. 17 CONG. REC. 1726 (1886) (statement of Sen. Blair). Blair’s concern for educating whites stemmed not only from considerations of equity but also from his belief in the ability of education to temper white racism. Citing Klan-led violence perpetrated by “the ignorant and degraded white man,” Blair said that “[w]e but half perceive our duty when we say we discharge it by educating the colored man” for it is essential that his “white brothers be educated, be refined by a higher form of civilization, be taught to respect his rights.” *Id.* at 1730.

299. 15 CONG. REC. 2589 (1884) (statement of Sen. Gibson).

300. *Id.* at 2467 (statement of Sen. Saulsbury).

unhealthy dependence on the federal government,<sup>301</sup> a federal takeover of public schools,<sup>302</sup> or wasteful or inequitable spending.<sup>303</sup>

The Blair bill won impressive backing in the Senate from a bipartisan, geographically diverse coalition. In presenting his bill, Blair had amassed dozens of letters, testimony, and memorials from school superintendents, education experts, and influential leaders in the North and South urging the establishment of national aid to education.<sup>304</sup> The Senate votes on the bill reflected this wide-ranging support.<sup>305</sup> In 1884, the bill passed the Senate by a margin of thirty-three to eleven, with nineteen Northern and Western Republicans together with fourteen Southern Democrats voting in favor. Similarly, in 1886, the bill passed by a vote of thirty-six to eleven, with the majority comprising eighteen Republicans and eighteen Democrats. In 1888, the bill passed by a narrower margin, thirty-nine to twenty-nine, but still managed to attract bipartisan support spanning all regions of the country. The political viability of the Blair bill is underscored by the virtual certainty that, had the House passed it in 1884, President Arthur would have signed it into law.<sup>306</sup> The bill's fate would have been less certain in 1886 or 1888 had it

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301. *See id.* at 2103 (statement of Sen. Plumb) (“[T]he beneficence of the General Government . . . will shrivel up all [the] aspirations of the people themselves, will induce them . . . to put out their children to nurse to the General Government, take away the interest of the people in regard to this great subject, and substitute for it the idea of leaning upon the General Government for everything [concerning education] . . .”); *id.* at 2246 (statement of Sen. Maxey).
302. *See id.* at 2292 (statement of Sen. Butler) (“My prediction is that if this money is appropriated under this bill . . . ten years will not roll around before the National Government will have control of every common school in the United States.”); *id.* at 2102 (statement of Sen. Plumb).
303. *See id.* at 2062, 2252-54 (statement of Sen. Sherman) (arguing that the bill lacked sufficient controls to ensure that states would not discriminate on the basis of race in the use of federal funds); *id.* at 2100 (statement of Sen. Wan Vyck).
304. *See id.* at 2002-09; *see also* LEE, *supra* note 179, at 94-139 (discussing attitudes toward the Blair bill among labor unions, the business community, the education profession, the media, churches, and other interest groups); Crofts, *supra* note 167 (discussing support for the bill among blacks).
305. For the recorded votes on the Blair bill, see 21 CONG. REC. 2469 (1890); *id.* at 2436; 19 CONG. REC. 1223 (1888); 17 CONG. REC. 2105 (1886); and 15 CONG. REC. 2724 (1884). *See also* LEE, *supra* note 179, at 157 (summarizing the relevant votes).
306. *See* LEE, *supra* note 179, at 141-42 (crediting President Arthur with “the most decisive and direct challenges to Congress on behalf of federal aid of any nineteenth century president” based on his annual messages to Congress).



reached the desk of President Cleveland, a states' rights Democrat,<sup>307</sup> yet the Senate votes showed that many Democrats were willing to support it.

In any event, the Blair bill never came to a vote in the House despite broad bipartisan support there. A determined minority led by House Speaker and Rules Committee Chairman John Carlisle, a Kentucky Democrat, repeatedly referred the bill to unfriendly committees that refused to report it for consideration or reported on it adversely,<sup>308</sup> even though as many as two-thirds of the House favored the measure.<sup>309</sup> By 1890, the bill faced growing resistance to federal intervention and racial equalization among Southern Democrats, compounded by signs of economic recovery in the South that undermined the argument for federal aid. When Blair brought his bill to a vote in the Senate for the fourth time, it failed by a margin of thirty-seven to thirty-one, as Democrats for the first time mustered a majority in opposition to the measure.<sup>310</sup> The demise of the Blair bill was one of a series of developments indicating that "the federal government had washed its hands of the South,"<sup>311</sup> and it effectively silenced consideration of federal aid to education for the next thirty years.

In sum, the Hoar, Perce, and Blair bills sought to strengthen the ideal of nationhood arising from the creation of a new polity composed of "citizens of the United States." In seeking to extend educational opportunity to all children, leading proponents of federal aid understood the measures as an exercise of Congress's power and duty to enforce and give substance to the guarantee of American citizenship. From the Freedmen's Bureau to the Blair

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307. *See id.* at 144-45.

308. *See* ELLWOOD P. CUBBERLEY, READINGS IN PUBLIC EDUCATION IN THE UNITED STATES: A COLLECTION OF SOURCES AND READINGS TO ILLUSTRATE THE HISTORY OF EDUCATIONAL PRACTICE AND PROGRESS IN THE UNITED STATES 369-71 (1934); *see also* LEE, *supra* note 179, at 158 (describing Speaker Carlisle's "parliamentary obstructionism" in packing the House Committee on Education with opponents of federal aid); Crofts, *supra* note 167, at 44 (noting that the Blair bill "never reached the floor of the House, thanks to the parliamentary intrigues of northern and border state Democrats, who dominated the House leadership").

309. *See* CUBBERLEY, *supra* note 308, at 369, 371 (excerpting an 1887 speech by Senator Blair to the National Education Association reporting that "a test vote" in the House showed "a majority of 160 in its favor to 76 against it").

310. *See* 21 CONG. REC. 2436 (1890).

311. Crofts, *supra* note 167, at 44 (noting that the same Congress also defeated legislation to strengthen federal supervision over Southern elections). The potent opposition of a few Southern Democrats to the Blair bill was echoed half a century later when a similar bloc of Southern Democrats, in the name of states' rights and racial ideology, warped and truncated the majoritarian New Deal constitutional vision of social and economic rights for all citizens of the United States. *See* Forbath, *supra* note 17, at 76-85 (discussing Dixiecrat success in excluding blacks from New Deal social insurance programs).

bill, the series of proposals steadily expanded the scope of federal responsibility for aiding public education. What began as a racially and sectionally exclusive concern evolved into a matter of broad national interest. Amid persistent worries about federal overreaching and resistance to mixed schools, federal aid took the form of conditional grants that sought to accommodate state prerogatives while mandating racially equal if separate education. Guided by a national standard of literacy for effective citizenship, the proposals envisioned a distribution of aid that would lessen educational inequality across states. This constitutionally informed conception of the federal role garnered sustained bipartisan and regionally diverse support. But for the parliamentary maneuvers of a stubborn House minority, the Blair bill in all likelihood would have become law.

*E. Educational Adequacy: Then and Now*

Given the magnitude of interstate disparities at the time, Senator Blair had no illusion that the federal government could produce absolute equality of educational opportunity. His bill taxed wealthier states for the benefit of poorer states, and for this he offered no apology: “You may call it a leveling theory, but it is the theory upon which this bill and republican creeds are built.”<sup>312</sup> But Blair understood that the extent of leveling would be modest. Even with the proposed federal aid, he acknowledged, “the Southern colored child as well as the Southern white child is still left greatly to the disadvantage as compared with the Northern child.”<sup>313</sup> Instead of absolute equality, the Blair bill sought to guarantee “[t]he indispensable standard of education for the people of a republic”<sup>314</sup>—what I have called educational adequacy for equal citizenship.

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312. 17 CONG. REC. 1726 (1886) (statement of Sen. Blair). Blair’s proposed “leveling” had a precedent in “the system provided by the Morrill Act whereby lands were taken from those states which possessed them and were made available to those states which had none.” LEE, *supra* note 179, at 17.

313. 15 CONG. REC. 2070 (1884) (statement of Sen. Blair). Under the Blair bill, the average yearly appropriation would have increased the 1881 level of school expenditures across the South by 60% and would have more than doubled expenditures in Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee. *See id.* at 2027 tbl.22. Even so, per-pupil spending in the South would have continued to lag behind the rest of the country.

314. *Id.* at 2000 (statement of Sen. Blair).

The standard of adequacy Blair envisioned was higher than “the nominal capacity to read and write.”<sup>315</sup> Although basic literacy was the measure for which data were available and thus served as a basis for distributing aid, Blair saw it as “a very low standard of education compared with that which should be set up in the common school.”<sup>316</sup> Basic literacy “suffices merely to accomplish the ordinary business of life under the careful supervision of others, and is not really the source of knowledge and means of interchange of thought.”<sup>317</sup> Educational opportunity, according to Blair, should prepare all citizens to participate actively in self-government and in all the duties of public life, not limited to holding elective office.<sup>318</sup> It should “enable the citizen sovereign to obtain and interchange ideas and knowledge of affairs as well as to transact intelligently and safely all matters of business in the avocations of life.”<sup>319</sup> Blair described these capacities as “indispensable” qualifications “for the duties and opportunities of citizenship.”<sup>320</sup> His ambition was to educate the citizenry to a “high level . . . where equality and sovereignty are convertible terms.”<sup>321</sup>

A key difference between Blair’s era and our own is the importance of education to economic opportunity and a decent livelihood. Hoar, Blair, and their contemporaries articulated the imperative of education mainly in civic republican and not economic terms. This emphasis was largely a function of the constitutional moment in which they lived, as black enfranchisement drew attention to the widespread lack of civic preparedness among all citizens, black and white. Yet it also reflected the fact that literacy and economic self-sufficiency were not yet closely linked in the agrarian and emerging industrial society of the time.<sup>322</sup> Even at the middle of the twentieth century, still two-

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315. *Id.*; see S. REP. NO. 48-101 (1884), reprinted in 17 CONG. REC. 1240, 1242 (1886) (“It by no means follows that the person who can read and write is therefore qualified to discharge his duty as a sovereign.”).

316. 15 CONG. REC. 2000 (1884) (statement of Sen. Blair).

317. S. REP. NO. 48-101, reprinted in 17 CONG. REC. at 1240, 1242.

318. See 15 CONG. REC. 2000 (1884) (statement of Sen. Blair).

319. *Id.*

320. *Id.*

321. S. REP. NO. 48-101, reprinted in 17 CONG. REC. at 1240, 1242.

322. The educational demands of the industrializing economy did not become a matter of serious policy concern until the early years of the twentieth century, when numerous vocational education programs were launched at the state and federal levels. See R. FREEMAN BUTTS & LAWRENCE A. CREMIN, A HISTORY OF EDUCATION IN AMERICAN CULTURE 388-89 (1963); Gordon I. Swanson, *The World of Work*, in EDUCATION IN THE STATES: NATIONWIDE DEVELOPMENT SINCE 1900, at 287, 295-96 (Edgar Fuller & Jim B. Pearson eds., 1969).

thirds of adult Americans—a substantial portion of whom were presumably middle-class—had not completed four years of high school.<sup>323</sup>

Today, of course, productive employment in the technological and information-based economy requires a much higher level of education. A high school diploma is no longer enough to ensure a foothold in the middle class, and the wage premium for more and better education has increased significantly.<sup>324</sup> To the Fourteenth Amendment's Framing generation, education was essential to full membership in society mainly by virtue of its relation to new rights and duties of civic participation. The relationship between education and social equality now turns on education's vital role in facilitating not only civic virtue but also economic well-being. Going forward, both economic participation and civic virtue properly inform the notion of educational adequacy for equal citizenship.

To be sure, public education in the United States has advanced considerably since the Blair bill. Educational attainment has risen far beyond its level a century ago, and interstate disparities are not as extreme as they once were. However, educational adequacy for equal citizenship does not imply a static threshold. In our era, as in Blair's, it depends on prevailing norms and expectations. It is an evolving standard shaped by social transformations from one generation to the next.<sup>325</sup>

It would be convenient to think that interstate educational disparities now occur above a sufficiently high threshold that they do not threaten the ideal of equal citizenship.<sup>326</sup> But it is doubtful that low-spending states such as

323. In 1950, 66% of people in the United States age twenty-five or older had not completed four years of high school, and an additional 20% had completed four years of high school but did not attend college. In 1960, 60% had not completed four years of high school, and an additional 25% had completed four years of high school but did not attend college. See U.S. Census Bureau, *Educational Attainment: Historical Tables tbl.A-1* (March 2005), <http://www.census.gov/population/socdemo/education/tabA-1.pdf>.

324. See David Card & Alan B. Krueger, *Does School Quality Matter? Returns to Education and the Characteristics of Public Schools in the United States*, 100 J. POL. ECON. 1 (1992); Timothy Egan, *No Degree, and No Way Back to the Middle*, N.Y. TIMES, May 24, 2005, at A15; Jennifer Cheeseman Day & Eric C. Newburger, U.S. Dep't of Commerce, *The Big Payoff: Educational Attainment and Synthetic Estimates of Work-Life Earnings* (July 2002), <http://www.census.gov/prod/2002pubs/p23-210.pdf>.

325. See *supra* notes 61-67 and accompanying text.

326. Cf. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 24 (1973) (crediting the state's assurance that every child receives "at least an adequate program of education" in upholding Texas's concededly unequal system of school finance). Although *Rodriguez* said that "[n]o proof was offered at trial persuasively discrediting or refuting the State's assertion," *id.*, the record is to the contrary, see Brief for Appellees at 17-18, *Rodriguez*, 411 U.S. 1 (No. 71-1332) (citing record evidence that the state did not assure a minimum educational program).

Alabama, California, Mississippi, and New Mexico, where the nation's minority and poor children are concentrated, could be said to offer adequate preparation for citizenship on par with the opportunities afforded by high-spending states such as New York, Wyoming, and Massachusetts. Thoughtful court decisions in recent years have found the educational *floor* in many high-spending states to be inadequate, despite equaling or exceeding the educational *average* in many low-spending states. In New York, for example, where black and Hispanic student achievement is comparable to average student achievement in Alabama and New Mexico,<sup>327</sup> the state high court held in 2003 that the public school system was failing to provide New York City's predominantly minority schoolchildren with the education necessary to ensure "meaningful civic participation in contemporary society" and "to compete for jobs that enable them to support themselves."<sup>328</sup> In Wyoming, where low-income students outperform the average student in California and Mississippi,<sup>329</sup> the state supreme court held in 1995 that students in poor districts lacked adequate "opportunity to become equipped for their future roles as citizens, participants in the political system, and competitors both economically and intellectually."<sup>330</sup> Similarly, the Supreme Judicial Court of Massachusetts in 1993 declared that the state was not providing adequate

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327. In 2005, black fourth graders in New York scored an average of 222 on the National Assessment of Educational Progress (NAEP) math test and 207 on the NAEP reading test, and Hispanic fourth graders in New York scored an average of 226 on math and 208 on reading. In Alabama, the average math and reading scores for *all* fourth graders were 225 and 208, respectively; in New Mexico, they were 224 and 207, respectively. These data are from Nat'l Ctr. for Educ. Statistics, *The Nation's Report Card: State Profiles*, <http://nces.ed.gov/nationsreportcard/states/> (select appropriate state; then follow hyperlinks under "Related Materials") (last visited Oct. 13, 2006) [hereinafter 2005 NAEP State Profiles].

328. *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 330-31 (N.Y. 2003).

329. In 2005, fourth graders eligible for free or reduced-price lunch (185% of the poverty line or below) scored an average of 236 on NAEP math and 216 on NAEP reading in Wyoming, whereas the *average* fourth grader scored 230 on math and 207 on reading in California, and 227 on math and 204 on reading in Mississippi. See 2005 NAEP State Profiles, *supra* note 327. Although Wyoming has different demographics than California and Mississippi, these disparities—across income groups—are quite large. A ten-point margin on NAEP equals roughly one grade level of learning.

330. *Campbell County Sch. Dist. v. State*, 907 P.2d 1238, 1259 (Wyo. 1995); see *State v. Campbell County Sch. Dist.*, 19 P.3d 518, 526-27 (Wyo. 2001) (providing guidance to the legislature for developing a school finance system that would assure each child an education "appropriate for the times"); *State v. Campbell County Sch. Dist.*, 32 P.3d 325 (Wyo. 2001) (further clarifying school finance requirements).

education to children in low-wealth districts,<sup>331</sup> where per-pupil spending exceeds the median in many low-spending states.<sup>332</sup>

Although interstate inequalities have decreased since Reconstruction, it is unlikely that lingering disparities will become much narrower without a more robust federal role. The overall level of interstate inequality in per-pupil spending has changed little in recent decades despite school finance litigation and policy reforms touting high standards for all children.<sup>333</sup> Unfavorable interstate comparisons have spurred improvement in some states but not others,<sup>334</sup> and substantial disparities in fiscal capacity constrain the extent of interstate equalization that states can achieve on their own.<sup>335</sup> More than a century after the Hoar, Perce, and Blair bills, the constitutionally motivated project of affording all children an adequate education for equal citizenship remains a work in progress.

#### IV. POLICY IMPLICATIONS

If Congress today were to take seriously its duty to secure full and equal national citizenship, what might be the contours of the federal role in public education and beyond?

##### A. Education and the Federal Role

As the varying approaches of the early federal aid bills demonstrate, the national citizenship guarantee does not entail a singular mode of legislative enforcement. Instead of being compelled to adopt a specific policy or program,

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331. *McDuffy v. Sec'y of Educ.*, 615 N.E.2d 516, 555-56 (Mass. 1993); cf. *Hancock v. Comm'r of Educ.*, 822 N.E.2d 1134, 1136-40 (Mass. 2005) (concluding, in light of school finance and other education reforms since *McDuffy*, that the state legislature was meeting its constitutional obligation to provide an adequate education to every child).

332. See JOHNSON, *supra* note 4, at 11 tbl.4.

333. See Murray et al., *supra* note 3, at 799 tbl.2.

334. Compare *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472, 488-89 (Ark. 2002) (relying on an interstate comparison of school achievement and expenditures to find the state education system inadequate), and *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 197 (Ky. 1989) (same), with *Charlet v. Legislature*, 713 So. 2d 1199, 1206-07 (La. Ct. App.) (rejecting a challenge to the Louisiana school finance system in part because per-pupil spending “was 94.2% of the average provided by the fifteen southern states”), *writ of review denied*, 730 So. 2d 934 (La. 1998), and Erik W. Robelen, *Alabama Voters Reject Gov. Riley's Tax Plan*, EDUC. WK., Sept. 17, 2003, at 19 (reporting the defeat of an Alabama ballot measure to raise per-pupil spending and to lengthen the school year).

335. See Rothstein, *supra* note 8, at 43-44, 49-50.

a conscientious legislator seeking to enforce the citizenship guarantee would, like Blair and his colleagues, pursue a stepwise inquiry. First, what does equal citizenship mean in contemporary American society? What are its political, civil, social, and economic attributes? Second, what are the educational prerequisites for achieving those attributes? What constitutes an adequate education for equal citizenship in the national community? Third, to what extent are states currently willing and able to provide an adequate education? Where and how do they fall short? Finally, what federal measures are needed to ensure that all children have adequate educational opportunity for equal citizenship? What policies best accord equal respect to every child, consistent with the guarantee of full and equal national citizenship?

Although Congress is unlikely to achieve consensus on these complex issues, its duty to enact “appropriate legislation” under Section 5 is best understood as a duty of *legislative rationality* in construing the Fourteenth Amendment’s substantive guarantees and in choosing the means to effectuate those guarantees. By legislative rationality, I mean something more than what is required under the judicial doctrine of rational basis review, whose undemanding standard serves not as a genuine test of rationality but as a “paradigm of judicial restraint.”<sup>336</sup> In addressing the questions above, Congress must pursue a deliberative inquiry (through the usual devices of hearings, reports, and public debate) into the meaning of national citizenship and its educational prerequisites, and it must take steps reasonably calculated to ameliorate conditions that deny children adequate opportunity to achieve those prerequisites.

Importantly, a legislative commitment to educational adequacy would give priority to the most glaring educational needs over the workaday politics of budget wrangling and special interest accommodation. If educational adequacy for equal citizenship has constitutional stature, then legislative enactment of its essential substance must reflect something more than pedestrian political bargaining. This idea is analogous to notions of legislative duty that state courts have inferred from state constitutions in educational adequacy cases.

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336. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993); *see id.* at 315 (holding that rational basis review does not “require a legislature to articulate its reasons for enacting a statute” because of separation-of-powers concerns). In other words, rational basis review is a rule limiting judicial power, an example of what Professors Post and Siegel call “the pragmatic horizon of adjudication.” Post & Siegel, *supra* note 27, at 1970. It does not capture what the Constitution itself, as opposed to a reviewing court, might demand of Congress. Although I believe, contrary to current doctrine, that rational basis review should govern judicial review of Section 5 legislation, *see Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966), Congress should understand itself to be governed independently by a higher standard of rationality in enforcing the Fourteenth Amendment.

When school systems have been judged inadequate, courts have faulted state legislatures for fashioning educational policy based on political or budgetary compromises rather than educationally relevant factors.<sup>337</sup> Without prescribing specific remedies, the cases have held that state legislatures are constitutionally obligated to develop policy based on rational, empirically supported judgments of what constitutes an adequate education and what reforms are necessary to provide it.<sup>338</sup> The Fourteenth Amendment demands no less of Congress.

The real bite of the legislative duty I posit here is perhaps best revealed by the shortcomings of current federal education policy. For all that the No Child Left Behind Act has done to enlarge the federal role, nothing in the Act establishes a common set of educational expectations for meaningful national citizenship. NCLB purports to “ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education.”<sup>339</sup> But the operative provisions of the statute—in particular, its testing and accountability requirements—address student “proficiency on challenging *state* academic achievement standards and *state* academic assessments.”<sup>340</sup> Although schools must make annual progress toward bringing all students to a “proficient level of academic achievement,”<sup>341</sup> each state has virtually unfettered discretion to define and revise the standards for measuring proficiency.<sup>342</sup> At most, NCLB

337. See *Montoy v. State*, 120 P.3d 306, 310 (Kan. 2005) (“[T]he financing formula was not based upon actual costs to educate children but was instead based on former spending levels and political compromise.”); *Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 109 P.3d 257, 263 (Mont. 2005) (“[B]ecause the Legislature has not defined what ‘quality’ means we cannot conclude that the current system is designed to provide a ‘quality’ education.”); *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 348 (N.Y. 2003) (“[T]he political process allocates to City schools a share of state aid that does not bear a perceptible relation to the needs of City students.”). The same charge is easily lodged against Congress. Its annual appropriations for elementary and secondary education are not based on any rational determination of what resources are necessary to meet children’s educational needs. See *infra* notes 344–345 and accompanying text.

338. In the school finance context, the requirement of legislative rationality typically entails an empirical cost study to determine the level and distribution of resources necessary to provide an adequate education. See *Montoy v. State*, 112 P.3d 923, 940 (Kan. 2005); *Campaign for Fiscal Equity*, 801 N.E.2d at 348; *Campbell County Sch. Dist. v. State*, 907 P.2d 1238, 1279 (Wyo. 1995). This further shows the distinction between my notion of legislative rationality and judicial rational basis review. Cf. *Beach Commc’ns*, 508 U.S. at 315 (holding that a statute survives rational basis review even when it is “based on rational speculation unsupported by evidence or empirical data”).

339. 20 U.S.C. § 6301 (Supp. III 2003).

340. *Id.* (emphasis added).

341. *Id.* § 6311(b)(2)(F).

342. See *id.* § 6311(b)(1)(A) (providing that “a State shall not be required to submit such standards to the Secretary [of Education]” for approval); *id.* § 6311(b)(1)(F) (authorizing



requires schools to teach math, science, and language arts, but it sets no content or performance standards in these subjects. The result has been a patchwork of state standards and assessments that vary considerably in content, ambition, and rigor.<sup>343</sup> In some states, schools and students are held to the highest competitive standards; in others, they are consigned to mediocrity or worse.

Similarly, the federal role in education funding is unguided by any determination of what resources are needed to ensure educational adequacy for equal citizenship. The single largest program of federal education aid—Title I of the Elementary and Secondary Education Act of 1965—awards funding to each state in proportion to its share of poor children *and* to its existing level of per-pupil spending.<sup>344</sup> Thus, wealthy, high-spending states receive more Title I aid per eligible child than poor, low-spending states. In 2001, for example, Massachusetts had 33% fewer poor children than Alabama but received 36% more Title I aid; New Jersey had 17% fewer poor children than Arizona but received 52% more aid.<sup>345</sup> The net effect of Title I is to reinforce, not reduce, the

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states to revise their standards); *id.* § 6311(e)(1)(F) (prohibiting the Secretary of Education from “requir[ing] a State, as a condition of approval of the State plan, to include in, or delete from, such plan one or more specific elements of the State’s academic content standards”); *id.* § 7907(c)(1) (same). NCLB does require states to participate in the National Assessment of Educational Progress, *see id.* § 6311(c)(2), and some have argued that NAEP testing, by enabling valid interstate comparison of educational performance, will foster convergence among state standards, *see* James S. Liebman & Charles F. Sabel, *The Federal No Child Left Behind Act and the Post-Desegregation Civil Rights Agenda*, 81 N.C. L. REV. 1703, 1729-30 (2003). This seems unlikely, however, because NCLB holds schools and districts accountable for performance on state assessments, not NAEP. *See* James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 959-60 (2004).

343. *See* G. GAGE KINGSBURY ET AL., NW. EVALUATION ASS’N, THE STATE OF STATE STANDARDS: RESEARCH INVESTIGATING PROFICIENCY LEVELS IN FOURTEEN STATES (2003), available at <http://www.nwea.org/research/getreport.asp?reportID=5>; DAVID KLEIN, THOMAS B. FORDHAM FOUND., THE STATE OF STATE MATH STANDARDS 2005 (2005), available at <http://www.math.jhu.edu/~wsw/ED/mathstandards05FINAL.pdf>; SANDRA STOTSKY, THOMAS B. FORDHAM FOUND., THE STATE OF STATE ENGLISH STANDARDS 2005 (2005), available at <http://ripolicyanalysis.org/EnglishStds2005.pdf>; *Do We Need To Repair the Monument? Debating the Future of No Child Left Behind*, EDUC. NEXT, Spring 2005, at 8, 15 fig.2; Diane Ravitch, *National Standards: ‘50 Standards for 50 States’ Is a Formula for Incoherence and Obfuscation*, EDUC. WK., Jan. 5, 2006, at 54.

344. *See* 20 U.S.C. § 6333(a)-(b) (2000).

345. *See* U.S. Census Bureau, American Community Survey: Percent of Related Children Under 18 Years Below Poverty Level in the Past 12 Months (2001), <http://www.census.gov/acs/www/Products/Ranking/2001/R11To40.htm> (2001 child poverty data); U.S. Dep’t of Educ., Fiscal Year 2001-2007 State Tables for the U.S. Department of Education: State Tables by Program 1 (Aug. 2006), <http://www.ed.gov/about/overview/budget/statetables/07stbypprogram.pdf> (2001 Title I allocations by state).

wide disparities in educational resources that exist across states, with no formal or informal determination by Congress that the lowest-spending states provide a floor of adequacy. In sum, our current policies treat the nation's schoolchildren not as "citizens of the United States" but foremost as "citizens of the state wherein they reside" – an improper inversion of the Fourteenth Amendment guarantee.

In securing national citizenship, the federal government must serve not merely as a facilitator of educational choices that reflect each state's ambition and capacity, but as the ultimate guarantor of opportunity for every child to achieve equal standing and full participation in the national community. In the abstract, this duty could be satisfied by an array of policy alternatives. At one end of the spectrum are highly centralized approaches, such as the nationalized school systems in France and Japan, but no proposal of this sort has been seriously entertained in the United States since the Hoar bill died in 1871.<sup>346</sup> At the other end of the spectrum are highly decentralized approaches, such as the national voucher systems in Chile, Colombia, and Sweden.<sup>347</sup> A national voucher plan providing genuinely equal access to schools that are held accountable for meeting common educational standards could be a powerful way of treating all children with equal regard,<sup>348</sup> although the prospect of bringing a well-regulated voucher system to national scale in the United States seems remote.<sup>349</sup>

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346. Although nationalization of public education has long been rejected, Congress has considered a variety of proposals to increase centralization of education funding and policy throughout the past century, with the most recent centralization movement culminating in the No Child Left Behind Act.

347. See Joshua Angrist et al., *Vouchers for Private Schooling in Colombia: Evidence from a Randomized Natural Experiment*, 92 AM. ECON. REV. 1535 (2002); Martin Carnoy, *National Voucher Plans in Chile and Sweden: Did Privatization Reforms Make for Better Education?*, 42 COMP. EDUC. REV. 309 (1998).

348. In the American context, the idea has a diverse intellectual pedigree. See, e.g., JOHN E. COONS & STEPHEN D. SUGARMAN, *EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL* (1978); MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 85-107 (1962); Theodore Sizer & Phillip Whitten, *A Proposal for a Poor Children's Bill of Rights*, PSYCHOL. TODAY, Aug. 1968, at 59.

349. According to some observers, Congress recently took a step toward a national voucher plan when it enacted the Hurricane Education Recovery Act, which provides Alabama, Louisiana, Mississippi, and Texas students displaced by Hurricanes Katrina and Rita with \$6000 vouchers (\$7500 for children with disabilities) redeemable at public and private schools in other states. Pub. L. No. 109-148, § 107, 119 Stat. 2680, 2798-2805 (2005); see Meghan Clyne, *Bush To Sign 'Monumental' School Voucher Law*, N.Y. SUN, Dec. 30, 2005, at 1. The national portability and uniform amount of the vouchers are consistent with treating eligible students as "citizens of the United States." But voucher students are still educated to standards wholly defined by the state where they reside. The plan sunset on August 1, 2006,

The basic point is that Congress retains wide policymaking discretion within the bounds of the duty I have described. In a separate article fleshing out how Congress should exercise this discretion, I argue that federal education policy can best give expression to the citizenship guarantee by enlisting nongovernmental organizations to develop national education standards and by incentivizing states to adopt them voluntarily.<sup>350</sup> Further, Congress should reform and expand the federal role in school finance to narrow interstate disparities and to establish a national floor of educational opportunity below which no state or district may fall.<sup>351</sup> These policies, I contend, are logical and attainable outgrowths of the standards-based reforms embodied in NCLB.

Whatever option Congress pursues, an approach that gives meaningful content to the national citizenship guarantee will entail a stronger role for the federal government. Given the enlargement of federal power and corresponding duty worked by application of Section 5 to the Citizenship Clause, my account of the Fourteenth Amendment does not assign constitutional weight to the claim that education is an area of “traditional state concern.”<sup>352</sup> Not only has the factual basis for this claim been eroded by recent policy developments culminating in NCLB, but the normative element of the claim stands in tension with the constitutional investiture of authority and responsibility in Congress to secure the essential conditions of opportunity for meaningful national citizenship.

To envision Congress as the ultimate guarantor of educational adequacy, however, is not to suggest that it possesses plenary power over education or that its power is without limits. As a practical and constitutional matter, Congress’s authority to secure the citizenship guarantee is constrained by federalism-based limitations inherent to the exercise of federal power in areas over which the states have concurrent jurisdiction. Although some have questioned whether “the structure of the Federal Government itself” effectively

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see § 110, 119 Stat. at 2806, and is unlikely to expand beyond its unique circumstances. On the limited scope of existing voucher programs and bipartisan resistance to significant expansion, see Goodwin Liu & William L. Taylor, *School Choice To Achieve Desegregation*, 74 *FORDHAM L. REV.* 791, 812–17 (2005); and James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 *YALE L.J.* 2043, 2078–91 (2002).

350. See Liu, *supra* note 8 (manuscript at 48–68).

351. See *id.* (manuscript at 57–68).

352. *United States v. Lopez*, 514 U.S. 549, 577 (1995) (Kennedy, J., concurring). *But cf.* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 548 (1985) (holding that the constitutional limits on federal power cannot be discerned by “singl[ing] out particular features of a State’s internal governance that are deemed to be intrinsic parts of state sovereignty”).

“protect[s] the States from overreaching by Congress,”<sup>353</sup> there remains a strong argument that the national political process as a whole, including the informal web of federal-state relationships and obligations facilitated by political parties and advocacy groups, contains important checks on federal usurpation of state prerogatives.<sup>354</sup>

In elementary and secondary education, the operation of such checks is evident in an array of statutory limitations on federal power. For example, the federal government has long been prohibited from exercising any supervision or control over school personnel, curriculum, textbook selection, or the assignment or transportation of students or teachers to overcome racial imbalance.<sup>355</sup> In addition, the federal government may not mandate national school building standards;<sup>356</sup> it may not develop, administer, or distribute national tests in any subject unless specifically authorized by statute,<sup>357</sup> and it may not require a national test or otherwise take part in certifying teachers or teachers’ aides.<sup>358</sup> The point is not that these specific limitations mark substantive constitutional boundaries. Rather, these limitations—plus the fact that state compliance with federal education policy is generally voluntary<sup>359</sup>—

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353. *Garcia*, 469 U.S. at 551 (citing JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 175-84 (1980); and Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954)). For arguments that formal constitutional structure does not effectively safeguard federalism, see Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 113-15 (2001); and Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1471-80 (2001).
354. See CHOPER, *supra* note 353, at 180-81; Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 252-87 (2000). *But cf.* Prakash & Yoo, *supra* note 353, at 1480-89.
355. See 20 U.S.C. §§ 1232a, 7906(b)(1), 7907(b), 9572(b)-(c) (2000 & Supp. II 2002).
356. See *id.* § 7907(d) (Supp. II 2002).
357. See *id.* § 1232j(a) (2000); *id.* § 7909(a) (Supp. II 2002).
358. See *id.* § 7910(a) (Supp. II 2002).
359. The main policy directives of NCLB, for example, are conditions attached to voluntary state receipt of federal education aid. Although I have focused on the Fourteenth Amendment to explain the substantive values that should guide the federal role in education, it is certainly true that conditional spending legislation provides a constitutionally flexible vehicle for Congress to enact education policy in furtherance of national citizenship. Such spending legislation may also be regarded as Section 5 legislation. *Cf.* Fullilove v. Klutznick, 448 U.S. 448, 476-78 (1980) (plurality opinion) (upholding the application of a minority set-aside in a federal contracting program to state and local grantees as valid Section 5 and spending legislation); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 284-87 (1978) (opinion of Powell, J.) (describing Title VI of the Civil Rights Act of 1964, which bans racial

indicate that respect for state prerogatives constrains the national policymaking process and will inevitably inform any federal effort to give expression to the national citizenship guarantee.<sup>360</sup> The federal role in education, however expanded or reformed, will have to preserve a cooperative federalism that balances legitimate interests in flexibility and innovation against the benefits of policy alignment and coherence.

### *B. Beyond Education*

The constitutional vision sketched here raises another question of limits generally applicable to theories of positive social and economic rights. As Justice Powell said in refusing to recognize education as a fundamental right under the Equal Protection Clause, “the logical limitations [of the] theory are difficult to perceive. How, for instance, is education to be distinguished from the significant personal interests in the basics of decent food and shelter?”<sup>361</sup> One could readily imagine that a conscientious legislator, upon a diligent inquiry into the prerequisites for equal citizenship, would feel duty-bound to address more of the nation’s opportunity structure than K-12 education.

At one level, it may be argued that the adequacy of educational opportunity is uniquely a matter of governmental concern because government has made schooling compulsory and has long assumed primary responsibility for its finance and provision. This is a contingent fact of our present social organization—schooling was a largely private function in many parts of the country before the twentieth century<sup>362</sup>—but the expectation and reality of the government’s dominant role in providing education seem firmly entrenched. Even the most ardent critics of the government’s monopoly power over schools, such as Milton Friedman, accept that “both the imposition of a minimum required level of schooling and the financing of this schooling” by the government are justified by the positive externalities arising from

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discrimination by recipients of federal funds, as enforcing the constitutional right of equal treatment).

360. Thus, for example, while nothing in my account categorically precludes Congress from directly legislating national educational standards, such legislation would likely be forestalled by the operation of political safeguards that reject the idea of national standards, as the law currently stands, *see supra* note 355, or that favor a regime of voluntary state compliance, as I propose elsewhere, *see Liu, supra* note 8.

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

362. *See* ELLWOOD P. CUBBERLEY, *PUBLIC EDUCATION IN THE UNITED STATES: A STUDY AND INTERPRETATION OF AMERICAN EDUCATIONAL HISTORY* 163-206, 421-23 (1934); CARL F. KAESTLE, *PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780-1860*, at 182-217 (1983).

education's role in "promoting a stable and democratic society."<sup>363</sup> For all but the small minority of children whose families can afford private tuition or home-schooling,<sup>364</sup> participation in the public system is, by necessity and by law, compulsory. This fact alone suggests that government has a special responsibility to ensure educational adequacy apart from other facets of human welfare.

At another level, however, the duty to ensure educational adequacy rests on a normative, not factual, basis with broader sweep. While a decent education is essential to effective citizenship, "[e]mpirical examination might well buttress an assumption that the ill-fed, ill-clothed, and ill-housed are among the most ineffective participants in the political process" and in other domains that confer social regard.<sup>365</sup> On my account of the Constitution's citizenship guarantee, federal responsibility logically extends to areas beyond education. Importantly, however, the duty of government cannot be reduced to simply providing the basic necessities of life. Welfare provision in the form of cash assistance, food stamps, and public housing may prevent destitution (a worthy objective in its own right),<sup>366</sup> but such provision, with its accompanying stigma of dependence and bureaucratic control, does not assure its beneficiaries the dignity of full membership in society. Beyond a minimal safety net, the legislative agenda of equal citizenship should extend to systems of support and opportunity that, like education, provide a foundation for political and economic autonomy and participation. The main pillars of the agenda would include basic employment supports such as expanded health insurance, child care, transportation subsidies, job training, and a robust earned income tax credit. Further, the citizenship guarantee would find expression in

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363. FRIEDMAN, *supra* note 348, at 86, 89. In a section titled "General Education for Citizenship," *id.* at 86, Friedman objected to the government's role in running educational institutions, but not to its role in financing schools or setting minimum standards. He proposed that "[g]overnments could require a minimum level of schooling financed by giving parents vouchers redeemable for a specified maximum sum per child per year if spent on 'approved' educational services," *id.* at 89—an approach plausibly consistent with the national citizenship guarantee, *see supra* note 348 and accompanying text.

364. *See* JOHN WIRT ET AL., NAT'L CTR. FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION 2005, at 31 (2005) (reporting that 11% of U.S. students were enrolled in private K-12 schools in 1989-1990, and that 10% were enrolled in 2001-2002); *id.* at 32 (reporting that 2.2% of U.S. students were home-schooled in 2003).

365. *Rodriguez*, 411 U.S. at 37.

366. *See* Michelman, *supra* note 10, at 13-16 (discussing John Rawls).

antidiscrimination laws that promote inclusion in social, economic, and political spheres.<sup>367</sup>

The multiplicity and monetary cost of the duties I have posited for Congress may strike some as evidence that they cannot all be matters of constitutional obligation. However, the duty to enforce the national citizenship guarantee is no less a duty for being multifaceted and potentially expensive. Professor Black, in defending what he called the “*affirmative constitutional duty* of Congress . . . to ensure . . . a decent livelihood for all,”<sup>368</sup> drew the following analogy to the President’s duty to “take Care that the Laws be faithfully executed”<sup>369</sup>:

The President cannot do everything imaginable to bring it about that the laws be faithfully executed; he is limited by his own physical and mental powers, by other claims on these, and by the amplitude of the means put at his disposal by Congress. The duty has to be a duty to act prudently within these limits, without ulterior motive, sensitive to the force of the powerful conscience-stirring word “faithfully.” It cannot be any more—or, I should think, any less—than that. But is it not a duty?<sup>370</sup>

Section 5’s invitation to Congress to enact “appropriate” enforcement legislation likewise calls for prudent, good-faith action to make real the broad guarantees of the Fourteenth Amendment. The duty is not neatly bounded, and it will cost money. But in these respects, it is no different from other constitutional duties requiring government affirmatively to act, for example, to protect private property, contractual freedom, national security, or traditional

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367. Whatever the merits of characterizing statutes like the Americans with Disabilities Act or the Civil Rights Act of 1964 as commerce or equal protection legislation, they are readily understood as legislation to enforce the affirmative guarantee of equal national citizenship. See *Tennessee v. Lane*, 541 U.S. 509, 536 (2004) (Ginsburg, J., concurring) (“The Americans with Disabilities Act of 1990 . . . is a measure expected to advance equal-citizenship stature for persons with disabilities.”); Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 29 (2000) (“The most important objective of Title VII . . . has been to give excluded and subordinated groups greater access to good jobs and decent incomes. . . . [E]qual access to good jobs is . . . a basic element of equal citizenship.”); see also *The Civil Rights Cases*, 109 U.S. 3, 43-56 (1883) (Harlan, J., dissenting) (describing the federal ban on racial discrimination in public accommodations as legislation to enforce the national citizenship guarantee).

368. BLACK, *supra* note 21, at 133.

369. U.S. CONST. art. II, § 3.

370. BLACK, *supra* note 21, at 134.

“negative” rights such as freedom of speech and due process of law.<sup>371</sup> The discharge of such duties involves an essential if inexplicit balance. On one hand, enforcement of constitutional norms, like law enforcement generally, requires discretion as to what is reasonable, feasible, and likely to be effective. On the other hand, as Professor Black observed, “the decently eligible *range* of means and measures is one thing when you are under no duty at all to act, and quite another when you are under a serious duty to act effectively.”<sup>372</sup> In sum, substantial or indefinite cost is a feature common to a broad range of constitutional duties. Here, as elsewhere, such duties call on the conscientious legislator to combine seriousness of purpose with considerations of prudence, efficacy, and good faith.

### C. *Beyond Citizenship*

Finally, I wish to flag a set of issues requiring fuller treatment than I can provide here. National citizenship, as I have described it, functions as a constitutionally protected site of social regard and mutual obligation. My thesis has focused on the substantive provision that government owes to those whose formal claim to citizenship is not in doubt. What I have assumed but left unsaid is that citizenship marks a *membership boundary*, inevitably with insiders and outsiders. The concern, as Alexander Aleinikoff has put it, is that our national experience has sometimes shown “a darker side of the emphasis on citizenship—a circling of the wagons more than a[n] invitation to climb on board.”<sup>373</sup>

There are at least three dimensions to the concern. First, to what extent should citizenship status be a prerequisite for citizenship rights? Does the guarantee of educational adequacy for equal citizenship extend to children who are formally noncitizens? These questions have particular salience in light of the 1996 federal welfare legislation limiting the eligibility of noncitizens, including legal permanent residents, for certain social services.<sup>374</sup> Second, does

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371. See *supra* note 24 and accompanying text.

372. BLACK, *supra* note 21, at 136.

373. T. Alexander Aleinikoff, *The Tightening Circle of Membership*, 22 HASTINGS CONST. L.Q. 915, 917 (1995); see also Linda Bosniak, *Constitutional Citizenship Through the Prism of Alienage*, 63 OHIO ST. L.J. 1285, 1316-23 (2002) (discussing “citizenship’s exclusionary face”).

374. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified in scattered sections of U.S.C.). For analysis of the statute’s provisions concerning immigrants, see Emilie Cooper, Note, *Embedded Immigrant Exceptionalism: An Examination of California’s Proposition 187, the 1996 Welfare Reforms and the Anti-Immigrant Sentiment Expressed Therein*, 18 GEO. IMMIGR. L.J. 345, 351-53 (2004).



national citizenship subsume a notion of national identity, and if so, does this raise the risk of illiberal educational agendas being pursued in the name of national citizenship? History provides a sober lesson in the project of “Americanization” early in the last century, in which public schools responded to increasing immigration and cultural diversity with an untidy mixture of benign tutelage, nativism, and intolerance.<sup>375</sup> Do we invite the same difficulties today by linking education to national citizenship? Third, what are the limitations of orienting education policy toward the goals of civic nationalism and bounded social membership given the increasingly powerful forces of transnationalism and globalization? The question implicates the moral relevance of national citizenship as a site of belonging and obligation in the evolving international context.<sup>376</sup>

I take up these questions in a separate work in progress in which I argue that treating educational adequacy as an entailment of national citizenship need not marginalize noncitizen children and instead provides, even in light of cultural pluralism and globalization, the most promising framework for achieving equitable distribution of educational opportunity.<sup>377</sup> The guarantee of national citizenship, I suggest, is primarily a thesis about federalism and national supremacy, not a statement about the duties that government owes to citizens to the exclusion of noncitizens. At the same time, fostering a liberal nationalism as a framework for education policy is both sensible and necessary to achieve the distributive goals central to the ideal of equal citizenship.

## CONCLUSION

At a policy level, many issues merit further inquiry. How much education is really adequate, and how should adequacy be measured? What level of resources can be considered adequate, and how should that level change over time? Does adequacy by today’s standards entail additional opportunity

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375. See ROBERT A. CARLSON, *THE QUEST FOR CONFORMITY: AMERICANIZATION THROUGH EDUCATION* 121-31 (1975); JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925*, at 194-263 (2d ed. 1974); WILLIAM G. ROSS, *FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION, 1917-1927* (1994); DAVID B. TYACK, *THE ONE BEST SYSTEM: A HISTORY OF AMERICAN URBAN EDUCATION* 229-55 (1974).

376. For critical perspectives on education for national citizenship, see Rachel F. Moran, *The Transnational School*, 9 U.C. DAVIS J. INT’L L. & POL’Y 63 (2003); and Martha C. Nussbaum, *Patriotism and Cosmopolitanism*, BOSTON REV., Oct./Nov. 1994, reprinted in *FOR LOVE OF COUNTRY: DEBATING THE LIMITS OF PATRIOTISM* 2 (Joshua Cohen ed., 1996).

377. See Goodwin Liu, *Education, National Citizenship, and the Membership Boundary* (Aug. 7, 2006) (unpublished manuscript, on file with author).

beyond elementary and secondary education in both directions, i.e., preschool and higher education?<sup>378</sup> Must effective adequacy reforms address not only education resources but also non-resource factors such as accountability, efficiency, and choice?<sup>379</sup> These questions call for careful analysis informed by research and best practices. Moreover, because the meaning of adequacy depends on social context, policy solutions will reflect more than technical considerations. They will reflect socially situated judgments about the prerequisites of equal citizenship in the contemporary life of the nation.

The questions are admittedly difficult and do not lend themselves to precise answers. But that is not a reason to doubt that Congress is constitutionally obligated to inquire and act. As Professor Black observed with characteristic insight: “When we are faced with difficulties of ‘how much,’ it is often helpful to step back and think small, and to ask not, ‘What is the whole extent of what we are bound to do?’ but rather, ‘What is the clearest thing we ought to do first?’”<sup>380</sup> Reasonable legislators may disagree on how best to define and deliver educational adequacy for equal citizenship. But such disagreement, if pursued in good faith and with a determination to act, would be a welcome step forward from the present neglect of this constitutional imperative.

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378. See Linda Jacobson, *Pre-K Profile in School Finance Cases Grows*, EDUC. WK., Oct. 5, 2005, at 18, 22 (reporting claims by plaintiffs in six state lawsuits that educational adequacy includes preschool).

379. See David J. Hoff, *Movement Afoot To Reframe Finance-Adequacy Suits*, EDUC. WK., Oct. 26, 2005, at 25 (reporting efforts to obtain vouchers as remedies in state adequacy lawsuits).

380. BLACK, *supra* note 21, at 137.