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FREEDOM, DEMOCRACY, AND THE RIGHT TO EDUCATION

Derek W. Black

ABSTRACT—While litigation continues in an effort to establish a fundamental right to education under the U.S. Constitution, the full historical justification for this right remains missing—a fatal flaw for many jurists. This Article fills that gap, demonstrating that the central, yet entirely overlooked, justification for a federal right to education resides in America's education story during the era of slavery and Reconstruction.

At that time, education was first and foremost about freedom. The South had criminalized education to maintain a racialized hierarchy that preserved slavery. Many African-Americans, seeing education as the means to both mental and physical freedom, made extraordinary efforts to secretly acquire it. After the War, their efforts morphed into a full-fledged public education movement. Congress, aiming to remedy slavery and repair democracy itself, responded by requiring Confederate states to guarantee education in their state constitutions. The rest of the nation followed shortly thereafter.

This Article analyzes this history through the Thirteenth Amendment, the Fourteenth Amendment, the Guarantee Clause, and subsequent judicial precedent. It demonstrates, first, that the Constitution has long protected a negative right to education—the freedom to pursue learning without state interference. Second, it reveals how that negative right transformed into an affirmative one in the years immediately following the Civil War. By anchoring the right to education in multiple constitutional provisions, this Article demonstrates that the right to education permeates the very fabric of our constitutional democracy.

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INTRODUCTION

Public education has reached a troubling crossroads. Public school funding is in generational decline,[1] while segregation and inequality are steadily increasing.[2] Since the Great Recession, states have substantially reduced their fiscal effort for public education, exacting a $600 billion loss

[1] *See* MICHAEL LEACHMAN, NICK ALBARES, KATHLEEN MASTERSON & MARLANA WALLACE, CTR. ON BUDGET & POL'Y PRIORITIES, MOST STATES HAVE CUT SCHOOL FUNDING, AND SOME CONTINUE CUTTING 1 (2016), https://www.cbpp.org/research/state-budget-and-tax/most-states-have-cut-school-funding-and-some-continue-cutting [https://perma.cc/7HBD-PBNM] (finding that thirty-one states were still funding education below prerecession levels); MICHAEL LEACHMAN & ERIC FIGUEROA, CTR. ON BUDGET & POL'Y PRIORITIES, K-12 SCHOOL FUNDING UP IN MOST 2018 TEACHER-PROTEST STATES, BUT STILL WELL BELOW DECADE AGO 4–6 (2019), https://www.cbpp.org/research/state-budget-and-tax/k-12-school-funding-up-in-most-2018-teacher-protest-states-but-still [https://perma.cc/W6UF-QNLR] (finding that several were funding education below pre-recession levels).

[2] *See* GARY ORFIELD, JONGYEON EE, ERICA FRANKENBERG & GENEVIEVE SIEGEL-HAWLEY, C.R. PROJECT, *BROWN* AT 62: SCHOOL SEGREGATION BY RACE, POVERTY AND STATE 3 (2016), https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-62-school-segregation-by-race-poverty-and-state/Brown-at-62-final-corrected-2.pdf [https://perma.cc/KL2J-JE95] (indicating that the percentage of intensely segregated minority schools has tripled since 1988); NATASHA USHOMIRSKY & DAVID WILLIAMS, EDUC. TR., FUNDING GAPS 2015: TOO MANY STATES STILL SPEND LESS ON EDUCATING STUDENTS WHO NEED THE MOST 1 (2015), https://edtrust.org/wp-content/uploads/2014/09/FundingGaps2015_TheEducationTrust1.pdf [https://perma.cc/M5DQ-G92U] (finding a $1,200 funding gap per student in school districts with the highest poverty rates and a $2,000 gap between school districts serving "the most students of color and those serving the fewest"); BRUCE D. BAKER, MARK WEBER, AJAY SRIKANTH, ROBERT KIM & MICHAEL ATZBI, THE REAL SHAME OF THE NATION: THE CAUSES AND CONSEQUENCES OF INTERSTATE INEQUITY IN PUBLIC SCHOOL INVESTMENTS 1 (2018), https://www.shankerinstitute.org/sites/default/files/The%20Real%20Shame%20of%20the%20Nation.pdf [https://perma.cc/243F-GWFE] (calculating the funding gap between what students need and what states currently spend).

on schools nationally.[3] In Michigan, the loss is nearly $5,000 per student annually—the equivalent of more than $2 million a year in an average-sized school.[4] At the same time, efforts to privatize education have finally taken hold and are accelerating rapidly.[5] Going forward, the paths towards a revitalized public education look increasingly fraught.

A fundamental right to education under the U.S. Constitution is one of the few remaining hopes for millions of students.[6] While the Court refused to recognize a right to education in *San Antonio Independent School District v. Rodriguez* in 1973, it left open the possibility that different facts and theories might implicate a right to education.[7] Advocates, hoping to finally seize on that opening, have filed cases in four different federal circuits.[8] Scholarship on the topic has, likewise, flourished.[9]

The central theoretical thread necessary to secure the right to education, however, remains almost entirely unnoticed: the role of education in slavery

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[3] DANIELLE FARRIE & DAVID G. SCIARRA, EDUC. L. CTR., $600 BILLION LOST: STATE DISINVESTMENT IN EDUCATION FOLLOWING THE GREAT RECESSION 2 (2021), https://files.eric.ed.gov/fulltext/ED612474.pdf [https://perma.cc/DP63-R8GX].

[4] *Id.* at 8; *see* NAT'L CTR. FOR EDUC. STAT., OVERVIEW OF PUBLIC ELEMENTARY AND SECONDARY SCHOOLS AND DISTRICTS: SCHOOL YEAR 1999-2000, at tbl.5 (2001), https://nces.ed.gov/pubs2001/overview/table05.asp [https://perma.cc/7734-2QUC].

[5] JACK SCHNEIDER & JENNIFER BERKSHIRE, A WOLF AT THE SCHOOLHOUSE DOOR: THE DISMANTLING OF PUBLIC EDUCATION AND THE FUTURE OF SCHOOL, at xiii–xxi (2020) (detailing the ideological and practical expansion of private school choice at the expense of public education).

[6] State supreme courts have addressed several of these problems but produced uneven results and, in several states, have even held that school quality and funding are nonjusticiable issues. *See generally* Joshua E. Weishart, *Rethinking Constitutionality in Education Rights Cases*, 72 ARK. L. REV. 491, 497 (2019) (analyzing the ineffectiveness of state courts even when they have intervened); Scott R. Bauries, *Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 ALA. L. REV. 701, 741 n.223 (2010) (listing courts rejecting claims as nonjusticiable).

[7] *See* 411 U.S. 1, 36–37 (1973).

[8] *See* Gary B. v. Whitmer, 957 F.3d 616, 620–21 (6th Cir. 2020), *reh'g en banc granted, opinion vacated*, 958 F.3d 1216 (6th Cir.); Williams v. Reeves, 954 F.3d 729, 731 (5th Cir. 2020); Williams *ex rel.* J.E. v. Reeves, 981 F.3d 437, 437 (5th Cir. 2020); A.C. v. Raimondo, 494 F. Supp. 3d 170, 170 (D.R.I. 2020); Martinez v. Malloy, 350 F. Supp. 3d 74, 79 (D. Conn. 2018). *Gary B.* was the first federal court since the three-judge panel in *Rodriguez v. San Antonio Independent School District*, 337 F. Supp. 280 (W.D. Tex. 1971), *rev'd*, 411 U.S. 1 (1973), to recognize a right to education. One of the litigants indicated an intention to go to the Supreme Court. Megan Lunny & Adina Cazacu-De Luca, *"The Wheels of Justice Clank Slowly": Michael Rebell's Ongoing Fight for Education Reform*, COLUM. SPECTATOR (Dec. 1, 2020), https://www.columbiaspectator.com/the-eye/2020/12/01/the-wheels-of-justice-clank-slowly-michael-rebells-ongoing-fight-for-education-reform/ [https://perma.cc/87QB-6NFE].

[9] *See, e.g.*, Derek W. Black, *Implying a Federal Right to Education*, *in* A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY 135, 135–36 (Kimberly Jenkins Robinson ed., 2019) (discussing the right to education and surveying the expanding literature); *see also infra* note 24 (listing current scholarship that develops theories for the recognition of a federal right to education under the U.S. Constitution).

and Reconstruction.[10] This thread grounds the justification for the right to education in history, not just theory. African-Americans' experiences with education—or lack thereof—during and after slavery reveal that the right to education encompasses interests much more fundamental to human life than those discussed today. At the time of slavery and Reconstruction, education was first and foremost about freedom.[11] In more formal terms, education was understood to be a necessary condition of full freedom.

The South criminalized reading, writing, and other forms of mental instruction for enslaved people.[12] That criminalization of education, moreover, was not merely an incidental condition of slavery. It was a tool used to enforce the enslavement of African-Americans both physically and mentally.[13] Many enslaved people also recognized the value of education and secretly acquired it at the risk of death, prizing education as a key to mental freedom and potentially full freedom.[14] During and after the Civil War, those secret efforts then morphed into organized campaigns to claim the right to education.[15] These campaigns and Congress's realization that a system of education was crucial to remedying slavery and rebuilding democracy in the

[10] The most extensive examination of slavery and education is four sentences and a string citation. *See Gary B.*, 957 F.3d at 650–51. The Supreme Court's seminal education rights case, *Rodriguez*, does not mention slavery or Reconstruction at all. 411 U.S. at 1. This flaw is arguably fatal, as "it is inconceivable that the Court could decide major federalism cases without mentioning the Civil War era." Justin Collings, *The Supreme Court and the Memory of Evil*, 71 STAN. L. REV. 265, 337 (2019).

[11] *See, e.g.*, CHRISTOPHER M. SPAN, FROM COTTON FIELD TO SCHOOLHOUSE: AFRICAN AMERICAN EDUCATION IN MISSISSIPPI, 1862–1875, at 43 (2009) (discussing education and freedom); HILARY GREEN, EDUCATIONAL RECONSTRUCTION: AFRICAN AMERICAN SCHOOLS IN THE URBAN SOUTH, 1865–1890, at 44 (2016) (finding education was "essential in preparing [African-Americans] to become freemen"); HEATHER ANDREA WILLIAMS, SELF-TAUGHT: AFRICAN AMERICAN EDUCATION IN SLAVERY AND FREEDOM 35–36 (2005) (discussing how eagerly newly freed people approached literacy and education); JANET DUITSMAN CORNELIUS, WHEN I CAN READ MY TITLE CLEAR: LITERACY, SLAVERY, AND RELIGION IN THE ANTEBELLUM SOUTH 2 (1992) (describing literacy as "the freedom to become a person").

[12] *See, e.g.*, United States v. Rhodes, 27 F. Cas. 785, 793 (C.C.D. Ky. 1866) (discussing a Louisiana law prohibiting persons from teaching enslaved people how to read or write, with violations punishable by imprisonment or death).

[13] Lynch v. Alabama, No. 08-S-450-NE, 2011 WL 13186739, at *153 (N.D. Ala. Nov. 7, 2011) (discussing "the resolve of whites during this period to totally control the thoughts and attitudes of all blacks"), *aff'd in part, vacated in part, remanded sub nom.*, I.L. v. Alabama, 739 F.3d 1273 (11th Cir. 2014). *See generally* BRITISH & FOREIGN ANTI-SLAVERY SOC'Y, SLAVERY AND THE INTERNAL SLAVE TRADE IN THE UNITED STATES OF NORTH AMERICA 194–96 (1841) (survey of anti-literacy and anti-learning laws in the South); Gelsey G. Beaubrun, *Talking Black: Destigmatizing Black English and Funding Bi-Dialectal Education Programs*, 10 COLUM. J. RACE & L. 196, 203–09 (2020) (discussing slave revolts and surveying the literacy prohibitions that followed).

[14] *See* SPAN, *supra* note 11, at 43; GREEN, *supra* note 11, at 44; DEREK W. BLACK, SCHOOLHOUSE BURNING: PUBLIC EDUCATION AND THE ASSAULT ON AMERICAN DEMOCRACY 73–94 (2020) (exploring the multiple links between education and freedom for enslaved people).

[15] *See infra* Section I.A.4.

South triggered a cascading series of events, policies, and constitutional developments.

The Thirteenth Amendment, ratified shortly after the Civil War, ensured the physical freedom of enslaved people and extended Congress the authority to pursue some education remedies, but the Amendment alone did not ensure access to education or the broader rights necessary for meaningful freedom.[16] Similarly, the Fourteenth Amendment addressed some of those limits, explicitly extending citizenship, privileges and immunities, liberty, and more to formerly enslaved people.[17] But the Fourteenth Amendment would have had little effect if individuals lacked the knowledge and skills necessary to exercise those rights. This was true for both formerly enslaved people and many white individuals.[18] Citizens needed to actually receive an education, not just the theoretical freedom to pursue it.[19]

Reconstruction provided Congress with the opportunity to finally correct the nation's earlier education failures while also addressing the effects of slavery.[20] The Thirteenth and Fourteenth Amendments had inverted the constitutional structure from one where Congress's authority over states was almost nonexistent to one where Congress's power, particularly to protect individual rights and remedy slavery, was expansive.[21]

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[16] *See generally* KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 50–57 (1989) (discussing barriers to full participation in society even following the Thirteenth Amendment).

[17] *Id.* at 51–52.

[18] *See* Susan P. Leviton & Matthew H. Joseph, *An Adequate Education for All Maryland's Children: Morally Right, Economically Necessary, and Constitutionally Required*, 52 MD. L. REV. 1137, 1155 (1993) (discussing how Maryland "antireformers" had restricted education for whites too).

[19] *See, e.g.*, Testimony by a South Carolina Freedman Before the American Freedmen's Inquiry Commission (June 1863), *reprinted in* THE WARTIME GENESIS OF FREE LABOR: THE LOWER SOUTH 250, 250–54 (Ira Berlin, Thavola Glymph, Steven F. Miller, Joseph P. Reddy, Leslie S. Rowland & Julie Saville eds., 1990) (discussing the skills and knowledge necessary for African-Americans to fully exercise their rights); WILLIAMS, *supra* note 11, at 149–50 (discussing the problem of white hostility against school attendance by Black schoolchildren).

[20] *See infra* Section III.D. The Northwest Ordinance of 1785, for instance, had laid the ground rules for statehood outside the original colonies and required that every new town in every new state reserve its center lot to construct schools and several outer-lying lots to generate resources for those schools. Public Land Ordinance of 1785, *reprinted in* 1 LAWS OF THE UNITED STATES OF AMERICA 563, 565 (Philadelphia, John Boren, W. John Duane & R.C. Weightman 1815); *see also* Papasan v. Allain, 478 U.S. 265, 268 (1986) (acknowledging that before the Constitution, Congress required states to reserve land for public schools—a practice followed by most states). Those well-intentioned measures, however, proved insufficient to support and expand a system of education, and the South, of course, had actively undermined education.

[21] *See* Seminole Tribe v. Florida, 517 U.S. 44, 59 (1996) ("[T]he Fourteenth Amendment, by expanding federal power at the expense of state autonomy, had fundamentally altered the balance of state and federal power struck by the Constitution." (citing Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976))); *see also* William J. Rich, *Taking "Privileges or Immunities" Seriously: A Call to Expand the*

Congress, pursuant to the Guarantee Clause, now had the power to set the terms of Southern states' readmission to the Union. These power shifts, combined with Congress's recognition that a more forceful approach to education was necessary, led Congress to demand that states provide for public education in their constitutions prior to rejoining the Union.[22]

The right to education, when accurately accounting for this history, builds upon the primary role public education played in transitions from slavery to freedom, liberty, and citizenship—and the nation's recommitment to its founding ideals. My prior article, *The Constitutional Compromise to Guarantee Education*, offers a precise historical justification for the right to education but still falls short of a full explanation.[23] In focusing almost exclusively on the readmission process for Southern states from 1867 to 1870, that earlier article overlooks extensive federal education efforts prior to 1867 and the central role education had long played as the dividing line between slavery and freedom.

As a result, that article and the various other conventional arguments for a federal education right suffer two fundamental flaws. First, they tend to narrowly define the nature of the right to education in terms of school quality and learning outcomes[24] and, thereby, overlook the importance of education to human freedom and the Constitution's overall system of democratic government. Second and relatedly, they locate the right solely in the

Constitutional Canon, 87 MINN. L. REV. 153, 200 (2002) ("The Civil War Amendments changed the relationship between state and federal citizenship, putting to rest arguments about the supremacy of state sovereignty.").

[22] Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735, 766 (2018) ("Education was specifically mandated in every new Southern constitution and implicit in the republican form of government Congress demanded pursuant to its own existing constitutional authority.").

[23] *See id.*

[24] *See, e.g.*, Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92, 110 (2013) (arguing for a right to adequate education); Stuart Biegel, *Reassessing the Applicability of Fundamental Rights Analysis: The Fourteenth Amendment and the Shaping of Educational Policy After* Kadrmas v. Dickinson Public Schools, 74 CORNELL L. REV. 1078, 1081–84 (1989) (analyzing applicability of the Equal Protection Clause to educational opportunity); Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 345–48 (2006) (arguing for education as a right of citizenship); Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 812–13 (1985) (arguing for a minimally adequate education); Note, *A Right to Learn?: Improving Educational Outcomes Through Substantive Due Process*, 120 HARV. L. REV. 1323, 1324 (2007) (arguing for recognition of basic education as a constitutional right); Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 579–96 (1992) (analyzing the right to education via substantive due process).

Fourteenth Amendment,[25] missing the crucial role that the Thirteenth Amendment and Guarantee Clause played in forcing a system of public education into existence in the South. History, quite simply, demonstrates that the right to education involves interests too diverse for the Fourteenth Amendment to explain alone.[26]

The historical backdrop of slavery and Reconstruction cures this problem by revealing, as a matter of fact, the multifaceted interests implicated by the right to education and at least three constitutional provisions that protect those interests. The interests include the vestiges of slavery, parental control and upbringing of children, mental liberty, citizenship, equality, democratic participation, and republican government.[27] Those interests find direct protection in the history and text of the Thirteenth Amendment, Fourteenth Amendment, and Guarantee Clause. Understood this way, education is an individual right that also constitutes the substrata of the Constitution, unifying and connecting multiple branches, themes, and powers.

Important caveats, however, are in order. First, while ongoing litigation makes this Article's thesis timely, the Article's primary goal is not to affect litigation. Accounting for and working through current doctrinal inclinations and openings can too easily lead to reverse engineering a scholarly argument. Even then, the applied prospects of scholarship can be dim. This Article's primary goal is to understand the federal constitutional right to education as it was, not as it might be to win litigation contests today. That historic pursuit, I believe, is of intrinsic value and can help shape how society thinks about, enforces, and protects the right to education, regardless of what a court might do with the right in the short term.[28] To be sure, this Article will consider

[25] *See* sources cited *supra* note 24; *see also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 30 (1973) (examining the right to education exclusively under the Equal Protection Clause of the Fourteenth Amendment); Gary B. v. Whitmer, 957 F.3d 616, 642 (6th Cir. 2020) (same), *reh'g en banc granted, opinion vacated*, 958 F.3d 1216 (6th Cir.). *But see* Brence D. Pernell, *The Thirteenth Amendment and Equal Educational Opportunity*, 39 YALE L. & POL'Y REV. 420, 420–21 (2021) (drawing on the Thirteenth Amendment as a tool for challenging racial inequalities in school discipline).

[26] This Article does not adopt the penumbra approach that led to the initial recognition of the right of privacy in *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965), but notes the overlap with its approach. This Article argues the right to education was contemporaneously linked to specific constitutional provisions.

[27] *See, e.g.*, *Gary B.*, 957 F.3d at 650 (discussing deprivation of education as a weapon during slavery); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (discussing parental liberty over upbringing of children); Bd. of Educ. v. Pico *ex rel.* Pico, 457 U.S. 853, 867–68 (1982) (explaining individuals' interests in citizenship, democratic participation, and republican government); Stanley v. Georgia, 394 U.S. 557, 564 (1969) (asserting that the right to mental liberty is fundamental).

[28] This thinking is in the vein of Professor Larry Kramer's notion that "the role of the people is not confined to occasional acts of constitution making, but includes active and ongoing control over the

modern implications, but fully resolving them with the care they deserve is beyond its scope. Those issues are matters for another article. For now, this Article will aim to dislodge some foundational premises about the right and replace them with rich history.

Second is a matter that perpetually occurs with education rights articles. This Article examines the existence and source of a right to education. It does not take up the substance or definition of that right—at least not in the typical terms of adequacy, equity, or quality. The substance is arguably far more difficult to triangulate than the existence. That difficulty motivates some courts to stay out of this area altogether.[29] But as the existence remains uncertain, if not derided, this Article trains its focus on the existence of the right. On the question of substance, my prior work addresses what the right to education would have encompassed during the second half of the nineteenth century.[30]

This Article proceeds in three Parts. Part I demonstrates that education, as a historical matter, is a necessary component of freedom and citizenship, which the government sought to guarantee in the immediate aftermath of slavery. It begins by detailing the full breadth of the South's education restrictions, which extended well beyond prohibiting Black literacy and sought to wall off the South from outside ideals. Those restrictions are the background for understanding many enslaved people's extraordinary efforts to become educated and how those secret educational efforts dramatically expanded when they reached safety behind Union lines. Following the War, education shifted from the pathway to freedom to an organized movement to secure the predicates and manifestations of actual freedom: economic liberty, self-autonomy, citizenship, and self-government. Part I closes by detailing the governmental responses to the freedmen's educational needs and demands. Those responses included presidential and executive action, congressional action, and state constitutional conventions.

Part II filters these events through subsequent Supreme Court case law to demonstrate that the U.S. Constitution protects a negative right to education. As early as 1923, for instance, the Court recognized education as

interpretation and enforcement of constitutional law." Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959, 959 (2004).

[29] *See, e.g.*, Comm. for Educ. Rts. v. Edgar, 672 N.E.2d 1178, 1191–93 (Ill. 1996) ("We conclude that the question of whether the educational institutions and services in Illinois are 'high quality' is outside the sphere of the judicial function."); *Rodriguez*, 411 U.S. at 41–43 (suggesting that the judiciary should refrain from creating precedent which would impede states' abilities to address ongoing, evolving issues in education).

[30] Black, *supra* note 22, at 744–46; Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. 1059, 1085–90 (2019).

an aspect of parental and liberty rights.[31] Filtered through that precedent, slavery impinged multiple educational interests that the Fourteenth Amendment now protects. This analysis demonstrates three key points: (1) negative education rights are well established, (2) slavery imposed the gravest invasions of those rights, and (3) the Fourteenth Amendment was designed to provide and authorize remedies to those invasions. These negative rights to education, however, were insufficient, in and of themselves, to cure the educational deprivations of slavery.

Part III demonstrates that Congress responded to that insufficiency and implemented education as a positive right during Reconstruction pursuant to its authority under multiple constitutional provisions. The three most relevant constitutional provisions are the Thirteenth Amendment, Fourteenth Amendment, and Guarantee Clause.[32] Part III examines constitutional text, judicial interpretation, and congressional action to identify the specific and unique interests that each constitutional provision protects. It also explains how each provision builds upon the one that preceded it to expand the right to education.

I. THE CENTRAL ROLE OF EDUCATION IN SLAVERY, FREEDOM, AND CITIZENSHIP

Courts and legal scholars have yet to fully evaluate the purpose and effect of the criminalization of African-American education during slavery,[33] typically just noting it as a passing example to support some larger point.[34] In 2020, the Sixth Circuit went further than any other court,[35] using the

[31] Meyer v. Nebraska, 262 U.S. 390, 400 (1923) ("His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment.").

[32] The transition, as I term it, was more a transition in form than in practice. States' constitutional texts transitioned and reflected a new theory of states' role in delivering education. The practical reality was slower to come. For instance, the actual enforcement of state constitutional text as an affirmative right did not occur for another century. For an account of the state judiciaries' recognition of the transition to a positive education right, see Joshua E. Weishart, *Equal Liberty in Proportion*, 59 WM. & MARY L. REV. 215, 235–40 (2017).

[33] *See, e.g.*, Nw. Austin Mun. Util. Dist. v. Holder, 557 U.S. 193, 219–20 (2009) (noting literacy prohibitions for enslaved people); South Carolina v. Katzenbach, 383 U.S. 301, 311 (1966) (explaining that African-American illiteracy rates served as the rationale for literacy requirements to voter registration); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 388 (1978) (noting the prohibition on slave literacy in passing); Lynch v. Alabama, No. CV 08-S-450-NE, 2011 WL 13186739, at *153 (N.D. Ala. Nov. 7, 2011) (discussing literacy prohibitions).

[34] *See, e.g.*, *Katzenbach*, 383 U.S. at 311, 311 n.10 (noting the intersection of prohibitions on literacy and voting restrictions); *Nw. Austin*, 557 U.S. at 219–20 (Thomas, J., concurring in the judgment in part and dissenting in part) (same).

[35] Gary B. v. Whitmer, 957 F.3d 616, 655 (6th Cir. 2020) (holding that "access to such a basic minimum education is a fundamental right protected by the Due Process Clause of the Fourteenth

criminalization of African-American education to help justify a fundamental right to literacy.[36] The court, however, still oversimplified the pre-Civil War criminalization and post-Civil War discrimination.[37] It framed the right to education as a modern concept to correct past wrongs, rather than a right that long ago existed—even if never fully implemented.[38] A deeper examination of the criminalization of African-American education reveals that education lies at the center not just of political power[39] but of freedom and liberty—two other crucial constitutional concepts.

A. African-Americans' Struggle for Education

The following Sections discuss how African-Americans struggled to obtain education during slavery, immediately sought it out upon freedom, and understood it as a gateway to freedom, citizenship, and self-government. The first Section explains why the South criminalized African-American literacy. Those prohibitions, however, did not end literacy; they drove it underground, where African-Americans went to extraordinary lengths to pass on literacy in secret. Those who were unable to obtain learning in secret—along with those who wanted to build on their knowledge—immediately sought learning opportunities upon escaping slavery. As a result, schools popped up behind Union lines throughout the South during the Civil War. While education represented a marker of freedom during slavery, it also became a gateway to citizenship and self-government afterward.

1. Criminalization of Education to Reinforce Slavery

The belief that the South's racial and social hierarchy depended on suppressing African-American education was a product of history that evolved over time.[40] The criminalization of African-American literacy was

Amendment"), *reh'g en banc granted, opinion vacated*, 958 F.3d 1216 (6th Cir.). Professor Areto A. Imoukhuede offers one of the fuller explanations of the connection between education, slavery, and freedom, though only as a subsection of a much broader analysis. *See* Areto A. Imoukhuede, *Education Rights and the New Due Process*, 47 IND. L. REV. 467, 494 (2014).

[36] *See Gary B.*, 957 F.3d at 650–51.

[37] *See id.* (jumping from prohibition on slave literacy straight to post-Civil War violence against African-American schools and then Jim Crow segregation).

[38] *See id.* at 651–52 (framing history as one of racial discrimination in education that required judicial intervention, beginning with *Brown v. Board of Education*).

[39] *See id.* (explaining that "access to literacy was viewed as a prerequisite to the exercise of political power, with a strong correlation between those who were viewed as equal citizens entitled to self-governance and those who were provided access to education by the state").

[40] *See* PATRICIA A. HERMAN, CTR. FOR STUDY OF READING, SOUTHERN BLACKS: ACCOUNTS OF LEARNING TO READ BEFORE 1861, at 11–12 (1984) (describing how slaveholders "fear[ed]" that "the spirit of discontent and insurrection" would disturb the economy and upset the social order unless laws were passed to prevent Black literacy).

not an original or inherent feature of American slavery. It was not until the early- to mid-1800s that anti-literacy laws spread.[41] Before then, many slave owners acquiesced in or supported the literacy of enslaved people.[42] Literate enslaved people's leading role in planning and executing revolts in 1822 and 1831 crystalized American slavery's need for more aggressive limits on the literacy of enslaved people.[43] Equally important, the growing circulation of abolitionist writings stoked fears that subversive written materials would provoke more unrest.[44]

Many slave owners had also long understood that slave literacy increased the risk of escape. Literate enslaved people could coordinate and plan their own individual escapes[45] and share information with others who might do the same or take even more extreme measures.[46] But more fundamentally, literacy challenged slave owners' dominion. As Frederick Douglass's enslaver proclaimed, "Learning would *spoil* the best [racial epithet] in the world" and "forever unfit him to be a slave,"[47] explicitly acknowledging that literacy would disrupt established hierarchies of violence and control.

The South responded to these concerns with legal restrictions aimed at more than just the functional skill of literacy.[48] The South Carolina

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[41] Birgit Brander Rasmussen, *"Attended with Great Inconveniences": Slave Literacy and the 1740 South Carolina Negro Act*, 125 PROC. MOD. LANGUAGE ASS'N 201, 201–02 (2010) (discussing the South Carolina anti-literacy law as an innovation in response to a revolt, a measure that became a familiar response to uprisings in slaveholding territories across different periods).

[42] *See, e.g.*, Janet Cornelius, *"We Slipped and Learned to Read:" Slave Accounts of the Literacy Process, 1830-1865*, 44 PHYLON 171, 171–72 (1983) (noting that some taught enslaved people to read for religious purposes); *see also* HERMAN, *supra* note 40, at 12–13 (discussing churches that taught enslaved people).

[43] *See, e.g.*, Nicholas May, *Holy Rebellion: Religious Assembly Laws in Antebellum South Carolina and Virginia*, 49 AM. J. LEGAL HIST. 237, 253 (2007) (noting the growing fear among white South Carolinians that rebellion would repeat itself as the consequence of literacy through religion); *see also* Beaubrun, *supra* note 13, at 203–09; Kim Tolley, *Slavery, in* MISEDUCATION: A HISTORY OF IGNORANCE-MAKING IN AMERICA AND ABROAD 13, 13–16 (A. J. Angulo ed., 2016) (explaining that the timing of Nat Turner's rebellion makes it impossible to foist the full responsibility of these anti-literacy laws on it).

[44] *See* Sean Wilentz, *Introduction* to DAVID WALKER'S APPEAL: TO THE COLOURED CITIZENS OF THE WORLD, BUT IN PARTICULAR, AND VERY EXPRESSLY, TO THOSE OF THE UNITED STATES OF AMERICA, at vii–xxiii (1995).

[45] Cornelius, *supra* note 42, at 183 (indicating that five enslaved people in the study had used literacy to escape); FREDERICK DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE 42–43 (Boston, Anti-Slavery Off. 1845) (discussing the use of literacy to escape).

[46] *See, e.g.*, Tolley, *supra* note 43, at 27 (discussing how the law instituted "quarantine on ships carrying free black sailors" to prevent the free exchange of information between them and enslaved people).

[47] DOUGLASS, *supra* note 45, at 36. The author and editors have agreed to edit this quote in keeping with the journal's values of diversity and inclusion.

[48] *See* Beaubrun, *supra* note 13, at 204–09.

legislature, for instance, prohibited "mental instruction" altogether and made it unlawful for enslaved people to assemble in any way that might be construed as involving mental instruction.[49] Louisiana prohibited the harboring of written ideas "having a tendency to produce discontent among the free colored population or insubordination among the slaves," whether by white or Black people, and outlawed any materials that might incite insubordination from enslaved people.[50] Mere possession of such materials was a crime.[51] Throughout the South, violators were flogged and imprisoned, not simply fined.[52] In short, the South did more than outlaw Black literacy; it stamped out any form of thinking or communication that might contest or undermine the enforced status of African-Americans as slaves. And as a result, anti-literacy laws shackled many enslaved people's minds, language, and interaction with the world.[53] As Frederick Douglass explained, illiteracy had limited his ability to fully process the depravity of slavery.[54] Though instinctually and emotionally rejecting his slave status, illiteracy denied him the ideas, concepts, and words to logically delegitimize slavery in his mind.[55]

2. Enslaved People's Secret Resistance to Education Deprivation

As doggedly as the South denied access to education, many enslaved people were equally determined to acquire this forbidden learning. Yet, their efforts are entirely missing from most legal discussions of the right to education.[56] Unearthing many enslaved people's determination to acquire education reveals how deeply the right to learn implicates basic human agency and liberty. As an elusive marker of freedom,[57] many enslaved people pined for education in ways not altogether distinct from the pains of hunger

[49] An Act Respecting Slaves, Free Negroes, Mulattoes, and Mestizoes, for Inforcing the More Punctual Performance of Patrol Duty, and to Impose Certain Restrictions on the Emancipation of Slaves., *reprinted in* ACTS AND RESOLUTIONS OF THE GENERAL ASSEMBLY OF THE STATE OF SOUTH-CAROLINA, PASSED IN DECEMBER, 1800, at 3, 38 (Columbia, Daniel & J. J. Faust 1801); WILLIAMS, *supra* note 11, at 13.

[50] United States v. Rhodes, 27 F. Cas. 785, 793 (C.C.D. Ky. 1866).

[51] WILLIAMS, *supra* note 11, at 14.

[52] *See* BRITISH & FOREIGN ANTI-SLAVERY SOC'Y, *supra* note 13, at 194–96 (surveying statutes and their punishments).

[53] *See* SPAN, *supra* note 11, at 43–44.

[54] DOUGLASS, *supra* note 45, at 40.

[55] *Id.* at 40–41.

[56] *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) (examining whether the Constitution explicitly or implicitly protects the right to education, with no discussion of slavery); *see also supra* note 24 (listing sources advocating for the recognition of an implicit right to education).

[57] *See, e.g.*, BOOKER T. WASHINGTON, UP FROM SLAVERY: AN AUTOBIOGRAPHY 6–7 (1901) (describing an enslaved person's desire to enter white children's schoolhouse, imagining it to be "paradise"); Cornelius, *supra* note 42, at 181 (stating that enslaved people highly valued literacy because of "their owners' resistance").

or the chills of winter.[58] The pursuit of education was a silent battle against the condition of slavery itself.[59] Slaveholders sought to shrink enslaved people's innate sense of self-determination and humanity, while enslaved people sought the opposite.[60]

Learning to read, regardless of the purpose to which enslaved people put it, was an enormous act of defiance.[61] Numerous African-Americans, if only to themselves, were proclaiming that they would not fully submit to slavery and would, instead, seize a piece of mental freedom for themselves.[62] Thus, long before freedom, many enslaved people preserved and spread "secret" learning.[63] In some instances, they covertly operated actual schools inside buildings and, in others, hid in caves, pits, and the dark of the night while teaching themselves and others.[64]

This secret learning was likely more prevalent than most white people of the time would have suspected.[65] When the first missionary teachers came South, they were surprised by how many African-Americans already knew how to read and write—some quite well.[66] They discovered that many

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[58] *Cf.* JAMES D. ANDERSON, THE EDUCATION OF BLACKS IN THE SOUTH, 1860–1935, at 5 (1988) (indicating that freedmen "cried for the spelling-book as bread, and pleaded for teachers as a necessity of life"); *Letter from W. C. Gannett*, 1 FREEDMEN'S REC. 91, 91 (1865) (describing the pursuit of learning as instinctive as "head-shaking, and clearing of the eyes, after emerging from the waters" of slavery); JOHN W. ALVORD, FIRST SEMI-ANNUAL REPORT ON SCHOOLS AND FINANCES OF FREEDMEN 1 (Washington, Gov't Printing Off. 1866) [hereinafter ALVORD, FIRST SEMI-ANNUAL REPORT] (characterizing freedmen's educational pursuits as "[t]he natural thirst for knowledge common to all men").

[59] *See* SPAN, *supra* note 11, at 43.

[60] WILLIAMS, *supra* note 11, at 7 (indicating literacy "revealed a world beyond bondage" and freedom to think in ways that "subverted the master-slave relationship").

[61] Cornelius, *supra* note 42, at 181; WILLIAMS, *supra* note 11, at 7 (discussing the tension between Black people and slaveowners over access to education).

[62] *See* WILLIAMS, *supra* note 11, at 7.

[63] Cornelius, *supra* note 42, at 173 (presenting an empirical study of the secret learning that had occurred); *Letter from Lucy Chase*, 1 FREEDMEN'S REC. 96, 96 (1865) (discussing the substantial secret learning during slavery).

[64] *See* WILLIAMS, *supra* note 11, at 19–20 (finding some enslaved people, through various ingenious tactics, taught themselves to read); C. G. WOODSON, THE EDUCATION OF THE NEGRO PRIOR TO 1861, at 128 (2d ed. 1919) (stating that "Julian Troumontaine taught openly in Savannah up to 1829 when such an act was prohibited by law" and "taught clandestinely thereafter, however, until 1844"); Virgil A. Clift, *Educating the American Negro*, *in* THE AMERICAN NEGRO REFERENCE BOOK 360, 360–64 (John P. Davis ed., 1966) (surveying the education of Black students during Colonial, Revolutionary, and pre-Civil War periods); ELIJAH MARRS, LIFE AND HISTORY OF THE REV. ELIJAH P. MARRS 11–12 (Louisville, Bradley & Gilbert Co. 1885); DOUGLASS, *supra* note 45, at 43, 50 (explaining Douglass's process of secretly learning to write).

[65] *See* Cornelius, *supra* note 42, at 184–86 (producing statistics and charts regarding reading levels among enslaved people); WILLIAMS, *supra* note 11, at 19–21.

[66] *See* GREEN, *supra* note 11, at 17; *Letter from Lucy Chase*, *supra* note 63, at 95–96; JUSTIN BEHREND, RECONSTRUCTING DEMOCRACY: GRASSROOTS BLACK POLITICS IN THE DEEP SOUTH AFTER THE CIVIL WAR 61 (2015).

enslaved people had learned to read before the criminalization of literacy and then held onto that knowledge and passed it from generation to generation.[67] The best measure of this secret learning may be how quickly formerly enslaved people advanced in the missionary schools. In Norfolk in 1864, for instance, missionaries reported that nearly 1,000 out of 1,430 formerly enslaved people were spelling and reading, with a few hundred performing math calculations.[68]

3. Immediate Post-Slavery Desires for Education

The deep desire for education held by many African-Americans transformed into concrete and systematic forms during and following the Civil War. Their efforts began during the opening months of the War and quickly accelerated. And once they recognized that education would impact not just their immediate lives but the future, they also began to press for structural and legal changes. Their efforts, combined with those of Northern missionaries and Union officials, laid the foundation for what became a formal system of public education—a system that continues in the South to this day.

In May 1861, about a month after the Civil War began, three enslaved people fled their plantations for Fort Monroe, Virginia.[69] Those three expanded to 800 within two months and nearly doubled that by the next spring.[70] Having found physical freedom at Fort Monroe, literacy became a more pressing goal for formerly enslaved people.[71] In response, Mary Peake opened the first school for African-Americans in the South in the fall of 1861.[72]

A few weeks after the formerly enslaved escaped to Fort Monroe, the Union won the Battle of Port Royal, South Carolina.[73] White Southerners completely fled Port Royal and left a large population of enslaved people behind. Union forces allowed the formerly enslaved people to run their own

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[67] *Letter from Lucy Chase*, *supra* note 63, at 95–96.

[68] *Report of School Committee*, 1 FREEDMEN'S REC. 25, 25 (1864).

[69] LOUIS S. GERTEIS, FROM CONTRABAND TO FREEDMAN: FEDERAL POLICY TOWARD SOUTHERN BLACKS 1861–1865, at 12 (1973).

[70] *Id.* at 19.

[71] Edward Lillie Pierce, *The Contrabands at Fortress Monroe*, 8 ATL. MONTHLY 626, 639 (1861) (Union officer reporting "a very general desire among the contraband to know how to read").

[72] LEWIS C. LOCKWOOD, TWO BLACK TEACHERS DURING THE CIVIL WAR: MARY S. PEAKE: THE COLORED TEACHER AT FORTRESS MONROE, at ii (William Loren Katz ed., 1969); GERTEIS, *supra* note 69, at 20.

[73] The attack on Port Royal was launched from Fort Monroe. ROBERT ARTHUR, HISTORY OF FORT MONROE 91 (1930) (indicating that the expedition against South Carolina sailed from Fort Monroe on October 29, 1861); John V. Quarstein, *Battle of Port Royal Sound*, MARINERS' BLOG (Nov. 5, 2020), https://blog.marinersmuseum.org/2020/11/battle-of-port-royal-sound/ [https://perma.cc/HD2N-R3KY].

society.[74] With that freedom, the formerly enslaved people in conjunction with Northern missionaries quickly started a rudimentary system of schools. The first school moved into St. Helena Island's "Brick Church" in 1863.[75] The church, however, quickly proved too small for the swelling number of students, and the community purchased an adjacent lot on which to build a three-room schoolhouse—the first ever built for African-Americans in the South.[76] By the end of 1862, almost 2,000 children attended school on three islands, with more than thirty different schools operating on the islands by 1863.[77]

Similar stories soon unfolded throughout the eastern seaboard and Mississippi River region.[78] Schools often could not be built fast or large enough to meet the demand.[79] By 1864, schools were operating in Virginia, North Carolina, South Carolina, Florida, Louisiana, Kentucky, Tennessee, Mississippi, Arkansas, Missouri, and Kansas.[80] Enrollment was consistently overwhelming and included everyone from young children to adults nearing the end of life.[81]

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[74] *See generally* KEVIN DOUGHERTY, THE PORT ROYAL EXPERIMENT: A CASE STUDY IN DEVELOPMENT (2014) (detailing life in Port Royal, South Carolina, where federal officials allowed formerly enslaved people to operate their own free society, making their own labor decisions and forming their own cultural institutions).

[75] Proclamation No. 9567, 82 Fed. Reg. 6167, 6168 (Jan. 12, 2017).

[76] *A Timeline of Our History*, PENN CTR., http://www.penncenter.com/explore-penn-centers-history [https://perma.cc/P9NV-U9CT]; *see also* Luana M. Graves Sellars, *Penn Center & the Port Royal Experiment*, HILTON HEAD MONTHLY (Jan. 30, 2017), https://www.hiltonheadmonthly.com/living/4078-penn-center-the-port-royal-experiment [https://perma.cc/26G9-HLZR] (recounting the Penn Center's history).

[77] ROBERT C. MORRIS, READING, 'RITING, AND RECONSTRUCTION: THE EDUCATION OF FREEDMEN IN THE SOUTH, 1861–1870, at 7 (1976).

[78] *See, e.g.*, Maxine D. Jones, *The American Missionary Association and the Beaufort, North Carolina School Controversy, 1866-67*, 48 PHYLON 103, 103 (1987) (describing the opening of a school in North Carolina); JAMES E. YEATMAN, A REPORT ON THE CONDITION OF THE FREEDMEN OF THE MISSISSIPPI: PRESENTED TO THE WESTERN SANITARY COMMISSION 11 (Saint Louis, W. Sanitary Comm'n Rooms 1863) (reporting on new schools erected in Mississippi).

[79] *See* PETER KOLCHIN, FIRST FREEDOM: THE RESPONSES OF ALABAMA'S BLACKS TO EMANCIPATION AND RECONSTRUCTION 84 (2008) (recounting Major General Wager Swayne's statement that "to open a school has been to have it filled").

[80] *See* AM. MISSIONARY ASS'N, HISTORY OF THE AMERICAN MISSIONARY ASSOCIATION 14–15 (New York, Bible House 1891); *see also* JOE M. RICHARDSON, CHRISTIAN RECONSTRUCTION: THE AMERICAN MISSIONARY ASSOCIATION AND SOUTHERN BLACKS, 1861–1890, at 37–40 (1986) (noting stories from Virginia, Tennessee, Louisiana, South Carolina, Florida, North Carolina, Arkansas, Missouri, and Mississippi about the African-American desire for education following the Civil War).

[81] *See* AM. MISSIONARY ASS'N, *supra* note 80, at 13–14 (describing the increase in missionaries and teachers as a mark of increased enrollment as well as the ages of students ranging from five years old to the elderly); *Letter from Lucy Chase*, *supra* note 63, at 95–96 (noting the school in Richmond had its hands full with 1,075 pupils, including both adults and children); ALVORD, FIRST SEMI-ANNUAL REPORT,

The sacrifices many African-Americans made to attend school were enormous. Many faced violence, the loss of work and housing, and the crushing weight of abject poverty.[82] Some families had to choose between school supplies and food, or which child would get to wear shoes for the long walk to school.[83] For instance, when one teacher asked her student why he was not writing on his slate, he responded "that he had sold his pencil for a piece of bread."[84] Many African-Americans went to these lengths because education represented a sharp break from slavery. A scholar of the period explained:

> Becoming literate proved to be as much a psychological victory for many freedpeople as it was an intellectual one. Illiteracy was a vestige of slavery, a reminder of the blatant denial of one's rights to self-advancement; it served as a badge of inferiority and societal impotence. To become literate challenged this status.[85]

The schoolhouse became the "fundamental vehicle" by which many Black students could distance "themselves from their slave past" and "transition to freedom."[86]

Also notable is the fact that some freedmen demanded education for their children. For instance, in February 1864, a Union officer testified that a Black soldier insisted that his children be brought from a distant plantation so that he could "send them to school."[87] When the officer resisted, the father rebuked his white superior: "I am in your service; I wear military clothes; I have been in three battles; I was in the assault at Port Hudson; I want those children; they are my flesh and blood."[88] Freedmen in North Carolina

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supra note 58, at 2 (noting the average attendance of African-American schools in the Confederate and border states nearly equaled that of white schools in the North, with numbers only trending upwards); J. W. ALVORD, THIRD SEMI-ANNUAL REPORT ON SCHOOLS AND FINANCES OF FREEDMEN 12 (Washington, Gov't Printing Off. 1867) (describing how members from four generations within the same family were all in school together); WALTER LYNWOOD FLEMING, CIVIL WAR AND RECONSTRUCTION IN ALABAMA 458 (1905) (noting all African-Americans wanted to go to school irrespective of their age and noting their desire for education).

[82] *See, e.g.*, GREEN, *supra* note 11, at 30 (noting individuals connected with the racially inclusive public schools in Richmond faced minor acts of violence from white Richmonders); WILLIAMS, *supra* note 11, at 142–43 (noting African-American workers were turned away without financial compensation for their work, as well as noting the poor shape of the wooden cabins in which they slept); WASHINGTON, *supra* note 57, at 4 (describing Washington's early impoverished years with no cooking stove in his poorly built plantation cabin).

[83] WILLIAMS, *supra* note 11, at 142–43.

[84] *Id.* at 142.

[85] SPAN, *supra* note 11, at 43.

[86] GREEN, *supra* note 11, at 2–3.

[87] WILLIAMS, *supra* note 11, at 70.

[88] *Id.* (emphasis omitted).

similarly demanded to know what right an official has "to take our boy . . . from us and from the School and Send them . . . to work . . . without . . . parent Consint."[89] These men and others, in effect, proclaimed a human right to educate their children.[90]

4. The Gateway to Citizenship and Self-Government

The Union victory and the Thirteenth Amendment ended slavery, but neither granted African-Americans citizenship.[91] While debates over whether and how best to extend citizenship proceeded at the national level,[92] many freedmen quickly seized on the idea that education was an important step toward the possibility of citizenship.[93] Illiteracy could be the basis upon which to deny African-Americans voting rights.[94] But African-Americans and their supporters believed that by gaining education, they would prepare themselves for citizenship and the right to vote—maybe even speed those rights along.[95]

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[89] *Id.*

[90] *Cf.* ANDERSON, *supra* note 58, at 9–10 (discussing Black parents "demanding the continuation of universal schooling" following "officials temporarily clos[ing] all black schools under their authorization"). At one point, 10,000 African-Americans reportedly petitioned the military governor to continue the education program in Louisiana. *Id.*

[91] Maria L. Ontiveros, *Noncitizen Immigrant Labor and the Thirteenth Amendment: Challenging Guest Worker Programs*, 38 U. TOL. L. REV. 923, 929 (2007); William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1323 (2007). Many in Congress, however, believed that the Civil Rights Act of 1866 did extend citizenship. Rebecca E. Zietlow, *Free at Last! Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. REV. 255, 282 (2010).

[92] *See generally* Zietlow, *supra* note 91, at 271–75 (surveying those advocating for full equality for formerly enslaved people); GARRETT EPPS, DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA 234–35 (2006) (discussing objections to the Civil Rights Act of 1866's Citizenship Clause); Zietlow, *supra* note 91, at 283 (same).

[93] *See, e.g.*, GREEN, *supra* note 11, at 3–6, 16 (noting that attending school "symbolized [freedmen's] free status and entry . . . as citizens in[to] the body politic"); SPAN, *supra* note 11, at 29, 31 (discussing education as the means to liberty and citizenship); *cf. Letter from W. C. Gannett*, *supra* note 58, at 108 ("[W]e confidently look for the admission of the freedmen to the general rights of citizenship; and we feel ourselves doubly bound to fit them for the duties of citizenship by educating them.").

[94] *See* Black, *supra* note 30, at 1109–10; *see also* MORRIS, *supra* note 77, at 219 (discussing the argument that literacy could be the measure of voter eligibility); WILLIAMS, *supra* note 11, at 5 ("[E]ach constituency realized that an educated black population could bring about a seismic change in the American South."); Dayna L. Cunningham, *Who Are to Be the Electors? A Reflection on the History of Voter Registration in the United States*, 9 YALE L. & POL'Y REV. 370, 373–80 (1991) (discussing literacy restrictions on voting in the post-Reconstruction Era).

[95] *See, e.g.*, J. W. ALVORD, EIGHTH SEMI-ANNUAL REPORT ON SCHOOLS FOR FREEDMEN 3 (New York, AMS Press, Inc. 1869) [hereinafter ALVORD, EIGHTH SEMI-ANNUAL REPORT] ("But with universal suffrage conceded, surely the freedmen's vote should be intelligent; as the colored man is to become a part of society, he must have substantially its privileges . . . ."); *Letter from W. C. Gannett*, *supra* note 58, at 108 (expressing that the purpose of supplying education was "to fit [former slaves] for the duties of

In the few years immediately following the war, well over 100,000 African-Americans took steps to educate themselves through any available means.[96] These efforts typically involved collaborations with missionaries and the Freedmen's Bureau[97] but also involved African-Americans taking matters into their own hands. In 1865 in Arkansas, for instance, Black organizers formed the Freedman's School Society and raised the funds to support free schools in Little Rock for the remainder of the year.[98] Those efforts later transitioned into a statewide convention in which Black leaders, through the Convention of Colored Citizens of the State of Arkansas, formally demanded that the state "clothe [them] with the power of self protection" and citizenship through "suffrage" and the "provi[sion] for the education of [their] children."[99] African-American-led conventions in Alabama and South Carolina similarly placed education at the forefront of their visions of citizenship, calling on the state constitutional conventions and officials to establish "a thorough system of common schools throughout the State, and indeed of the Union, for the well-being of such ensures to the advantage of all."[100] The State Convention of the Colored People of South Carolina even penned a letter to Congress, asking that Congress make education "as secure in South Carolina as in Massachusetts or Vermont."[101]

citizenship"); Robert C. Morris, *Introduction* to 1 FREEDMEN'S SCHOOLS AND TEXTBOOKS (1980) (describing that education's purpose was "to prepare the former slaves for full citizenship"); *Letter from General O. Howard, War Department, Bureau of Refugees, Freedmen, and Abandoned Lands*, 1 FREEDMEN'S REC. 169, 177 (1865) [hereinafter *Letter from General O. Howard*] (stating that education will allow African-Americans to "demand and receive both privileges and rights" that were not yet guaranteed); MORRIS, *supra* note 77, at 219–20 (noting that aid societies prepared Black people for "the rights and responsibilities of full citizenship"); ANDERSON, *supra* note 58, at 31 (stating that the purpose for schooling was to provide formerly enslaved people with the literacy skills and "the rudiments of citizenship training" to participate "in a democratic society").

[96] *See* ALVORD, FIRST SEMI-ANNUAL REPORT, *supra* note 58, at 2 (indicating that 90,589 African-Americans were in school); J. W. ALVORD, NINTH SEMI-ANNUAL REPORT ON SCHOOLS FOR FREEDMEN 4 (Washington, Gov't Printing Off. 1870) [hereinafter ALVORD, NINTH SEMI-ANNUAL REPORT] (reporting 122,317 pupils); J. W. ALVORD, FIFTH SEMI-ANNUAL REPORT ON SCHOOLS FOR FREEDMEN 7 (Washington, Gov't Printing Off. 1868) (estimating that one million African-Americans were ready to be educated on a regular basis).

[97] *See supra* note 68 and accompanying text; *supra* note 95.

[98] ALVORD, FIRST SEMI-ANNUAL REPORT, *supra* note 58, at 11.

[99] 1 PROCEEDINGS OF THE BLACK NATIONAL CONVENTIONS, 1865–1900, at 194 (Philip S. Foner & George E. Walker eds., 1986).

[100] GREEN, *supra* note 11, at 49; *see also Alabama Colored Convention*, 19TH CENTURY U.S. NEWSPAPERS, https://omeka.coloredconventions.org/items/show/1690 [https://perma.cc/8QPE-CPB7] (calling for the creation of tax-supported schools); PROCEEDINGS OF THE COLORED PEOPLE'S CONVENTION OF THE STATE OF SOUTH CAROLINA 9–10 (Charleston, S.C. Leader Off. 1865) (adopting a rule that calls for the establishment of schools in every neighborhood).

[101] PROCEEDINGS OF THE COLORED PEOPLE'S CONVENTION OF THE STATE OF SOUTH CAROLINA, *supra* note 100, at 30.

B. The Governmental Response: Guaranteeing Access to Education

Both the federal and state governments responded to the freedmen's calls with decisive action that sparked an education revolution.[102] The actions that Congress, the federal Executive Branch, and states took to secure education were not, however, just on behalf of freedmen. They were on behalf of everyone.[103] Poor whites' access to education, while not prohibited, had been sparse in the South.[104] What began as a remedy to slavery became an agenda to extend education to all and reclaim the nation's founding vision of democracy.[105] As one scholar succinctly concluded, "The chief contribution of the Reconstruction government was to set a precedent for the democratic right of all people to public tax-supported education."[106] The following Sections individually detail the executive, legislative, and constitutional steps in pursuit of this agenda.

1. Executive and Congressional Action During the War

The first most notable executive action occurred in 1863 in Louisiana. President Lincoln sent General Nathaniel Banks, the commander there, a letter outlining the next steps for Louisiana.[107] Lincoln wrote that the state needed to "adopt some practical system by which the two races could gradually live themselves out of their old relation to each other, and both come out better prepared for the new."[108] This required a state constitutional convention.[109] Lincoln deferred to Louisiana's people on most aspects of their new government but was direct on one: "Education for young blacks should be included in the plan."[110]

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[102] *Cf.* J. W. ALVORD, SECOND SEMI-ANNUAL REPORT ON SCHOOLS AND FINANCES OF FREEDMEN 13 (Washington, Gov't Printing Off. 1866) ("We hail, with exceeding pleasure, the better feeling in regard to the education of these freedmen. All advances on the subject should be cordially met. . . . [I]f the several States will inaugurate and sustain a system of public instruction for all, though imperfect at first, we should give it warmest encouragement."); ALVORD, NINTH SEMI-ANNUAL REPORT, *supra* note 96, at 4 (describing how education had produced "a revolution" from "which [the South] can never go backward").

[103] *See* Clift, *supra* note 64, at 366.

[104] *See generally* LAWRENCE A. CREMIN, AMERICAN EDUCATION: THE NATIONAL EXPERIENCE 1783–1876, at 148–63 (1980) (contrasting the history of public education in New York and Massachusetts with that in Virginia); *see also* CONG. GLOBE, 40th Cong., 1st Sess. 167 (1867) (statement of Sen. Sumner) (emphasizing illiteracy rates were four times higher in the South).

[105] *See, e.g.*, H.R. J., 39th Cong., 1st Sess. 69 (1865) (framing the creation of the Department of Education as an attempt to reach the nation's goals of a republican form of government).

[106] Clift, *supra* note 64, at 366.

[107] Letter from Abraham Lincoln to Nathaniel Banks (Aug. 5, 1863), *in* 6 ABRAHAM LINCOLN ASS'N, THE COLLECTED WORKS OF ABRAHAM LINCOLN 365, 365 (Roy P. Basler ed., 1953).

[108] *Id.*

[109] *Id.*

[110] *Id.*

General Banks responded by issuing General Order 23.[111] The order reshaped local government until such time as the people formed a new one.[112] Most notably, it divided the state into districts, required them to establish a system of schools, and placed them under the direction of a superintendent.[113] A second order dictated the managerial, operational, and resource details for the education system.[114] The most aggressive detail was to grant the districts taxing power to support the schools—something that would have been radical even in the North.[115]

This type of unilateral wartime executive action transitioned into congressionally sanctioned activity following the War. Congress's most significant role in expanding education was to establish the Freedmen's Bureau.[116] The Bureau was responsible for "provisions, clothing, and fuel, as . . . [may be] needful for the immediate and temporary shelter and supply of destitute and suffering refugees and freedmen and their wives and children."[117] That basic subsistence work quickly transitioned to ensuring lasting freedom and citizenship through education. Bureau officials, like the freedmen, saw education as the gateway to citizenship.

General Oliver Howard, the Bureau Director, wrote that "from the first I have devoted more attention to [the education of the freedmen] than to any other branch of my work."[118] His logic was simple: "Education underlies every hope of success for the freedman. . . . Through education . . . the fearful prejudice and hostility against the blacks can be overcome. They themselves will be able to demand and receive both privileges and rights that

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[111] General Orders, No. 23 (Feb. 3, 1864), *in* 34 ROBERT N. SCOTT, THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES 227–29 (Washington, Gov't Printing Off. 1891).

[112] *Id.*

[113] *Id.*

[114] *See* General Orders, No. 38 (Mar. 22, 1864), *in* 4 ELIHU ROOT, THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES 193–94 (1900), https://babel.hathitrust.org/cgi/pt?id=hvd.hwsk39;view=1up;seq=209 [https://perma.cc/ZVU3-SMKS].

[115] *Compare id.* (permitting the acquisition of land, establishing schools, and authorizing the employment of teachers), *with* JOHANN N. NEEM, DEMOCRACY'S SCHOOLS: THE RISE OF PUBLIC EDUCATION IN AMERICA 69–71 (2017) (discussing reluctance of citizens in New York and Massachusetts to increase funding allocations to schools). For further discussion of resistance to supporting the establishment of schools, see ALVORD, EIGHTH SEMI-ANNUAL REPORT, *supra* note 95, at 1 (discussing former slave owners' objection to school taxes).

[116] *See* Freedmen's Bureau Act of 1865, ch. 90, 13 Stat. 507; CREMIN, *supra* note 104, at 517–21 (summarizing the Bureau's extensive education work); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 144 (1988) ("Education probably represented the [Freedmen's Bureau's] greatest success in the postwar South.").

[117] § 2, 13 Stat. at 508.

[118] 2 OLIVER OTIS HOWARD, AUTOBIOGRAPHY OF OLIVER OTIS HOWARD: MAJOR GENERAL UNITED STATES ARMY 368 (1907).

we now have difficulty to guarantee."[119] The Bureau's expenditures revealed a commitment beyond rhetoric.[120] Education consumed more than two-thirds of the Bureau's budget in most years.[121] Bureau officers secured, leased, and helped build and repair facilities for schools.[122] They coordinated with missionaries and local communities to staff those buildings with teachers.[123]

The Bureau's education efforts were so expansive that they required their own leadership and bureaucracy. John Alvord served as General Superintendent of Schools,[124] with a structure of state and local superintendents underneath him.[125] His department helped establish and maintain 4,239 schools, hire 9,307 teachers, and educate 247,333 students.[126] Yet, General Howard recognized that the Bureau's role, as well as Congress's, was temporary.[127] The ultimate goal was for states, not the federal government, to provide education.[128] That meant facilitating education in certain respects and absolutely demanding it of states in others. Those demands, which the next Section details, established a structure strong enough to outlive the Bureau.

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[119] *Letter from General O. Howard*, *supra* note 95, at 177. The solution to our "delicate social dilemma," wrote the North Carolina superintendent, was to "[s]end out teachers . . . . in the track of every conquering army. Let them swarm over the savannahs of the South." *Negro Affairs in North Carolina*, 1 FREEDMEN'S REC. 141, 144 (1865).

[120] *See* FONER, *supra* note 116, at 144.

[121] Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 780–81 (1985); *see also* PAUL SKEELS PEIRCE, THE FREEDMEN'S BUREAU: A CHAPTER IN THE HISTORY OF RECONSTRUCTION 76–77 (1904) (discussing the multiple ways in which the funds were raised for and expended on education, including through discretionary acts of the Bureau).

[122] *See, e.g.*, MORRIS, *supra* note 77, at 49 (noting congressional funds for "repairs and rent of schoolhouses"); GEORGE R. BENTLEY, A HISTORY OF THE FREEDMEN'S BUREAU 171–74 (1955) (discussing the acquisition of buildings, which were given free of rent for schools, and the creative financing to support the schools).

[123] MORRIS, *supra* note 77, at 36–37, 43–44, 49 (discussing immediate coordination with missionaries and later work with major organizations).

[124] *Id.* at 37.

[125] *Id.* at 37–38; *see also* J. W. ALVORD, FOURTH SEMI-ANNUAL REPORT ON SCHOOLS FOR FREEDMEN 11–37 (Washington, Gov't Printing Off. 1868) [hereinafter ALVORD, FOURTH SEMI-ANNUAL REPORT] (receiving reports from various state superintendents).

[126] J. W. ALVORD, TENTH SEMI-ANNUAL REPORT ON SCHOOLS FOR FREEDMEN 4 (Washington, Gov't Printing Off. 1870); 2 ALAN BRINKLEY, AMERICAN HISTORY: CONNECTING WITH THE PAST 409 (2014). To be clear, however, African-Americans made huge contributions on their own behalf—both financially and through in-kind services. ALVORD, FOURTH SEMI-ANNUAL REPORT, *supra* note 125, at 3–4 (indicating 28,068 freedmen paid tuition and covered about 40% of the Bureau's monthly statewide costs in some instances and the entire cost of some schools).

[127] *Letter from General O. Howard*, *supra* note 95, at 130 (indicating the Bureau's role was to act "until a system of free schools can be supported by the re-organized local governments").

[128] *Id.*

2. Congress's Terms for Readmitting Southern States to the Union

Congress specified the conditions for Confederate states' readmission to the Union in the Reconstruction Act of 1867.[129] They had to rewrite their constitutions to conform to a republican form of government and the U.S. Constitution, extend the ballot to African-Americans, and ratify the Fourteenth Amendment.[130] And Congress would determine whether the new constitutions did, in fact, conform to a republican form of government.[131] Congress refrained from defining a republican form of government but made it clear that it expected states to eliminate slavery's remnants, ensure voting, and provide for education.[132]

The consensus around education was sufficiently broad that the Senate considered and nearly did something far more radical: prohibit school segregation (eighty-seven years before *Brown v. Board of Education*). Senator Charles Sumner, a longtime opponent of school segregation,[133] proposed an amendment to the Reconstruction Act to explicitly require that states' public schools be "open to all, without distinction of race or color."[134] As radical as the amendment was, it fell just one vote short of passing.[135] Not a single senator, however, contested the notion that education was a necessity in a republican form of government. The objections were to integration and placing explicit advance conditions on readmission, regardless of their substance.[136]

Later enacted legislation confirmed that education was a requirement of republican government. The first seven Confederate states readmitted under the Reconstruction Act included affirmative education clauses in their

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[129] Reconstruction Act of 1867, ch. 153, § 5, 14 Stat. 428, 429.

[130] *Id.*

[131] *Id.*

[132] Black, *supra* note 22, at 775–83.

[133] Senator Sumner served as counsel and argued against school segregation in *Roberts v. Boston*, 59 Mass. (5 Cush.) 198 (1850). His loss, unfortunately, became a predicate for the Supreme Court's decision in *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896).

[134] CONG. GLOBE, 40th Cong., 1st Sess. 165, 581 (1867) (statements of Sen. Sumner). Senator Sumner explained that the amendment was a simple "safeguard for the future" and a natural corollary to universal suffrage, which Congress already required. *Id.* at 166–67.

[135] *Id.* at 170 (statement of the President *pro tempore*).

[136] *See, e.g.*, *id.* at 169–70 (statements of Sens. Williams, Cole & Buckalew) (posing a rhetorical question regarding whether the amendment would require integration and then voting against it); *id.* at 148 (statement of Sen. Conkling) (arguing that readmission requirements are akin to "forcing upon an unwilling people a minority government"); *id.* at 149 (statement of Sen. Howard) (objecting to the condition of voting rights); *id.* at 157 (statement of Sen. Hendricks) (arguing that it was wrong to impose readmission conditions "at the point of the bayonet"); *id.* at 168 (indicating a negative vote against condition of general education because Congress lacks such power).

constitutions.[137] But one of those states, Georgia, started breaking certain commitments immediately after readmission, expelling newly elected African-Americans from the state legislature.[138] To guard against any further ambiguity or backsliding, Congress was more explicit with the remaining Confederate states' readmissions. For example, Congress conditioned their readmission on education, requiring that the "constitution[s] of [those states] shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the constitution[s] of said State[s]."[139]

3. Congressional Efforts Beyond the South

Congress also took steps to expand education in other states. Concurrent with passing the Reconstruction Act, Congress established a federal Department of Education.[140] The stated purpose was twofold: to monitor whether states were carrying out their education obligations and "aid" in education's further expansion "throughout the country."[141] More specifically, the Department was to work toward the "establishment and maintenance of efficient school systems."[142] These terms of art, along with "uniform" systems, were found in various new state constitutional clauses of the era.[143]

This choice of language and its appearance in state constitutions reveals that Congress and states were moving in a singular direction toward systems of education. Slavery, the failures of the past, and the aspirations of the reframed Union required no less. As Representative Samuel W. Moulton explained:

> [E]very 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 qualify him to discharge all the duties that may devolve upon him as an American citizen. This is as much a natural right as the right to breath the air.[144]

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[137] Black, *supra* note 22, at 783–90; GLENNA R. SCHROEDER-LEIN & RICHARD ZUCZEK, ANDREW JOHNSON: A BIOGRAPHICAL COMPANION 240 (2001) (cataloguing readmissions).

[138] RICHARD L. HUME & JERRY B. GOUGH, BLACKS, CARPETBAGGERS, AND SCALAWAGS: THE CONSTITUTIONAL CONVENTIONS OF RADICAL RECONSTRUCTION 135–36 (2008).

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

[140] An Act to Establish a Department of Education, ch. 158, 14 Stat. 434, 434 (1867).

[141] *Id.*

[142] *Id.*

[143] Some examples of state constitutions containing either the term of art "efficient" or "uniform" include: IND. CONST. of 1851, art. VIII, § 1; KAN. CONST. of 1861, art. VI, § 2; NEB. CONST. of 1866, art. II, § 1; NEV. CONST. of 1864, art. XI, § 2; and W. VA. CONST. of 1863, art. X, § 2.

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

4. States' Constitutional Responses

The state response to Congress's readmission demands was emphatic. Before the Reconstruction Act of 1867, a few Southern state constitutions made reference to education, but they did not mandate the creation of a statewide education system. Within three years of the Act, all ten remaining Confederate states had adopted affirmative education clauses in their constitutions, often quite detailed in structure.[145] In most instances, state constitutional conventions met immediately after Congress passed the Reconstruction Act.[146] The conventions' stated goal was to create a republican form of government,[147] and they consistently emphasized that education was a central component of such a government and necessary to prepare citizens to assume their roles in it.[148]

Most conventions created a committee devoted exclusively to drafting a detailed education article for the constitution.[149] The final result was robust

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[145] *See* ALA. CONST. of 1868, art. XI, § 6; ARK. CONST. of 1868, art. IX, § 1; FLA. CONST. of 1868, art. VIII, § 1; GA. CONST. of 1868, art. VI, § 1; LA. CONST. of 1868, tit. VII, art. 135; MISS. CONST. of 1868, art. VIII, § 1; N.C. CONST. of 1868, art. IX, § 2; S.C. CONST. of 1868, art. X, § 3; TEX. CONST. of 1869, art. IX, § 1; VA. CONST. of 1870, art. VIII.

[146] *See, e.g.*, CYNTHIA E. BROWNE, STATE CONSTITUTIONAL CONVENTIONS: FROM INDEPENDENCE TO THE COMPLETION OF THE PRESENT UNION, 1776–1959: A BIBLIOGRAPHY 5, 39, 46, 80, 112, 167, 234 (1973) (showing that most state conventions occurred within one year of the passage of the Reconstruction Act).

[147] *See, e.g.*, 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA 10 (Charleston, Denny & Perry 1868) [hereinafter CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA] (demonstrating framers' desire to do what was "necessary to secure a Republican form of Government"); 2 *id.* at 628–807 (stating importance of education in a country where "the republican form of government prevails"); JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NORTH CAROLINA 486–87 (Raleigh, Joseph W. Holden 1868) [hereinafter CONSTITUTIONAL CONVENTION OF NORTH CAROLINA] (urging the "Republican principle of local self-government," public education, and teaching lessons of "statesmanship" and participatory government).

[148] *E.g.*, CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA, *supra* note 147, at 264 (explaining that education "is the surest guarantee of the . . . republican liberty"); 2 *id.* at 688 (stating that education was necessary for republican progress); *id.* at 695 (explaining that an ignorant man "can never be a good citizen"); DEBATES AND PROCEEDINGS OF THE CONVENTION TO FORM A CONSTITUTION FOR THE STATE OF ARKANSAS 500 (Little Rock, J. G. Price 1868) [hereinafter CONSTITUTIONAL CONVENTION OF ARKANSAS] (arguing that access to education would give Black people the means to "take their place . . . among the leaders of their people"); *id.* at 683 (supporting the constitution because of its education mandate); CONSTITUTIONAL CONVENTION OF NORTH CAROLINA, *supra* note 147, at 486 (providing for county government to carry out the "Republican principle of local self-government" and education); OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE CONVENTION, FOR FRAMING A CONSTITUTION FOR THE STATE OF LOUISIANA 200–01, 289 (New Orleans, J. B. Roudanez & Co. 1868) [hereinafter CONSTITUTIONAL CONVENTION OF LOUISIANA] (stating that education was a necessity for African-Americans).

[149] *See, e.g.*, Black, *supra* note 22, at 784–85 (detailing the committee structures in South Carolina); CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA, *supra* note 147, at 264; CONSTITUTIONAL CONVENTION OF NORTH CAROLINA, *supra* note 147, at 338; CONSTITUTIONAL CONVENTION OF ARKANSAS, *supra* note 148, at 61; CONSTITUTIONAL CONVENTION OF LOUISIANA, *supra* note 148, at 13.

education articles and clauses that mandated statewide uniform systems of education,[150] tax schemes to ensure funding,[151] and constitutional officers and state boards of education to manage and dictate the details of the systems.[152] Equally, if not more, important, these new Southern constitutions mandated that public schools be open to "all" children,[153] a phrase effectively mirroring Senator Sumner's proposed amendment to the Reconstruction Act two years earlier.[154]

This wave of constitutional education mandates became the model for the rest of the nation. The thirteen new states that entered the Union after 1867 all included an education mandate in their constitutions.[155] Congress denied the petition of the single state, New Mexico, that attempted statehood without an education clause in its constitution.[156] Northern states, during the normal process of revisions, also began voluntarily including new education clauses in their constitutions.[157] By 1875, the only state without an education

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[150] *See* FLA. CONST. of 1868, art. VIII, § 2; MISS. CONST. of 1868, art. VIII, § 1; N.C. CONST. of 1868, art. IX, § 2; S.C. CONST. of 1868, art. X, § 3; TEX. CONST. of 1869, art. IX, § 4; VA. CONST. of 1870, art. VIII, § 3. During this same period, the term "uniform" also was used outside the South. *See, e.g.*, NEV. CONST. of 1864, art. XI, § 2 ("The Legislature shall provide for a uniform system of common schools . . . .").

[151] For examples of states appropriating tax proceeds for educational purposes, see ALA. CONST. of 1868, art. XI, §§ 10, 11; FLA. CONST. of 1868, art. VIII, §§ 4, 7; GA. CONST. of 1868, art. VI, § 3; and see also JOHN MATHIASON MATZEN, STATE CONSTITUTIONAL PROVISIONS FOR EDUCATION: FUNDAMENTAL ATTITUDE OF THE AMERICAN PEOPLE REGARDING EDUCATION AS REVEALED BY STATE CONSTITUTIONAL PROVISIONS, 1776–1929, at 129–39 (1931) (tracking the new common school funds in state constitutions).

[152] MATZEN, *supra* note 151, at 4–12, 36–52, 118 (cataloging state constitutional provisions establishing state boards of education, state superintendents, and common school funds).

[153] ALA. CONST. of 1868, art. XI, § 6; ARK. CONST. of 1868, art. IX, § 1; FLA. CONST. of 1868, art. IX, § 1; GA. CONST. of 1868, art. VI, § 1; LA. CONST. of 1868, tit. VII, art. 135; N.C. CONST. of 1868, art. IX, § 2; S.C. CONST. of 1868, art. X, § 4.

[154] *See* CONG. GLOBE, 40th Cong., 1st Sess. 166 (1867) (statement of Sen. Sumner).

[155] *See* INST. FOR EDUC. EQUITY & OPPORTUNITY, EDUCATION IN THE 50 STATES: A DESKBOOK OF THE HISTORY OF STATE CONSTITUTIONS AND LAWS ABOUT EDUCATION app. 1 (2008) (summarizing the education clauses and their histories in each state).

[156] *Id.* at 29. The denial of admission, however, involved complexities beyond education. Some apparently opposed New Mexico's admission due to fears of rebalancing sectional partisan power in Congress from the east to the west. *See* DAVID V. HOLTBY, FORTY-SEVENTH STAR 39–48 (2012). That aside, the Senate had serious concerns about New Mexico's "success [on] three key agents of Americanization—public schools, courts, and public officials." *Id.* at 53.

[157] *See* William Penn Sch. Dist. v. Pa. Dep't of Educ., 170 A.3d 414, 423 (Pa. 2017) (noting the 1873 Pennsylvania convention corrected the prior education clause, which was limited to a system of pauper schools, and that Massachusetts, Connecticut, Ohio, and Michigan also added education clauses to their constitutions to provide universal public education); *see also* 7 DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA 691–92 (Harrisburg, Benjamin Singerly 1873) [hereinafter CONSTITUTIONAL CONVENTION OF PENNSYLVANIA] ("If there is any duty more incumbent upon the whole people of this Commonwealth than any other, it is to see that every child . . . shall be educated and taken care of."); PA. CONST. of 1874, art. X, § 1 (providing for public education).

clause was Connecticut (though Connecticut's constitution did reserve certain funds for education).[158] In short, after 1867, Congress never admitted another state to the Union without an education clause—and those few existing states without an education clause soon revised their constitutions to correct the omission.[159]

II. ALIGNING HISTORY AND PRECEDENT WITH THE RIGHT TO EDUCATION

African-Americans' education efforts before and after slavery provide an illuminating framework through which to view the right to education. The educational deprivations they suffered were, of course, never adjudicated. But the Supreme Court later recognized rights, such as those of parents to control the education and upbringing of their children, that implicate those deprivations. The Court's other broader liberty doctrines also reveal that more is at stake with education than just parental rights. In short, a retrospective accounting of enslaved people's experiences demonstrates that their education deprivations were denials of humanity and liberty. And correcting these denials became a key predicate for the nation to transition education from a negative right to an affirmative one.

The following Sections lay out that predicate. Section II.A details the Supreme Court's precedent regarding the negative right to education, including parental rights and the broader individual mental and physical liberty rights intertwined with education. Section II.B then filters enslaved people's experiences through that precedent and explains how, even with the fall of slavery, their negative liberty rights could not be realized without the affirmative provision of education.

A. Negative Education Rights

This Section analyzes Supreme Court precedent and rationales regarding parental rights over education and other rights deeply tied to the right to education. Those rights are primarily understood as negative rights that prohibit interference with education. Their underlying logic, however, is consistent with an affirmative right to education. More specifically, a negative right to education is insufficient to protect the constitutional liberty rights at stake in these cases.

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[158] Steven G. Calabresi & Michael W. Perl, *Originalism and* Brown v. Board of Education, 2014 MICH. ST. L. REV. 429, 457–59 & n.130. Connecticut cured that defect in 1965. *Id.* at 458 n.130.

[159] *See id.* at 458 n.132.

1. Parental Control over Education

Scholars have paid relatively scant attention to the fact that some fundamental negative education rights already exist.[160] Those rights, while short of the affirmative type of right advocates seek, buttress the logic to an affirmative right to education.[161] The first relevant case, decided in 1923, was *Meyer v. Nebraska*.[162] In *Meyer*, the Court struck down a statute that interfered with children's ability to learn German.[163] The Court explained that "[t]he American people have always regarded education and acquisition of knowledge as matters of supreme importance" and "it is the natural duty of the parent to give his children education suitable to their station in life."[164] The Court then, without any doctrinal explanation, announced that state interference with parental education efforts for their children implicated "fundamental rights which must be respected."[165] The Court had yet to formalize its strict scrutiny framework[166] but indicated that the state lacked a sufficient justification to interfere with the parental right.[167]

Two years later in *Pierce v. Society of Sisters*, the Court framed *Meyer* as recognizing a Fourteenth Amendment "liberty of parents and guardians to direct the upbringing and education of children under their control."[168] Relying on that right, the Court declared the requirement that all children attend public school unconstitutional because it interfered with parents' ability to send their children to private schools.[169] The Court wrote that "[t]he fundamental theory of liberty" in our Constitution "excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only."[170] Parents "who nurture" and "direct [their children's] destiny have the right . . . to recognize and prepare [them]

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[160] *See, e.g.*, Biegel, *supra* note 24, at 1083 (noting these negative rights only in passing); Ratner, *supra* note 24 (failing to discuss negative rights cases). *But see* Bitensky, *supra* note 24, at 580–81 (discussing the negative right to education in the context of substantive due process analysis of education); Joshua E. Weishart, *Reconstituting the Right to Education*, 67 ALA. L. REV. 915, 961–62, 975 (2016) (accounting for negative education rights in analyzing theories of positive education rights).

[161] *See* Bitensky, *supra* note 24, at 583 (explaining the logic by which *Meyer v. Nebraska*, *Pierce v. Society of Sisters*, and personhood cases require government to provide education).

[162] 262 U.S. 390 (1923).

[163] *Id.* at 396–97.

[164] *Id.* at 400.

[165] *Id.* at 401.

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

[167] *Meyer*, 262 U.S. at 403.

[168] 268 U.S. 510, 534–35 (1925); *see also* Bartels v. Iowa, 262 U.S. 404, 409 (1923) (overturning the conviction of a teacher for instructing students in German because the conviction was inconsistent with *Meyer*).

[169] *Id.*

[170] *Id.* at 535.

for additional obligations."[171] The Court has since reaffirmed these rights on several occasions,[172] rendering a fundamental parental right in regard to education beyond question.

2. Liberty Rights Involved in Education

The parental right to direct their children's education, however, only skims the surface of the negative right to education. Various other individual rights bear upon and undergird education. First among these is the basic right to mental liberty,[173] one of the most foundational rights in the Constitution.[174] Mental liberty includes more particularized rights, including freedom of conscience or belief, freedom of thought, freedom of inquiry, and freedom of religion.[175] Mental liberty also intersects with tangible rights to act, such as the rights to receive information, disseminate information, and make certain personal life choices.[176] While principally grounded in the First Amendment, these freedoms are not confined to the First Amendment but are grounded in liberty itself.[177] "Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[178]

Mental freedom also includes the inverse right to be free from government-imposed ideology. The Court famously wrote in *West Virginia State Board of Education v. Barnette* that

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[171] *Id.*

[172] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 207, 218 (1972) (affirming right of Amish parents not to enroll children in any private or public school); Farrington v. Tokushige, 273 U.S. 284, 298 (1927) (rejecting affirmative direction of foreign-language schools partly based on idea that such direction deprives parents of right to "direct the education of [their] own children").

[173] *See* Bitensky, *supra* note 24, at 582–83 (stating that "it is impossible to avoid the conclusion that intellectual development is a major component of human identity" and thus the right of privacy).

[174] *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 51–52 (1985) (describing the "sphere of intellect and spirit" as "reserve[d] from all official control" by the First Amendment (citing Wooley v. Maynard, 430 U.S. 705, 714–15 (1977))); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . .").

[175] *See Wallace*, 472 U.S. at 51–52 (analyzing issue from several distinct yet related First Amendment rights (citing *Wooley*, 430 U.S. at 714)). Freedom of conscience, of course, overlaps with religious freedom and belief. *See, e.g.*, Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 877 (1990) (articulating that the First Amendment excludes any regulations on religious beliefs per se).

[176] *See, e.g.*, *Wooley*, 430 U.S. at 714 (referencing and connecting various rights to "the broader concept of 'individual freedom of mind'" (quoting *Barnette*, 319 U.S. at 637)); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 915–17 (1992) (Stevens, J., concurring in part and dissenting in part) (referencing choice, information, liberty, and dignity).

[177] *See* Lawrence v. Texas, 539 U.S. 558, 562 (2003); *Wallace*, 472 U.S. at 49 (discussing the intersection between the First and Fourteenth Amendments); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (stating that "[t]he fundamental concept of liberty" includes First Amendment rights).

[178] *Lawrence*, 539 U.S. at 562.

> [i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[179]

The freedom to explore ideas, whether in the classroom, library, home, or open marketplace of ideas, must be free of totalitarianism or "orthodoxy."[180]

These rights further translate into affirmative rights to engage others in thought. "[P]ublic access to discussion, debate, and the dissemination of information and ideas"[181] is necessary to prevent the government from "strangl[ing] the free mind at its source"[182] or "contract[ing] the spectrum of available knowledge."[183] The Court succinctly characterizes this as the fundamental right to "receive information and ideas."[184] On these grounds, the Court has struck down government policies that limit access to books,[185] interfere with doctor–patient discussions,[186] curtail labor-union recruitment,[187] impede particular types of instruction,[188] and restrict freedom of the press.[189] The right to receive information also intersects with the "privacy of a person's own home—[where the] right takes on an added dimension."[190] In that context, free access to and use of information is part of the "the right to be let alone—the most comprehensive of rights and the right most valued by civilized man."[191]

These rights have long been treated as the lifeblood of democracy itself. They "make[] it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner,"[192] acquire and contest ideas, and

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[179] 319 U.S. at 642.

[180] Keyishian v. Bd. of Regents of the Univ. of the State of N.Y., 385 U.S. 589, 603 (1967); *Barnette*, 319 U.S. at 637.

[181] First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978).

[182] *Barnette*, 319 U.S. at 637.

[183] Griswold v. Connecticut, 381 U.S. 479, 482 (1965).

[184] Stanley v. Georgia, 394 U.S. 557, 564 (1969); Kleindienst v. Mandel, 408 U.S. 753, 762–63 (1972); *see also* Martin v. City of Struthers, 319 U.S. 141, 143 (1943) (stating that the freedom of speech "embraces the right to distribute literature and necessarily protects the right to receive it" (citation omitted)).

[185] Bd. of Educ. v. Pico *ex rel.* Pico, 457 U.S. 853, 866–67 (1982).

[186] *Griswold*, 381 U.S. at 482.

[187] Thomas v. Collins, 323 U.S. 516, 534 (1945).

[188] Meyer v. Nebraska, 262 U.S. 390, 400 (1923); Farrington v. Tokushige, 273 U.S. 284, 298 (1927).

[189] *Martin*, 319 U.S. at 143 (noting that freedom of speech and press includes the right to receive information).

[190] Stanley v. Georgia, 394 U.S. 557, 564–65 (1969).

[191] *Id.* (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

[192] Bd. of Educ. v. Pico *ex rel.* Pico, 457 U.S. 853, 867–68 (1982).

participate in the democratic process.[193] Without the liberty "to inquire, to study and to evaluate, to gain new maturity and understanding[,] . . . our civilization will stagnate and die."[194]

These varied rights have quite frequently coalesced around and intersected with education rights. The Court's lead opinion in *Griswold v. Connecticut*, a reproductive-autonomy case, cited the parental education rights cases as a fountainhead of the right to privacy.[195] Summarizing *Pierce v. Society of Sisters* and *Meyer v. Nebraska*, the Court in *Griswold* "reaffirmed" the rights to receive information, read, inquire, and think because those rights overlapped with the reproductive autonomy at issue in *Griswold*.[196] The Court in *Moore v. City of East Cleveland* similarly pointed out that a "host of cases, tracing their lineage" to *Meyer* and *Pierce*, "have consistently acknowledged a 'private realm of family life which the state cannot enter.'"[197] On that basis, *Moore* struck down a housing regulation that limited the number of extended family members who could cohabitate.[198]

These privacy cases should likewise reflexively impact the logic of the right to education. While squarely addressing familial and sexual choices, the Court's privacy cases explicitly acknowledge that the underlying core interests at stake are individual dignity and self-autonomy.[199] These matters lie "[a]t the heart of liberty [and] the right to define one's own concept of existence."[200] As demonstrated in Part I, education, in the various ways one receives and utilizes it, also implicates the basic liberty of choice, self-autonomy, and dignity. That connection suggests the right to education lies far closer to individual liberty and the proper functioning of our constitutional system than typically acknowledged. Education is so intertwined with self-autonomy and liberty that it is more akin to due process

193 *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 954–57 (4th ed. 2011).

194 Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

195 381 U.S. 479, 482–83 (1965).

196 *Id.*

197 Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (plurality opinion) (citations omitted) (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

198 *Id.* at 495–99.

199 *See* Obergefell v. Hodges, 576 U.S. 644, 663 (2015) ("[T]hese liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."); *id.* at 665 ("[T]he right to personal choice regarding marriage is inherent in the concept of individual autonomy."); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (stating that "choices central to personal dignity and autonomy" are "central" to Fourteenth Amendment liberty); Lawrence v. Texas, 539 U.S. 558, 562 (2003) ("Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.").

200 *Casey*, 505 U.S. at 851; *see also Obergefell*, 576 U.S. at 665 (describing the "abiding connection between marriage and liberty"); Cruzan v. Mo. Dep't of Health, 497 U.S. 261, 269, 278–79, 287 (1990) (describing the connection between medical treatment, bodily autonomy, and personal liberty).

rights that impose positive obligations on the state—such as providing an attorney, a jury, or a transcript—than it is to a purely positive right to food or water. The Court, of course, used this latter comparison to discredit the possibility of a right to a quality education.[201] A purely negative right in education is insufficient to protect liberty. Meaningful liberty, as detailed below, requires affirmative governmental steps.

B. Slavery's Infringement on Liberty Through the Denial of Education

The criminalization of African-American education involved a broader set of goals and activities than just barring enslaved people from the functional skills of reading and writing.[202] The regime restricted information and ideas to pose a pall of orthodoxy that effectively eliminated the self-autonomy and liberty of enslaved people—and whites. The human agency that rebelled against that regime reveals the extent to which education is intertwined with the innate human desire for freedom, liberty, and self-determination.[203] Framed in these terms, education and literacy fall squarely within the constitutional right of liberty.

Prohibiting slave literacy served the larger agenda to restrict information and ideas. In fact, some states directly attacked the ideas and information themselves and did not limit that attack by race. Louisiana, for instance, prohibited the circulation of ideas—and mere possession of materials—that ran counter to the institution of slavery.[204] Similarly, South Carolina seized abolitionist writings from post offices and burned them.[205] The South also banned antislavery opinions, criminalizing the presence of antislavery thinkers and silencing the mere discussion of antislavery ideas.[206] Citizens were beaten, banished from town, and jailed for uttering ideas or

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[201] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 21–24 (1973) (distinguishing education infringements from infringements on the rights of criminal defendants); *id.* at 37 (arguing that it is difficult to distinguish access to education from access to food and shelter).

[202] *See supra* notes 48–50.

[203] *See supra* Sections I.A.2, I.A.4.

[204] United States v. Rhodes, 27 F. Cas. 785, 793 (C.C.D. Ky. 1866) (discussing the Louisiana law); WILLIAMS, *supra* note 11, at 14–15; *see also* JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS 263 (3d ed. 1969) (describing a $20,000 bounty on abolitionist Arthur Tappan in New Orleans).

[205] *See* FRANKLIN, *supra* note 204, at 263–64.

[206] *See, e.g.*, *id.* at 263 (discussing bounties on abolitionists); 1 ENCYCLOPEDIA OF AFRICAN AMERICAN SOCIETY 864–65 (2005) (explaining the Southern response to the publication of David Walker's pamphlets, including banning its publication and criminalizing its distribution); William Lawless Jones, *Mob Violence Against Abolitionists in the South*, 7 NEGRO HIST. BULL. 134, 136–38 (1944) (surveying acts of violence and punishment, including tarring and feathering a man for allegedly "talking to a Negro"). In 1836, members of Congress "prevented the reading and circulation of all antislavery petitions and memorials that were received by Congress." 1 ENCYCLOPEDIA OF EMANCIPATION AND ABOLITION IN THE TRANSATLANTIC WORLD 241 (Junius Rodriguez ed., 2007).

taking actions that might be interpreted as sympathizing with abolition or equality.[207]

By restricting access to ideas, access to information, the right to speak, and the right to think, the South created an intellectually closed community where the only acceptable ideas were those that expressed full fidelity to slavery.[208] This pall of orthodoxy, combined with anti-literacy laws, seriously constricted mental self-autonomy. At some point, the denial of education and ideas is so encompassing that free and voluntary choices cease to exist. The denial can, in effect, put an individual's mind in a box. Frederick Douglass, for instance, explained how he emotionally rebelled against his conditions in slavery, but also how illiteracy denied him the knowledge and tools to contest its ideology.[209] Slavery had illegitimately propped itself up in his mind.[210] James Pennington similarly recounted how slavery "robbed" him of education and "shackled" his mind, an "evil" that took him years to "throw[] off."[211] Other slave narratives similarly convey this larger connection between education and fundamental mental liberty.[212]

Many enslaved people's instinct and desire to learn immediately upon freedom also confirms education's role in human dignity and defining life for oneself. Both before and after the fall of slavery, many African-Americans traveled long distances, sacrificed life's basic necessities, devoted every free moment, and even risked violence and punishment to learn.[213] These efforts were acts to claim the liberty and freedom that they had long been denied.[214] They were, as one of the original missionary teachers wrote, the "first act on coming to the surface, a kind of instinctive head-shaking, and clearing of the eyes, after emerging from the waters."[215]

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[207] *See* FRANKLIN, *supra* note 204, at 264.

[208] *See generally* Jones, *supra* note 206, at 136–38 (exploring the violent ways in which the South sought to repress antislavery thinking against abolitionists and abolitionist sympathizers).

[209] *See* DOUGLASS, *supra* note 45, at 33 (explaining that the denial of literacy and the keeping of ideas from him was "the white man's power to enslave the black man"); *see also id.* at 39–40 (explaining that literacy "enabled me to utter my thoughts, and to meet the arguments brought forward to sustain slavery").

[210] *See id.* at 40 (explaining that it was impossible to dispel the "everlasting thinking of my condition that tormented me").

[211] *See* ARNA BONTEMPS, GREAT SLAVE NARRATIVES 246 (1969).

[212] *See* Lindon Barrett, *African-American Slave Narratives: Literacy, the Body, Authority*, 7 AM. LITERARY HIST. 415, 415 (1995) (reviewing and analyzing multiple slave narratives to "consider[] [an] inexorable connection between literacy and African-American corporeality").

[213] *Supra* notes 82–85.

[214] WILLIAMS, *supra* note 11, at 30–41.

[215] *Letter from W. C. Gannett*, *supra* note 58, at 91.

In doing so, many African-Americans exercised a basic instinct to learn and reclaim a part of their humanity in a way rarely seen in human history.[216]

These restrictions on education and information, filtered through modern precedent, amount to an extensive and obvious list of constitutional rights infringements. At the very least, the prohibition on writing denied enslaved people the rights to (1) share information with others, (2) free speech, and (3) free press. The prohibition on reading denied enslaved people the rights to (1) receive information, (2) access the press, (3) exercise religion by reading religious texts, and (4) adopt and hold religious beliefs free of the versions imposed by white intermediaries. The combined prohibition of reading and writing also denied parents the right to control and direct the upbringing and education of their children. The prohibition on the circulation of certain ideas and texts denied enslaved people and whites the right to engage with, and thus adopt, ideas. The prohibition on reading and writing denied enslaved people the information and ability to travel beyond their immediate vicinity.[217]

In these respects, education was the gateway to what the Court today recognizes as a hub of interlocking constitutional liberties.[218] As such, the case for education as a fundamental right is far stronger than otherwise appreciated. If the right to receive information, for instance, is constitutionally protected because it is a predicate to free speech,[219] and the general right of privacy is a predicate to the rights to procreate, to marry, and to be free from unreasonable searches and seizures,[220] education should be protected as a predicate to the panoply of connected constitutional liberties and choices that rest upon it. As the lived reality for enslaved people demonstrated, liberty and self-autonomy do not exist without some level of education and information. As state constitutions themselves explicitly

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[216] *See What Shall We Do with the Freedmen, Now that They Have No Masters to Take Care of Them?*, 1 FREEDMEN'S REC. 108, 109 (1865) (remarking on the never-before-seen efforts "of a degraded and subjugated race so anxious for mental culture"); *see also The Free Colored People*, 1 FREEDMEN'S REC. 154, 156 (1865) (noting that "it may be doubted whether any other oppressed class . . . has ever exhibited such ability in withstanding" their circumstances).

[217] *See, e.g.,* DOUGLASS, *supra* note 45, at 86–87 (describing practice of forging notes to facilitate escape).

[218] *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (plurality opinion) (drawing a line of seemingly disparate cases together as one); Wallace v. Jaffree, 472 U.S. 38, 51–53 (1985) (articulating freedom of conscience as unifying various rights).

[219] Bd. of Educ. v. Pico *ex rel.* Pico, 457 U.S. 853, 867 (1982).

[220] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (explaining penumbral rights stemming from the specific guarantees of the Bill of Rights).

attested, the provision of public education "is necessary for the preservation of [the people's] rights and liberties."[221]

III. CONSTITUTIONAL SOURCES FOR THE TRANSITION TO AN AFFIRMATIVE RIGHT TO EDUCATION

The open and most consequential constitutional issue today is not whether the Constitution protects a negative right to education—it surely does—or whether Congress has the authority to protect that right—it surely does.[222] The question is whether the Constitution protects any individual right of education beyond those negative rights. More specifically, does the Thirteenth Amendment, Fourteenth Amendment, Guarantee Clause, or some other constitutional principle require states to provide some baseline of educational opportunity? Historical experience, judicial precedent, and congressional action demonstrate that the answer to this question is yes.

Reaching this conclusion, however, requires a more holistic and integrated analysis than courts or scholars have previously offered.[223] The Court's negative and positive education analyses are riddled with ambiguities that are largely intractable when viewed in isolation.[224] But analyzed together, the Court's distinct lines of doctrine become complementary and resolve certain ambiguities. Yet, existing doctrine alone is insufficient. The Court's analysis operates at a high level of generality, rhetoric, and theory that has never systematically broached the constitutional and historical basis for a right to education.[225]

The following Sections integrate the Court's precedent with a detailed historical accounting of the interplay between access to education and the

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[221] MASS. CONST. pt. 2, ch. 5, § 2; *see also* N.H. CONST. pt. II, art. LXXXIII ("Knowledge and learning, generally diffused through a community, . . . [is] essential to the preservation of a free government . . . ."); John C. Eastman, *When Did Education Become a Civil Right? An Assessment of State Constitutional Provisions for Education: 1776-1900*, 42 AM. J. LEGAL HIST. 1, 10–11 (1998) (surveying state constitution language).

[222] *See* Meyer v. Nebraska, 262 U.S. 390, 396–97 (1923).

[223] Most analyze the right to education through only one constitutional doctrine. *See, e.g.*, Friedman & Solow, *supra* note 24, at 110 (articulating a substantive due process analysis); Biegel, *supra* note 24, at 1081–82 (providing an equal protection or equal opportunity analysis); Liu, *supra* note 24, at 335 (analyzing under the Citizenship Clause).

[224] *See, e.g.*, Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 466 n.1 (1988) (Marshall, J., dissenting) (writing that the Court did not address the possible right to "minimally adequate education"); Papasan v. Allain, 478 U.S. 265, 284 (1986) (writing that *San Antonio Independent School District v. Rodriguez* did not "foreclose the possibility that some identifiable quantum of education is a constitutionally protected prerequisite" (internal quotation marks omitted)); Plyler v. Doe, 457 U.S. 202, 221–22 (1982) (writing that education may not be a fundamental right but "has a fundamental role in maintaining the fabric of our society" and individual merit).

[225] *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (not mentioning slavery or Reconstruction); *Plyler*, 457 U.S at 221 (offering no clear doctrinal basis for outcome).

enactment and implementation of constitutional amendments. Section III.B analyzes the Thirteenth Amendment, which abolished slavery and gave Congress the power to abolish slavery's badges and incidents, including the lingering effects of forced illiteracy. Section III.C examines how the Fourteenth Amendment secured liberty and citizenship rights broader than freedom from slavery—for both white and Black Americans. This broader guarantee of rights encompassed access to education, which both Congress and states were contemporaneously extending. Section III.D then grounds the Thirteenth and Fourteenth Amendments in the historical development of the Constitution's guarantee of a republican form of government, exploring states' initial failures and Congress's Reconstruction Era corrections.

A. The Positive Rights Implications of the Court's Negative Rights Cases

An affirmative right to education lies just beneath the surface of the Court's negative rights cases. Parents' right to control their children's education, for instance, is logically derivative of the child's right to education. Thus, it is no surprise that the Court in *Meyer v. Nebraska* and *Pierce v. Society of Sisters* indicated that parents have a "high" and "natural" duty to educate their children.[226] This notion of a parental duty to educate has important historical roots. During the second half of the 1800s, some states contemplated imposing this duty on families through specific constitutional provisions.[227] They ultimately refrained from this not because they questioned the duty, but because they believed legislatures were better suited than constitutional conventions to work through the duty's details.[228] Legislatures, of course, did not hesitate in codifying this duty,[229] criminalizing the failure to educate one's child and later articulating it as a form of abuse and neglect.[230] As such, parents' educational duties warranted

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[226] *Meyer*, 262 U.S. at 400; Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).

[227] *See, e.g.*, 6 CONSTITUTIONAL CONVENTION OF PENNSYLVANIA, *supra* note 157, at 75–78 (expressing idea that "it is the duty of the parent . . . not only to afford, [b]ut to compel the attendance of his children to acquire those attainments"); 2 CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA, *supra* note 147, at 693–94 (South Carolina Constitutional Convention debate on compulsory education).

[228] *See, e.g.*, 6 CONSTITUTIONAL CONVENTION OF PENNSYLVANIA, *supra* note 157, at 74 (urging the matter of education be left to the "wisdom, experience and humanity of the Legislature"); 2 CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA, *supra* note 147, at 693–99 (debating whether compulsory education should be left to the legislature).

[229] *See generally* CREMIN, *supra* note 104, at 148–63 (discussing states' adoption of compulsory-education laws); *see, e.g.*, 4 CALIFORNIA FAMILY LAW § 60.02[1][b] (1990) (describing the parental duty to educate children).

[230] *See, e.g.*, *In re* Welfare of B.A.B., 572 N.W.2d 776, 779 (Minn. Ct. App. 1998) (holding a child was in need of protective services because her parent was unwilling or unable to provide necessary education); Doe v. Downey, 377 A.2d 626, 627–28 (N.J. 1977) (defining education in the context of child

state intervention in the family and, if necessary, separating children from their parents.[231]

These measures substantially interfere with and terminate a fundamental right—a parent's right to control her children—which normally requires a compelling interest and clear and convincing evidence.[232] The Court, of course, has recognized states' authority to regulate and interfere with private education.[233] The state's interest in ensuring children's access to some baseline level of education is, the Court reasoned, sufficient to justify the invasion of parental and private rights.[234]

The state's legal authority to require that parents carry out their "natural" duty to educate their children and to interfere with familial rights and private schools, however, begs for more inquiry into the nature of the state's interests. The state's interest might be understood as no more than a discretionary public welfare interest.[235] The Court in *Pierce* referenced a general public welfare.[236] But a general welfare interest is arguably too weak to support certain substantial invasions of a fundamental right.[237] Only

abuse or neglect as "parental encouragement to truancy of a school age child, or other interference with normal educational processes"); *In re* W.U., 556 N.E.2d 887, 888 (Ill. App. Ct. 1990) (upholding the termination of parental rights where a parent did not provide her child with the education required by law); *see also* Kurtis A. Kemper, Annotation, *Determination that Child Is Neglected or Dependent, or that Parental Rights Should Be Terminated, on Basis that Parent Has Failed to Provide for Child's Education*, 6 A.L.R. 161 (2005) (surveying cases).

[231] *See, e.g.*, *W.U.*, 556 N.E.2d at 888 (upholding termination of parental rights for educational neglect).

[232] The parental right of control does not exempt the parent from general welfare regulation. *See generally* Prince v. Massachusetts, 321 U.S. 158, 166–68 (1944) (upholding the state's power to enforce child-labor laws that conflict with the parents' desire to have their children assist in selling literature on the city streets). Termination of rights, however, goes one step further than regulation and requires a more substantial showing and set of procedures. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 769 (1982) (requiring clear and convincing evidence); Troxel v. Granville, 530 U.S. 57, 72–73 (2000) (plurality opinion) (indicating state courts should not "infringe on the fundamental right of parents to make child rearing decisions").

[233] Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925).

[234] *See, e.g.*, *id.* (affirming government's power to ensure "that certain studies plainly essential to good citizenship [are] taught, and that nothing be taught which is manifestly inimical to the public welfare").

[235] Responding to the notion that the state's only interest in education is discretionary public welfare, Professor Joshua Weishart argues that *parens patriae* doctrine translates into an affirmative duty to protect children. Joshua E. Weishart, *Aligning Education Rights and Remedies*, 27 KAN. J.L. & PUB. POL'Y 346, 364 (2018).

[236] *See* 268 U.S. at 529.

[237] *See In re* Custody of Smith, 969 P.2d 21, 28–29 (Wash. 1998) (explaining the federal precedent and the predicate of a compelling interest); *see also* Little v. Streater, 452 U.S. 1, 13 (1981) (recognizing that "substantial" and "compelling" individual interests at stake in a paternity dispute require the state to provide additional procedural safeguards before invading those interests).

compelling interests support such invasions.[238] A state's constitutional duty to provide for a student's constitutional right to receive education, for instance, could presumptively outweigh a parent's or private school's rights.[239] A state's general welfare interest in improving citizens' skills and knowledge, however, might not. No doubt, a less educated public would exact societal and social costs, but the Court generally has been less receptive to government action that compels or regulates private activity simply because doing so produces benefits to society at large.[240]

The Court's public education cases, likewise, contain their own ambiguities but curiously align with the notion of a state educational duty or student rights that would justify the invasions in parental-rights cases. The Court has consistently alluded to that possibility.[241] For instance, in *San Antonio Independent School District v. Rodriguez*, the Court rejected the claim that unequal school funding alone violated a right to education but specifically left open whether grossly inadequate educational opportunities might.[242] A "financing system occasioned an absolute denial of educational opportunities" might, the Court allowed, violate a right "to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process."[243] The Court has reiterated this point in other cases.[244]

A state's authority to interfere with private schools and parents curiously occurs at roughly the same point at which a state failure in public education triggers the theoretical right in *Rodriguez*. The state can, as *Pierce* indicated, intervene in private schools to ensure a basic education that is "plainly essential to good citizenship."[245] And when the state provides

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[238] *See Custody of Smith*, 969 P.2d at 28–29.

[239] *See Pierce*, 268 U.S. at 534 (recognizing the state's "power . . . reasonably to regulate all schools" to ensure "studies plainly essential to good citizenship").

[240] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 548–58 (2012) (finding the Affordable Care Act's individual mandate could not be justified under the Commerce Clause despite the positive effects it would have on health insurance costs).

[241] *See* Papasan v. Allain, 478 U.S. 265, 284 (1986); Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 467 (1988); Plyler v. Doe, 457 U.S. 202, 221 (1982); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 36–37 (1973).

[242] 411 U.S. at 36–37.

[243] *Id.* at 37.

[244] *See, e.g.*, *Papasan*, 478 U.S. at 284 (stating that the Court is open to the idea that "some identifiable quantum of education is a constitutionally protected prerequisite" to exercising the right to vote or speak (quoting *Rodriguez*, 411 U.S. at 36)); *Kadrmas*, 487 U.S. at 467 (noting that the Constitution is also concerned with sophisticated modes of discrimination).

[245] Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925). The power to invade parental rights similarly occurs when parents either fail to send their children to school or ensure some basic standard of education at home. *See, e.g.*, Kemper, *supra* note 230, at 161 (compiling cases that held that children were neglected and in need of assistance due to factors including their absence from public schools).

education, the Court has suggested that a claim might arise when the quality of education falls below minimal adequacy.[246] In other words, the state has the power, in the case of private parties, and likely the duty, in the case of public schools, to ensure students receive a minimally adequate education.

The Court's decision in *Plyler v. Doe*,[247] while maligned for its doctrinal imprecision,[248] offers a bridge between negative education rights and the affirmative provision of public education. The state's exclusion of undocumented students from school in *Plyler* caused an injury worse than simply failing to meet a theoretical minimally adequate education standard.[249] The Court indicated that the state cannot deny individuals "the means to absorb the values and skills upon which our social order rests," impose "[t]he stigma of illiteracy [that] will mark [children] for the rest of their lives," or "deny [children] the ability to live within the structure of our civic institutions" without a "substantial" state interest[250]—a more rigorous requirement than the Court typically applies in rational basis review.[251]

In ruling for the student, the Court forced the state, as a practical matter, to provide public education to the plaintiff class.[252] It did so, however, without explicitly articulating whether the right at stake was a negative or positive education right. Instead, the Court blended the two concepts, describing the harm in the language of negative rights—freedom from stigma and exclusion—and ordering a remedy that resembles an affirmative right—the state provision of public education to a student.[253] In this respect, the Court in *Plyer* went further than in *Brown v. Board of Education*. The Court in *Brown* carefully refrained from ordering affirmative education, instead

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[246] *Rodriguez*, 411 U.S. at 36; *see also* Friedman & Solow, *supra* note 24, at 117–21 (arguing that the Constitution should protect a right to a minimally adequate education).

[247] 457 U.S. 202 (1982).

[248] *See id*. at 247 (Burger, C.J., dissenting) ("Whatever meaning or relevance this opaque observation [(that education is not a right but not just social welfare either)] might have in some other context, it simply has no bearing on the issues at hand. Indeed, it is never made clear what the Court's opinion means on this score."); *see also* JUSTIN DRIVER, THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND 359–61 (2018) (discussing the Court's refusal to ever apply or expand *Plyler*'s holding outside its specific factual circumstances).

[249] *See* 457 U.S. at 218–23.

[250] *Id*. at 221–24.

[251] *Id*. at 224 (requiring a "substantial goal").

[252] *See id.* at 230.

[253] The majority's decision in *Plyler* contradicts its holding in *Rodriguez* that education is not fundamental. *See id*. at 247–48 (Burger, C.J., dissenting) (pointing out the contradictions between the two decisions). Professor Weishart's scholarship, however, adds further nuance to the categorization of education rights, explaining that they have often been enforced as immunities against state action rather than "claim-rights." Weishart, *supra* note 160, at 931–32; *see also* Scott R. Bauries, *A Common Law Constitutionalism for the Right to Education*, 48 GA. L. REV. 949, 981 (2014) (drawing on the concept of immunities in his analysis of the right to education).

only ordering equal education when the state otherwise provided it.[254] In contrast, whether flowing from a negative or positive concept of education, the Court in *Plyer* reached a conclusion that effectively translated into an affirmative obligation to provide education.

Yet, no matter how one dissects these cases, they do not, as a matter of existing doctrine, equal an affirmative right to education.[255] The Court has simply refused to rule the right out.[256] The Court's negative and positive rights cases combined, however, offer another lens for considering the right. And training that combined lens on history reveals that the negative right to education is a huge explanatory factor in the evolution of the affirmative right to public education. In fact, the most important constitutional sources for an affirmative education right were born out of congressional action to correct deprivations of negative education rights.[257]

The following Sections trace the historical and constitutional evolution of the right to education. Over time, the nation learned from its errors and recognized the need to affirmatively guarantee education.[258] Congress's and the states' historic exercise of constitutional power in furtherance of education, then, provides the modern doctrinal basis for recognizing the right to education. A fatal flaw of prior analysis has been to pigeonhole the right to education into a single constitutional doctrine or idea. But Congress's actual exercise of constitutional power was multifaceted and grounded in its understanding of the Thirteenth Amendment, Fourteenth Amendment, and Guarantee Clause.

B. The Thirteenth Amendment's Impact on Education

The following Sections discuss the Thirteenth Amendment's purpose of eliminating both slavery and its lingering effects. The Court's precedent incorporates this broad purpose, holding that the Thirteenth Amendment grants Congress the power to eliminate the badges and incidents of slavery. Contemporaneous evidence indicates that the deprivation of education was among those badges and incidents, which Congress could therefore remedy pursuant to the Thirteenth Amendment.

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[254] 347 U.S. 483, 493 (1954).

[255] Black, *supra* note 22, at 740 n.17.

[256] *See* Matthew A. Brunell, *What* Lawrence *Brought for "Show and Tell": The Non-Fundamental Liberty Interest in a Minimally Adequate Education*, 25 B.C. THIRD WORLD L.J. 343, 366 (2005) ("The lower federal courts have interpreted *Rodriguez* as holding that education is not a fundamental right under the Due Process Clause.").

[257] *See supra* notes 127–140 and accompanying text.

[258] *See infra* notes 375–402 and accompanying text.

1. The Badges and Incidents of Slavery

The point of the Thirteenth Amendment was to eliminate the vestiges of slavery and guarantee freedom.[259] Section One of the Thirteenth Amendment prohibits "slavery" and "involuntary servitude."[260] Section Two grants Congress "power to enforce" this prohibition through "appropriate legislation."[261] The Framers intended this prohibition and congressional power to reach beyond just human bondage itself.[262] The Supreme Court has consistently affirmed this broad understanding of the Thirteenth Amendment.

In 1883 in the *Civil Rights Cases*, the Court explained that the Thirteenth Amendment "nullif[ied] all State laws which establish or uphold slavery. But it has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States."[263] Thus, Congress's Section Two power included the "power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States" and to "obliterat[e] and prevent[] . . . slavery with all its badges and incidents."[264] Badges and incidents are "servitudes imposed by the old law, or by long custom, which had the force of law, and exacted by one man from another without the latter's consent."[265] By way of example, the Court listed:

> [c]ompulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities[, and] . . . . [s]everer punishments for crimes . . . on the slave than on free persons guilty of the same offences.[266]

These practices, the Court explained, impose on "those fundamental rights" that mark "the essential distinction between freedom and slavery."[267]

Drawing on contemporaneous uses of the terms, scholars have distinguished badges from incidents. The incidents of slavery, most narrowly, referred to "any legal right or restriction that necessarily

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[259] Carter, *supra* note 91, at 1331–32; ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY 3 (2004).

[260] U.S. CONST. amend. XIII, § 1.

[261] *Id.* § 2.

[262] *See* Carter, *supra* note 91, at 1331–32; TSESIS, *supra* note 259, at 5.

[263] 109 U.S. 3, 20 (1883).

[264] *Id.* at 20–21.

[265] *Id.* at 21.

[266] *Id.* at 22.

[267] *Id.*

accompanied the institution of slavery."[268] More specifically, incidents were "the aspects of property law that applied to the ownership and transfer of slaves [and] . . . the civil disabilities imposed on slaves by virtue of their status as property."[269] Congressional debates identified limits on conjugal relations, property ownership, testimony in court, freedom of speech, and the ability to enforce rights in court as incidents of slavery too.[270]

Badges of slavery was a more general concept that overlapped with the incidents of slavery. The phrase initially "refer[ed] to the color of an African American's skin or other indications of legal and social inferiority connected with slavery."[271] After the Thirteenth Amendment's passage, it referred to legal efforts to target freedmen for discrimination and perpetuate their status as slaves.[272] The crucial distinction, however, is not between badges and incidents but whether Section One of the Thirteenth Amendment prohibits the badges and incidents through its own force or if Congress alone can remedy them.

2. *Logical Implications of Congress's Broad Thirteenth Amendment Authority*

The Thirteenth Amendment was intended to root out the institution of slavery, its peculiar customs, and its lingering effects.[273] In doing so, it would secure meaningful freedom for African-Americans, not just end slavery.[274] Senator Sumner, for instance, argued that the Amendment "abolishes slavery entirely . . . . [,] root and branch[,] . . . in the general and the particular[,] . . . in length and breadth and then in every detail. . . . Any other interpretation belittles the great amendment."[275] The Court has consistently affirmed this

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[268] Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 575 (2012).

[269] *Id.*; *see also id.* at 572 (describing other aspects of the incidents of slavery such as "the power of the master to control a slave's labor, food, clothing, and punishment; the slave's status as chattel owned by the master; the slave's lack of enforceable property and contract rights; and the slave's lack of standing to sue the master or to obtain redress for cruel treatment").

[270] CONG. GLOBE, 38th Cong., 1st Sess. 1439 (1864) (statement of Sen. Harlan); CONG. GLOBE, 39th Cong., 1st Sess. 322–23 (1866) (statement of Sen. Trumbull).

[271] McAward, *supra* note 268, at 581.

[272] *Id.*; *see also* Carter, *supra* note 91, at 1367 (discussing "de jure and de facto attempts to return the freedmen to a condition of servitude and sub-humanity after formal emancipation").

[273] *See* James Gray Pope, *Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery*, 65 UCLA L. REV. 426, 433–36 (2018) (discussing debates between members of Congress and statements by African-American leaders on the intended scope of the Thirteenth Amendment); *see also* Alexander Tsesis, *Furthering American Freedom: Civil Rights and the Thirteenth Amendment*, 45 B.C. L. REV. 307, 323–28 (2004) (discussing how the Radical Republicans based the Thirteenth Amendment on natural rights principles).

[274] *See* Tsesis, *supra* note 273, at 323–28.

[275] CONG. GLOBE, 42d Cong., 2d Sess. 728 (1872) (statement of Sen. Sumner).

intent in the context of justifying Congress's extensive power to eradicate the vestiges of slavery.[276] It has largely left it to Congress to determine the meaning and proper enforcement of badges and incidents itself.[277]

The Court has only hinted at whether Section One of the Thirteenth Amendment also reaches the badges and incidents of slavery. In *Palmer v. Thompson*, plaintiffs claimed that a city's decision to close its swimming pools rather than integrate them was a "badge or incident" of slavery.[278] The Court reasoned that, because the policy equally denied both white and Black people access to swimming pools, overturning the policy as a badge or incident of slavery would stretch the Thirteenth Amendment too far.[279] But in closing, the Court curiously suggested that the Thirteenth Amendment's prohibition on slavery might reach the badges and incidents of slavery if "tax-supported swimming pools are being denied to one group because of color and supplied to another."[280] The facts simply failed to raise that issue.[281]

In *City of Memphis v. Greene*,[282] the Court again left open the possibility of a Section One claim against badges and incidents of slavery. Plaintiffs argued that the city's decision to close a street that previously connected a predominantly Black neighborhood to a white neighborhood imposed a badge of slavery.[283] The Court responded that the racially disparate impact of the closure "could not, in any event, be fairly characterized as a badge or incident of slavery."[284] But the Court again indicated it was not foreclosing the possibility that Section One prohibits other modern practices that amount to badges or incidents of slavery.[285] Congress's power to eliminate the badges and incidents of slavery is, the Court wrote, "not inconsistent with the view that the Amendment has self-executing force" and "'[b]y its own unaided

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[276] *See* The Civil Rights Cases, 109 U.S. 3, 20–21 (1883); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968) ("Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery . . . .").

[277] *See* McAward, *supra* note 268, at 605; Alexander Tsesis, *Congressional Authority to Interpret the Thirteenth Amendment*, 71 MD. L. REV. 40, 40 (2011); William M. Carter, Jr., *Judicial Review of Thirteenth Amendment Legislation: "Congruence and Proportionality" or "Necessary and Proper"?*, 38 U. TOL. L. REV. 973, 973 (2007) (espousing a rationality review). Some suggest, however, that the Court might apply a more restrictive proportionality and congruence test instead. Jennifer Mason McAward, *Congressional Authority to Interpret the Thirteenth Amendment: A Response to Professor Tsesis*, 71 MD. L. REV. 60, 62–63, 82 (2011).

[278] 403 U.S. 217, 226–27 (1971).

[279] *Id.* at 226.

[280] *Id.* at 226–27.

[281] The Court was "almost inviting a citizen lawsuit to rely on Section 1 to petition for an injunction" in a case that did involve a badge or incident of slavery. Tsesis, *supra* note 273, at 347.

[282] 451 U.S. 100 (1981).

[283] *See id.* at 102–03, 124.

[284] *Id.* at 126.

[285] *See id.* at 125–26 (leaving the issue of whether Section One did more than abolish slavery "open").

force and effect,' . . . 'abolished slavery' and 'established universal freedom.'"[286]

The Court's approach to other Reconstruction Era Amendments further supports the conclusion that Section One reaches beyond formal slavery. The Court has held that the rights-creating clauses in the Fourteenth Amendment are coextensive with its enforcement clause.[287] Thus, Congress lacks the power to remedy activities that are not themselves violations of Section One of the Fourteenth Amendment.[288] Similarly, in *Shelby County v. Holder*, the Court struck down a portion of the Voting Rights Act because Congress was regulating voting practices without sufficient evidence of Fifteenth Amendment violations.[289] Conversely, the Court has upheld expansive civil rights legislation that proscribes activities that violate the Fourteenth Amendment.[290]

Absent some compelling reason to treat the Thirteenth Amendment differently,[291] the logic of those cases suggests Section One of the Thirteenth Amendment reaches beyond formal slavery. It would be inconsistent with the Court's Fourteenth and Fifteenth Amendment precedent to hold that Congress can prohibit activities beyond formal slavery but the Thirteenth Amendment itself does not reach those activities.[292] Or, more simply, if Section One of the Thirteenth Amendment only prohibits the formal continuation of slavery, the Court's precedent upholding broad congressional power to root out the vestiges of slavery is wrong.

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[286] *Id.* at 125 (quoting Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968)).

[287] *See* City of Boerne v. Flores, 521 U.S. 507, 519 (1997).

[288] *See id.* at 519; *see also* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 640 (1999) (identifying patent infringement as the conduct that must lead to the Fourteenth Amendment violation Congress intended the Patent Remedy Act to redress); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 82–83 (2000) (finding the Age Discrimination in Employment Act to be "inappropriate legislation" because it tried to remedy age discrimination activity that was constitutional under the Fourteenth Amendment's Equal Protection Clause); Bd. of Trs. v. Garrett, 531 U.S. 356, 374 (2001) (determining that there was not a pattern of discrimination that rose to a Fourteenth Amendment violation that would justify Congress's proposed remedy). Congress may, however, enact prophylactic legislation to ensure violations do not occur, which may block some behavior that does not necessarily violate the Constitution. *See Kimel*, 528 U.S. at 88; Nevada v. Hibbs, 538 U.S. 721, 721–22 (2003). But that legislation is aimed at something that does violate the Constitution, not something that is permissible.

[289] *See* 570 U.S. 529, 556–57 (2013).

[290] *See, e.g.*, *Hibbs*, 538 U.S. at 724, 735 (upholding the Family and Medical Leave Act); Tennessee v. Lane, 541 U.S. 509, 533–34 (2004) (holding that Title II of the Americans with Disabilities Act is a valid exercise of Congress's authority).

[291] Some, however, apply an inverse analysis that suggests the Court might constrain Congress's Thirteenth Amendment authority. McAward, *supra* note 268, at 607.

[292] Professor William Carter notes that, while the Court has used the proportionality and congruence test to shrink Congress's Fourteenth Amendment power, it has done it in nonracial contexts and has been more permissive as to race. Carter, *supra* note 277, at 985–88.

This does not, however, mean that Sections One and Two of the Thirteenth Amendment are precisely coextensive in every respect. It only means that if Section Two categorically reaches beyond slavery, Section One does too. A gray area can remain between the Sections because of the Court's and Congress's distinctly different roles in enforcing the Constitution.[293] The Court has indicated that Congress can regulate some behavior that may not be a core violation of the Constitution so long as the legislation's overall regulatory structure is aimed at remedying or preventing constitutional violations.[294] This leeway prevents the judiciary from intruding on Congress's independent authority to determine how best to legislatively enforce the Constitution. This nuanced distinction between judicial and legislative interpretation of the Constitution, however, does not change the conclusion that if Congress has the power to remedy the badges and incidents of slavery, those badges and incidents are violations of Section One of the Thirteenth Amendment as well.

3. Section One's Scope

If Section One prohibits more than just slavery, two categorical possibilities exist for the scope of that broader reach. First, the Thirteenth Amendment could prohibit only those laws and practices that directly supported and reinforced African-Americans' status as slaves. Second, the Amendment could reach those rights and liberties necessary to secure full freedom post-slavery. The narrower scope entails what Professor James Gray Pope terms the "core" incidents of slavery itself and those key components of oppression that accompanied slavery but which may not have been necessary for its operation.[295] The core incidents include "the master's rights to possess his slaves, dispose of their labor, and own the offspring of his female slaves."[296] The components of oppression that accompanied slavery include "race-based (or perhaps even non-race-based) barriers to owning property, making and enforcing contracts, participating in court, marrying, raising one's children, and obtaining an education."[297]

Justice Joseph Bradley's reference to the "necessary incidents of slavery" in the *Civil Rights Cases* reflects a similar understanding.[298] The

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[293] *See generally Flores*, 521 U.S. at 519, 523–24 (holding that Congress can only enforce those rights that the Court has interpreted the Constitution as protecting); Katzenbach v. Morgan, 384 U.S. 641, 648, 657–58 (1966) (upholding a Voting Rights Act provision as being a valid exercise of power even though the activity it regulated does not specifically violate the Constitution).

[294] *Hibbs*, 538 U.S. at 727–28.

[295] Pope, *supra* note 273, at 465–66.

[296] *Id.* at 429.

[297] *Id.* at 429–30.

[298] *See* 109 U.S. 3, 22 (1883).

phrase alone rings of core incidents, but Justice Bradley's lists of necessary incidents also included what Professor Pope would categorize as components of oppression that accompanied slavery. Justice Bradley included "those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell, and convey property as is enjoyed by white citizens."[299] The Court's modern validation of Congress's prohibition on real estate discrimination is, moreover, consistent with Justice Bradley's notion that the badges and incidents of slavery reach beyond its core components.[300] Some scholars forcefully interpret the Thirteenth Amendment's scope even more broadly to also include "a substantive assurance of freedom."[301] The narrow interpretation, however, is sufficient for the purposes of this Article.

4. Educational Deprivation as a Badge and Incident of Slavery

The intentional denial of education as a means of perpetuating slavery easily falls within the practices captured in the narrow interpretations of Section One of the Thirteenth Amendment. As detailed throughout this Article, educational deprivation was a tool for enslaving African-Americans and remained a tangible and lingering badge or incident of slavery after the War.[302] Senators specifically listed the deprivation of education as an *incident* of slavery, listing education alongside denials of the right to testify, make familial decisions, and enter contracts—all of which whites possessed and enslaved people did not.[303] In short, the denial of education is in the bundle of legal *incidents* that accompanied slavery.

Education denials, however, were also a core aspect of slavery rather than just a form of oppression coinciding with or incidental to slavery. Unlike familial rights,[304] for instance, education—as conceptualized by slaveholders—was subversive of and entirely incompatible with slavery.[305] Thus, the South denied Black Americans education, not just to demarcate their rights from whites, but also to keep them enslaved.[306] The post-Civil War effect of this core aspect of slavery, moreover, lingered for years and

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[299] *Id.* at 35.

[300] *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 434–37 (1968).

[301] *See* Tsesis, *supra* note 273, at 387.

[302] *See supra* Section I.A.

[303] CONG. GLOBE, 38th Cong., 1st Sess. 1439 (1864) (statement of Sen. Harlan); CONG. GLOBE, 39th Cong., 1st Sess. 322–23 (1866) (statement of Sen. Trumbull).

[304] *See, e.g.*, PETER KOLCHIN, AMERICAN SLAVERY: 1619-1877, at 139 (2003) (stating that slaveholders "were usually aware of, and considered themselves strong supporters of, slave families").

[305] *See, e.g.*, DOUGLASS, *supra* note 45, at 42–44 (describing the unconventional methods Douglass used to learn how to read and write, as he had no opportunities otherwise); *supra* Section I.A.1.

[306] *See supra* Section I.A.1.

decades,[307] marking it as a badge of slavery that many African-Americans went to extraordinary measures to remove. [308]

Understanding the denial of education as a badge and core aspect of slavery offers the justification for Congress to expand education and remedy African-American illiteracy following the Civil War. The connection was sufficiently clear that Congress's authority to remedy formerly enslaved people's educational deprivations never seemed to be seriously called into question. The Court's later validation of legislation aimed at practices and effects that were not core incidents of slavery, such as racial discrimination in private property sales,[309] only reinforces Congress's authority to eliminate and remedy the freedmen's illiteracy, a core incident of slavery as previously described. In fact, Congress's continuing Thirteenth Amendment power to guarantee racial equity in real estate[310] raises questions of the extent to which Congress might also address aspects of racially inequitable education today.[311] Congress could, for instance, theoretically mandate that states provide Black Americans with the same quality of education as whites.[312] Yet, such a power would still fall short of justifying the entirety of Congress's education agenda during Reconstruction, since that agenda was to expand education for both white and Black Americans. Identifying education as a badge and incident of slavery to remedy would be easy, but once Congress's post-Civil War education agenda went beyond that, it would have required more authority than the Thirteenth Amendment could provide.[313]

In sum, the foregoing Sections demonstrate three key points. First, aspects of the right to education are directly grounded in slavery. Second, the eradication of those aspects of slavery, including long after slavery, are

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[307] IES:NCES, *National Assessment of Adult Literacy (NAAL): 120 Years of Literacy*, https://nces.ed.gov/naal/lit_history.asp [https://perma.cc/V2N7-BSLR] (indicating less than half of Black Americans were literate until 1900).

[308] SPAN, *supra* note 11, at 65 (outlining extraordinary measures African-Americans took to gain an education).

[309] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413, 434–37 (1968).

[310] The Court continued its adherence to *Jones* in *Patterson v. McLean Credit Union*, 491 U.S. 164, 190 (1989).

[311] *See, e.g.*, Brence D. Pernell, *The Thirteenth Amendment and Equal Educational Opportunity*, 39 YALE L. & POL'Y REV. 420, 420 (2021) (arguing that the Thirteenth Amendment is a viable tool for challenging racial disparities in school discipline).

[312] *Id*.

[313] Justice Bradley made just this argument in the lower court decision in *United States v. Cruikshank*, 25 F. Cas. 707, 711 (C.C.D. La. 1874), *aff'd on other grounds*, 92 U.S. 542 (1875). *See also* McAward, *supra* note 268, at 580–81 (discussing Justice William Woods's opinion in a lower court case, which argued that the power to remove badges of slavery does "not justify federal legislation to protect the rights of white people, or even African-Americans who had not been slaves").

within the Thirteenth Amendment's scope. Third, even if the Thirteenth Amendment is short of the constitutional authority necessary for a general fundamental right to education, it is an important part of the substrata and overall justification for a general right to education. In fact, the Thirteenth Amendment may be the most obvious constitutional provision to have brought education within its scope—even if thus far undiagnosed. Before the Fourteenth Amendment was even considered, the Thirteenth Amendment provided protection for the freedmen's right to education.

C. The Fourteenth Amendment

The next Sections discuss how the Fourteenth Amendment built upon the rights established in the Thirteenth Amendment. The Fourteenth Amendment's extension of liberty and citizenship rights, in particular, encompassed broader rights than those contained in the Thirteenth Amendment's guarantee of freedom from slavery. The implications for education rights are substantial. Affirmative access to education was a predicate to the liberty and citizenship the Fourteenth Amendment sought to guarantee.

1. Individual Liberty

The Fourteenth Amendment, when understood in relationship to the Thirteenth Amendment, provides the basis for education rights beyond those implicated by slavery. The Thirteenth Amendment had only addressed the immediate status and condition of enslaved African-Americans. Guaranteeing full freedom and rights to African-Americans—not just the end of slavery—required an additional step. The Fourteenth Amendment did just that, extending full freedom and various subsidiary rights to African-Americans.[314] Even further, it extended those rights to everyone else in the process. The Fourteenth Amendment's Citizenship Clause is the clearest example of the transition and expansion of rights. The Thirteenth Amendment granted freedom but not citizenship. The Fourteenth Amendment cured that for African-Americans and everyone else too.[315] The Fourteenth Amendment's guarantee of liberty likewise expanded on the Thirteenth Amendment's basic protection of freedom.[316]

This expansion is particularly important to education rights. Full freedom and liberty for Black Americans and poor whites required more than

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[314] U.S. CONST. amend. XIV.

[315] *Id.* § 1 ("All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

[316] *See* KARST, *supra* note 16, at 50–57 (explaining the interplay and broadening of rights between the Thirteenth Amendment, Civil Rights Act of 1866, and Fourteenth Amendment); *see also* FONER, *supra* note 116, at 255–61 (discussing the broader purpose of the Fourteenth Amendment).

the negative right to pursue education.[317] Thus, Congress took affirmative steps to guarantee education in the aftermath of the War.[318] Those steps, moreover, directly intersected with the ratification of the Fourteenth Amendment.[319] As detailed in Section I.B.3, Congress forced Confederate states to ratify the Fourteenth Amendment, rewrite their state constitutions, and provide for public education in their constitutions as a condition of readmission to the Union. These new constitutional education provisions did more than remove barriers to the negative right to education; they affirmatively ensured education for all through a new system of schools.[320]

This government-mandated provision of education represented a newly conceived affirmative form of education liberty. History had shown—and Congress and states recognized—that some liberties are pointless without positive government action. Citizenship, personal liberty, and participation in a self-government would be hollow concepts for the masses without affirmative action.[321] Removing state interference with education was not enough. Unless government provided education, large swaths of citizens would remain uneducated.[322]

In 1866, U.S. Representative Moulton stated the logic and immediacy of affirmative education:

> The two great pillars of our American Republic, upon which it rests, are universal liberty and universal education. We have established universal liberty through a bloody conflict, through four years of carnage and war, and Congress by the passages of the civil rights bill has provided the machinery by which

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[317] *See generally* KARST, *supra* note 16, at 50–57 (describing inadequacies of the Thirteenth Amendment at effecting full societal membership for Black people); FONER, *supra* note 116, at 255–56 (discussing the antidiscrimination and citizenship innovations of the Fourteenth Amendment); *see also* ANNE NEWMAN, REALIZING EDUCATIONAL RIGHTS: ADVANCING SCHOOL REFORM THROUGH COURTS AND COMMUNITIES 10, 15, 35–36 (2013) (theorizing why a positive entitlement to education is necessary for cognitive autonomy).

[318] *See* Black, *supra* note 22, at 741–43.

[319] *Id.*

[320] *See, e.g.*, MISS. CONST. of 1868, art. VIII, § 1 (mandating the creation of "a uniform system of free public schools"); N.C. CONST. of 1868, art. IX, § 2 (mandating the creation of "a general and uniform system of Public Schools").

[321] *See, e.g.*, CONG. GLOBE, 40th Cong., 1st Sess. 168 (1867) (statement of Sen. Morton) (reasoning that education was "essential" to wresting power from the slaveholding elite and rebuilding the South).

[322] *See generally id.* ("[W]e cannot expect the men who own the property voluntarily to tax themselves to provide for education for others."); *id.* at 167 (statement of Sen. Sumner) (discussing the stark absence of education in the South). Congress, ironically, recognized this dynamic long before the Court similarly acknowledged that the negative rights of procedural due process and a fair trial were empty without the affirmative right to trial transcripts and counsel. *See* Griffin v. Illinois, 351 U.S. 12, 19 (1956); Douglas v. California, 372 U.S. 353, 355, 357 (1963).

> universal liberty can be enforced and guarant[e]ed . . . . One of these pillars, then, rests upon a solid foundation. The other pillar is universal education.[323]

Various state constitutional education clauses are even more direct, proclaiming the governmental provision of public education is "essential to the preservation of the rights and liberties of the people."[324]

If there were any doubt of the link between the Fourteenth Amendment, state constitutions, and the right to education, Congress eliminated the doubt once the Fourteenth Amendment was officially ratified in 1868. At that point, three Confederate states—Texas, Mississippi, and Virginia—remained outside the Union.[325] Congress explicitly conditioned their readmission with statutory language: their state constitutions "shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the [state] constitution."[326]

Not only is the timing with the Fourteenth Amendment crucial, Congress's reference to school "privileges" of "citizens of the United States" invokes language very similar to the Fourteenth Amendment Privileges and Immunities Clause. That Clause indicates that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[327] The statutes' prohibition on depriving "any citizen" of the "right" of education also incorporates modern fundamental rights logic, under which states cannot deprive any individual of the right to liberty.[328] This overlap is no surprise. Many scholars, including a Supreme Court Justice, reason that Congress intended the Fourteenth Amendment Privileges and Immunities Clause to serve as the repository of fundamental rights, not the phrase "liberty" in the Due Process Clause.[329] Regardless,

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[323] CONG. GLOBE, 39th Cong., 1st Sess. 3044 (1866) (statement of Rep. Moulton) (discussing the creation of the Department of Education).

[324] ARK. CONST. of 1868, art. IX, § 1; *see also* MASS. CONST. pt. II, ch. V, § 2 (noting that wisdom and knowledge are "necessary for the preservation of [the people's] rights and liberties"); CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA, *supra* note 147, at 264 (stating that education is the best guarantee for the preservation of liberty).

[325] Black, *supra* note 30, at 1066–67.

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

[327] U.S. CONST. amend. XIV, § 1.

[328] *See, e.g.*, Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992) (protecting against "any deprivation of life, liberty, or property . . . . 'regardless of the fairness of the procedures used'" (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986))).

[329] *See, e.g.*, Saenz v. Roe, 526 U.S. 489, 527–28 (1999) (Thomas, J., dissenting) (indicating a willingness to reevaluate the Privileges and Immunities Clause); Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB.

Congress's statutory language suggests it fully understood education to be a right that falls squarely within what the Court would currently call a fundamental right or liberty. Equally important, this education right was not just the freedom to pursue learning free of interference but to have the government affirmatively provide education—forever henceforth.

2. Equality and Citizenship

The full scope of what Congress and states did with education, likewise, has enormous Fourteenth Amendment implications. Its actions served to ensconce education as a formal, rather than just ideological, cornerstone of the civic and social order. First, at Congress's urging, education became the service that all states have constitutionally obligated themselves to provide.[330] This includes oftentimes constitutionally framing education as one of the state's primary obligations to its people and an institution upon which civic order rests.[331] States have also forced every child to receive it.[332]

Second, understanding education as central to the citizenship that the Fourteenth Amendment had just extended, Congress prohibited the final readmitted states from denying education to any "class of citizens," applying an equal protection concept to a right of citizenship.[333] Extensive evidence from the myriad congressional actions, including debates surrounding the adoption of the Fourteenth Amendment, further demonstrates that Congress understood and protected education as a right of citizenship under the Fourteenth Amendment.[334]

Third, the Court itself, while never formally recognizing education as a fundamental right, acknowledges the net result of these state and federal

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POL'Y 63, 66–68 (1989) (discussing relation between natural rights and the Privileges or Immunities Clause); Philip B. Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round at Last"?*, 1972 WASH. U. L.Q. 405, 418–20 (positing the idea that the Court has laid the groundwork to move the Privileges and Immunities Clause in a different direction from the *Slaughter-House Cases*).

330 *See supra* notes 325–326 and accompanying text; Derek W. Black, *Reforming School Discipline*, 111 NW. U. L. REV. 1, 10 (2016). To be sure, however, Congress was riding the wave of a common school movement that predated the War and had increasingly gained cultural support. *See generally* CARL F. KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY 1780-1860, at 95–101 (1983) (recounting the common school movement of the early- and mid-1800s).

331 GA. CONST. art. VIII, § 1, para. I (describing education as a "primary obligation"); FLA. CONST. art. IX, § 1 (explaining education as a "paramount duty of the state"); Seattle Sch. Dist. v. State, 585 P.2d 71, 91 (Wash. 1978) (indicating the state's education duty is "paramount . . . [,] supreme, preeminent or dominant"); Campbell County v. State, 907 P.2d 1238, 1257, 1259 (Wyo. 1995) (emphasizing that education is established as a right in the state's Declaration of Rights and necessary for "survival for the democra[cy]").

332 VICTORIA J. DODD, PRACTICAL EDUCATION LAW FOR THE TWENTY-FIRST CENTURY 9 (2003).

333 *See* Black, *supra* note 22, at 783.

334 *See* Liu, *supra* note 24, at 370; Black, *supra* note 22, at 793–97.

actions: education is "the very foundation of good citizenship"[335] and "has a fundamental role in maintaining the fabric of our society."[336] This factual assessment, however, raises a problem with the Court's precedent. The other cornerstones of the civic and social order, such as voting and the judicial system, unquestionably trigger heightened scrutiny.[337] This raises the question of why the Court has not done the same with education.

Even if the federal Constitution does not affirmatively guarantee access to education, the notion that states could extend such a liberty- and citizenship-enhancing right that rests at the center of the civic order, but then afford certain groups unequal access to it, flies in the face of equal protection.[338] The Supreme Court in *Obergefell v. Hodges*, for instance, explained that once states create such rights, equality must follow.[339] Rejecting a false dichotomy between positive and negative rights,[340] the Court anchored its protection of marriage in the fact that marriage, by virtue of states' own voluntary action, is "a building block of our national community."[341] The Court wrote:

> States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order. . . . As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society.[342]

In short, states must provide equal access to the cornerstones of the social and civic order they create.

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[335] Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

[336] Plyler v. Doe, 457 U.S. 202, 221 (1982).

[337] *See, e.g.*, Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966) (finding that restrictions on voting must be "closely scrutinized and carefully confined"); Tennessee v. Lane, 541 U.S. 509, 522–23 (2004) (explaining that restrictions on access to the courts are subject to "more searching judicial review").

[338] *See Plyler*, 457 U.S. at 239 (Powell, J., concurring); *see also* Romer v. Evans, 517 U.S. 620, 633 (1996) ("[G]overnment and each of its parts remain open on impartial terms to all who seek its assistance.").

[339] 576 U.S. 644, 672–73 (2015).

[340] Chief Justice John Roberts's dissent in *Obergefell* implicitly invoked a distinction between positive and negative rights to argue against the recognition of same-sex marriage as a fundamental right. *Id.* at 702 (Roberts, C.J., dissenting). He wrote that the plaintiffs did "not seek privacy," at least not in the traditional sense of requesting that the state refrain from interfering with their relationship. *Id.* Rather, they sought affirmative "public recognition of their relationships, along with corresponding government benefits." *Id.*

[341] *Id.* at 669 (majority opinion).

[342] *Id.* at 670.

From this perspective, education's treatment under equal protection does not rest on whether the Constitution references or implies a right to education, nor on whether the provision of education stems from state or federal law.[343] The question is, as a factual matter, whether government has made education a cornerstone of civic and social life.[344] The answer to that question is yes in the context of education. As detailed throughout, Congress and states have intentionally made it so. This history largely obviates the relevance of any distinctions between positive and negative rights.[345] Equal protection simply demands that, upon making education a cornerstone of civic and social life, government deliver education equally.[346]

D. The Guarantee Clause

The broadest and ironically least developed source for a right to education, as well as the most direct congressional authority to impose such a right, is the Guarantee Clause in Article IV of the Constitution. It provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government."[347] The Guarantee Clause, in particular, was the source of Congress's power to set the terms of readmission to the Union and mandate that state constitutions provide for education.[348] The open question is not whether Congress imposed education through the Guarantee Clause, but why it exercised that power nearly a century after the nation's founding, whether the exercise of power was valid, and what the implications of that exercise of power are today.

The short answer is that the notion that education is a necessary component of republican government dates back to the Founding Era. In the initial years of the Republic, Congress did, in fact, take steps to ensure the growth of public education.[349] But those steps, over time, proved to be insufficient. Congress had seemed to incorrectly believe that education would solidify with just a little encouragement. The War brought those

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[343] *Cf.* United States v. Windsor, 570 U.S. 744, 766–67 (2013) (emphasizing that marriage was a state right and equal protection applies regardless of whether the right is fundamental under the federal Constitution).

[344] *See Obergefell*, 576 U.S. at 669–71.

[345] As Professor Weishart explains, the various distinctions one might make regarding the right to education overlap and intertwine, and he posits "that the lodestar for the analysis is the right's protection function in securing children's liberty and equality," not necessarily those distinctions. Weishart, *supra* note 160, at 922–23, 978.

[346] *See Obergefell*, 576 U.S. at 672.

[347] U.S. CONST. art. IV, § 4.

[348] David S. Louk, *Reconstructing the Congressional Guarantee of Republican Government*, 73 VAND. L. REV. 673, 711, 744–45 (2020).

[349] *See* Public Land Ordinance of 1785, *supra* note 20, at 565.

failures to the fore, and Reconstruction provided the opportunity to correct them. Thus, Congress forced states to constitutionalize education as a necessity of republican government.[350]

The following Sections trace the nation's historical arc to fully explain and justify Congress's use of the Guarantee Clause to secure public education. Section III.D.1 explains Congress's initial approach to achieving the national ideal of an educated citizenry. Section III.D.2 explains the perpetual practical failure to achieve that goal. Section III.D.3 frames Congress's exercise of Guarantee Clause power during Reconstruction as a solution to prior eras' failures and an attempt to finally realize a republican form of government through the mandatory provision of education to all. Section III.D.4 explores the limits on Congress's Guarantee Clause power. Section III.D.5 explains the implications of this history and power on the right to education today.

1. The Founders' Democratic Theory

At the nation's infancy, government by common people was a radical new idea, and public education was a centerpiece of making the idea work. From Washington and Adams to Jefferson and Madison, the Founders believed that education was a necessity on two counts. First, it was necessary to equip common people with the means to preserve their own liberty[351] and responsibly participate in the political process.[352] Education would allow people to identify their own self-interests, work toward achieving them, and guard their rights against others who might exploit or manipulate them in the pursuit of countervailing interests.[353]

Second, the Founders worried that the new form of government with which they were experimenting would implode without educated voters.[354] Political power in the hands of individuals who lacked the capacity to find

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[350] *See supra* Section I.B.

[351] *See, e.g.*, George Washington, President of the United States, Eighth Annual Address (Dec. 7, 1796), *reprinted in* 1 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 199, 202 (Washington, Gov't Printing Off. 1896) (advocating for education of young people from all quarters of society so as to guard liberty for the future); Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) (summarizing Jefferson's argument that education is necessary to the preservation of freedom and independence).

[352] Benjamin Rush, *Of the Mode of Education Proper in a Republic, 1798: Selected Writings 87–89, 92, 94–96*, *in* 1 THE FOUNDERS' CONSTITUTION 686, 686 (Philip B. Kurland & Ralph Lerner eds., 1987); CARL F. KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780-1860, at 6 (Eric Foner ed., 1983).

[353] *See* Tory Lynn Richey, An Historical Inquiry into Thomas Jefferson's Influence on the American Education System 16–27 (Aug. 2009) (Ph.D. dissertation, University of Denver) (on file with journal).

[354] James Madison, *To W. T. Barry*, *in* 9 THE WRITINGS OF JAMES MADISON 103, 103 (Gaillard Hunt ed., 1910).

the common good could become a practical tool of perversion.[355] Democracy could dissolve into mob rule and extract resources from the wealthy minority.[356] Thus, mass education was also a safeguard against the oppression of elites.[357]

John Adams was among the first to translate this democratic imperative into constitutional doctrine. On the eve of the Revolution, he foreshadowed the specifics of a post-independence democracy, writing that "[l]aws for the liberal education of youth, especially of the lower class of people, are so extremely wise and useful, that, to a humane and generous mind, no expense for this purpose would be thought extravagant."[358] Post-independence, Adams drafted the Massachusetts Constitution of 1780—the oldest functioning constitution in the world[359]—and took education from a democratic idea to a constitutional mandate.[360] "[B]eing necessary for the preservation of [the people's] rights and liberties," the constitution mandated that "legislatures and magistrates, in all future periods of this commonwealth, [shall] cherish the . . . public schools, [and] grammar-schools in the towns."[361]

Some other states copied this idea in their constitutions,[362] but more significantly, Congress embedded this democratic theory of education in the national plan for growth and expansion—the Northwest Ordinances of 1785 and 1787. The 1785 Ordinance required every town to reserve one of its four center lots for schools and one-ninth of its total land and one-third of its natural resources to financially support the schools.[363] In doing so, Congress mandated a system of public education two years before the U.S. Constitution existed. The Northwest Ordinance of 1787, with words echoing

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[355] *See A Bill for the More General Diffusion of Knowledge*, THOMAS JEFFERSON ENCYCLOPEDIA, https://www.monticello.org/site/research-and-collections/bill-more-general-diffusion-knowledge [https://perma.cc/T934-D2JZ].

[356] *See* John Adams, *A Dissertation on the Canon and Feudal Law*, *in* 3 THE WORKS OF JOHN ADAMS 447, 457 (Charles Francis Adams ed., Boston, Little, Brown, & Co. 1865) (indicating that public education was "of more consequence to the rich themselves"); *see also* THE FEDERALIST NO. 55, at 373–74 (James Madison) (Jacob E. Cooke ed., 1961) (advocating that a system of electing representatives of a sufficient number every two years would prevent the ultimate danger of a small group of individuals engaging in tyranny or conspiracy through legislation or falling victim to corruption).

[357] Adams, *supra* note 356, at 457.

[358] John Adams, *Thoughts on Government*, *in* THE WORKS OF JOHN ADAMS, *supra* note 356, at 189, 199.

[359] *John Adams & the Massachusetts Constitution*, MASS. CT. SYS., https://www.mass.gov/guides/john-adams-the-massachusetts-constitution [https://perma.cc/BW4W-8HPR].

[360] GEORGE THOMAS, THE FOUNDERS AND THE IDEA OF A NATIONAL UNIVERSITY: CONSTITUTING THE AMERICAN MIND 108 (2015).

[361] MASS. CONST. of 1780, ch. V, § 2.

[362] *See* Eastman, *supra* note 221, at 10.

[363] Public Land Ordinance of 1785, *supra* note 20, at 565–66.

the Massachusetts Constitution, explained the rationale: as a necessity of "good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[364] This declaration, moreover, resided alongside the Ordinance's articulation of several individual rights and liberties—familiar rights regarding religion, "trial by jury," bail, "cruel and unusual punishment," and "liberty or property" that were later incorporated into the Constitution's Bill of Rights.[365]

The Northwest Ordinance of 1787, moreover, was directly intertwined with the U.S. Constitution's adoption and substance—so much so that many scholars characterize the Ordinance as "in some sense constitutional."[366] First, it articulated several rights, such as freedom of religion, trial by jury, a prohibition against cruel and unusual punishment, and protection of liberty and property, that would later find their place in the Bill of Rights.[367] Second, several Constitutional Convention delegates simultaneously served in the Continental Congress.[368] In fact, during the summer of 1787, some Constitutional Convention delegates had to leave the Convention to establish a quorum in Congress to pass the Northwest Ordinance—what the Secretary described as "absolutely necessary for the great purpose of the union."[369] Third, the Northwest Ordinances were the documents that made the Constitution possible.[370] Under the Articles of Confederation, states were merely in "a firm league of friendship with each other."[371] As independents, multiple states asserted competing claims to the western territories.[372] Resolving these disputes, ceding the territories to a national government, and devising evenhanded rules for incorporating territories as new states was a predicate step for transitioning from a league of friends to a unified nation.[373]

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[364] Ordinance of 1787: The Northwest Territorial Government, *reprinted in The Organic Laws of the United States*, 1 U.S.C. XLV, LVII–LIX (2018).

[365] *Id.* at LVIII–LIX.

[366] Denis P. Duffey, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929, 931 (1995) (citing several scholars).

[367] *See* JAMES A. CURRY, RICHARD B. RILEY & RICHARD M. BATTISTONI, CONSTITUTIONAL GOVERNMENT: THE AMERICAN EXPERIENCE 54 (10th ed. 1989).

[368] George Anastaplo, *The Constitution at Two Hundred: Explorations*, 22 TEX. TECH L. REV. 967, 1100 (1991) (indicating forty-two of fifty-five delegates to the Constitutional Convention served in the Continental Congress at some point, with ten serving concurrently).

[369] MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 296 (2016).

[370] Jonathan Hughes, *The Great Land Ordinances: Colonial America's Thumbprint on History*, *in* ESSAYS ON THE ECONOMY OF THE OLD NORTHWEST 1, 1–3 (David C. Klingaman & Richard K. Vedder eds., 1987); Duffey, *supra* note 366, at 935–39.

[371] ARTICLES OF CONFEDERATION of 1777, art. III.

[372] *Northwest Ordinance and Slavery, in* 1 RACE AND ETHNICITY IN AMERICA: FROM PRE-CONTACT TO THE PRESENT 144, 144 (Russell M. Lawson & Benjamin A. Lawson eds., 2019).

[373] *See id.*

The Northwest Ordinances did just that, establishing the groundwork and principles for what would eventually be thirty new states—basically all the states except the original colonies.[374]

2. Practical Shortcomings

By the mid-1800s, the United States provided equal or more access to education than any nation in the world save Prussia.[375] But measured against the idea of a fully educated self-governing citizenry, education remained too limited. Setting aside land and rhetorically encouraging education had not ensured uniform access to education.[376] Through the first half of the 1800s, Northeastern states were the only ones to operate anything resembling a system of education.[377] Yet even there, public education struggled to secure the resources necessary to support a robust statewide system.[378] Education in the territories and developing states was even more challenging. The population was sparser and the communities newly developing.[379] Although Congress had theoretically given the territories a jump start with land grants and rules, the land was often mismanaged or failed to generate the resources necessary to properly finance education.[380] The result was inconsistent and inadequate schooling. The South faced both practical and ideological challenges. The South, as detailed above, criminalized the education of Black Americans and blocked public education for whites as well, for ideological, political, and tax reasons.[381]

The principle of self-government had likewise stalled. Women and African-Americans could not vote at all, even in the North. Often the only people who could vote were white male landowners or taxpayers.[382] The combined reality of lagging education and access to the ballot box meant that

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374 The Northwest Ordinances were the "institutional thumbprint on the American continent all the way from the Ohio River to the Pacific." Hughes, *supra* note 370, at 1–2.

375 Sun Go & Peter Lindert, *The Uneven Rise of American Public Schools to 1850*, 70 J. ECON. HIST. 1, 3 (2010).

376 *See, e.g.*, DAVID MCCULLOUGH, THE PIONEERS: THE HEROIC STORY OF THE SETTLERS WHO BROUGHT THE AMERICAN IDEAL 197–217 (2019) (describing the "gap between the dream and reality" of education in Ohio as immense).

377 *See* NEEM, *supra* note 115, at 71–72.

378 *Id.*

379 *See, e.g.*, MCCULLOUGH, *supra* note 376, at 197–217 ("Cleveland had a population of little more than 1,000 but also one of the best harbors on the lake and was growing rapidly.").

380 *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 3044–45 (statement of Rep. Moulton) (1866) (discussing mismanagement in Illinois).

381 *Cf.* Leviton & Joseph, *supra* note 18, at 1156 (discussing resistance to creation of public schools in post-Civil War Maryland).

382 Stanley L. Engerman & Kenneth L. Sokoloff, *The Evolution of Suffrage Institutions in the New World*, 65 J. ECON. HIST. 891, 907–08 (2005); Arthur W. Bromage, *Literacy and the Electorate*, 24 AM. POL. SCI. REV. 946, 946–47 (1930).

much of the nation was not operating as anything approaching a democracy. And the South, of course, had actively suppressed not just public education and the ballot box but the basic human liberty and freedom of African-Americans. The Civil War brought these contradictions to the fore.

3. Guarantee Clause Authority as the Cure

Relying on states to act in good faith to operate a republican form of government had, by the mid-1800s, left the nation fractured and uneven in critical respects. Reconstruction provided Congress the opportunity to cure these critical failures, particularly the lack of education, which leading members of Congress believed had been a contributing factor to the Civil War itself.[383] Equally important, if the South was going to bring millions of formerly enslaved people and poor whites into the electorate and finally function as a democracy, the South had to educate its people.[384] This would require a more forceful congressional approach to education. Rather than leaving education to chance, Congress forced Southern states to constitutionally guarantee education.[385]

The constitutional context for making this education shift had also radically changed. Unilaterally dictating terms to states would have been unfathomable at the founding. The Constitution's original framework was premised on expansive state power and only created those federal powers necessary to serve the states' collective interests.[386] The Founders were so concerned with federal power intruding on state power and individual rights that they devised internal checks and balances to slow the exercise of federal power, even when such power clearly existed.[387] The original Constitution

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[383] *See* CONG. GLOBE, 40th Cong., 1st Sess. 167 (1867) (statement of Sen. Sumner) ("A population that could not read and write naturally failed to comprehend and appreciate a republican government."); CONG. GLOBE, 41st Cong., 2d Sess. 1333 (1870) (statement of Sen. Edmunds) (arguing that the lack of education had played a role in the War).

[384] *See, e.g.*, CONG. GLOBE, 40th Cong., 1st Sess. 168 (1867) (statement of Sen. Morton) (arguing that education of the masses was necessary to change the political balance in the South); *see also* Mark A. Graber, *The Second Freedmen's Bureau Bill's Constitution*, 94 TEX. L. REV. 1361, 1364 (2016) (detailing that republicans argued "education [was a] central condition[] of freedom and full citizenship").

[385] *See supra* Section I.B.2.

[386] *See generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) (noting that the "constitution is written" so that the limits on federal power "may not be mistaken").

[387] *See generally* THE FEDERALIST NO. 51, at 347–48 (James Madison) (Jacob E. Cooke ed., 1961) (arguing for separation of power among the branches of government and the general need to check government power); *id.* NO. 84, at 577 (Alexander Hamilton) (expressing concerns and responses to runaway federal power); Kevin Maher, *Like a Phoenix from the Ashes:* Saenz v. Roe, *the Right to Travel, and the Resurrection of the Privileges or Immunities Clause of the Fourteenth Amendment*, 33 TEX. TECH L. REV. 105, 109 (2001) (explaining how our checks and balances preserve federalism).

did not include the Bill of Rights either.[388] Even once adopted, the Bill of Rights operated to limit the federal government, not states.[389]

The Reconstruction Amendments to the Constitution inverted this balance of power. The Fourteenth Amendment, for the first time, included the key phrase "no state shall" and, thereby, precluded states from invading individual rights.[390] It also granted Congress the revolutionary power to regulate states in regard to individual rights.[391] At that point, Congress, not the Supreme Court, was empowered to be the primary guarantor of individual rights.[392] The Fifteenth Amendment adopted the same structure as to voting.[393] These changes literally reframed the constitutional structure. States were no longer immune from unilateral federal causes of action,[394] nor free to infringe individual rights.[395]

This monumental shift also altered and intertwined with the meaning of a republican form of government and Congress's power to demand it. Prospective states were agreeing to the Constitution in its amended form and meaning, not the one that existed in 1787.[396] With a post-Civil War Constitution that reframed the relationship between citizens and their state governments,[397] Congress need not wait for a state to violate its relationship with citizens. Congress could dictate statehood terms consistent with this

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388 CHEMERINSKY, *supra* note 193, at 12.

389 *Cf.* Barron *ex rel.* Craig v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833) ("The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states.").

390 U.S. CONST. amend. XIV, § 1; *see* Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 904 (1986) (discussing resistance to the Fourteenth Amendment because it would absorb or substantially shrink state sovereignty).

391 U.S. CONST. amend. XIV, § 5.

392 Kaczorowski, *supra* note 390, at 867 ("[T]he congressional framers of the fourteenth amendment and the Civil Rights Act of 1866 also believed that Congress possessed primary authority to secure the civil rights of United States citizens.").

393 *See* U.S. CONST. amend. XV.

394 *See, e.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) ("Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.").

395 *See, e.g.*, Powell v. Alabama, 287 U.S. 45, 71 (1932) (holding that the Fourteenth Amendment protected a defendant's right to effective appointment of counsel); *see also* Kaczorowski, *supra* note 390, at 916–17 (explaining the fundamental change that the Fourteenth Amendment worked in limiting states' power to infringe on individual rights).

396 *See* Minor v. Happersett, 88 U.S. 162, 175 (1875).

397 Kaczorowski, *supra* note 390, at 910–17 (discussing how the Fourteenth Amendment delegated to Congress a power to protect individual rights, which previously had been a power reserved to states).

new relationship.[398] This meant Congress had the power to impose education as a right protected by the Thirteenth and Fourteenth Amendments and as a central component of a republican form of government in a way previously beyond its presumed power. As Section I.B.3 detailed, that is exactly what the Reconstruction Congress did, and states complied.

In exercising this power, Congress forced a redefined republican form of government into practical existence. Before the Fourteenth Amendment was proposed, less than half of state constitutions affirmatively guaranteed education.[399] After the Reconstruction Act, all the readmitted Southern states guaranteed education, as did newly formed western states and several Northern states (through voluntary amendments) over the next decade.[400] By 1875, only one state—Connecticut—lacked an education clause, and even it had a constitutional provision that helped fund education.[401] The single state to attempt to enter the Union without an education clause since Reconstruction—New Mexico—saw Congress reject its petition for statehood.[402] Congress expected and then required New Mexico to create and maintain public schools in its constitution.[403]

4. Constitutional Constraints on the Exercise of Congress's Constitutional Authority

Few Guarantee Clause cases have reached the Court and, of those, most did not address the Clause's substantive meaning because the Court reasoned "the claims were nonjusticiable under the 'political question' doctrine."[404] The one notable exception is a prohibition on imposing special burdens on new states.[405] Congress cannot, in effect, relegate new states to second-class status.[406] But given the broad implications of the Guarantee Clause, the Court has been careful to defer to Congress as to its substantive meaning.

In 1849 in *Luther v. Borden*, the Court held that whether a government is republican in form is a political question that rests with Congress, not the

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[398] *See, e.g.*, Joint Resolution to Admit the Territories of New Mexico and Arizona as States into the Union upon an Equal Footing with the Original States, 37 Stat. 39 (Aug. 21, 1911) (admitting states without dictating any terms or conditions).

[399] Black, *supra* note 30, at 1093–94; Calabresi & Perl, *supra* note 158, at 457–60.

[400] Black, *supra* note 30, at 1093–94.

[401] Calabresi & Perl, *supra* note 158, at 457 n.130.

[402] INST. FOR EDUC. EQUITY & OPPORTUNITY, *supra* note 155, at 29.

[403] *See* ROBERT W. LARSON, NEW MEXICO'S QUEST FOR STATEHOOD 1846–1912, at 266 (1968) (stating requirement that New Mexico establish schools).

[404] New York v. United States, 505 U.S. 144, 184 (1992) (citations omitted); Rome v. United States, 446 U.S. 156, 182 n.17 (1980); Baker v. Carr, 369 U.S. 186, 218–29 (1962).

[405] *See* Coyle v. Smith, 221 U.S. 559, 580 (1911) ("[T]he constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized.").

[406] *Id.* at 567–68.

courts.[407] Congress's decision, moreover, "is binding on every other department of the government, and [can] not be questioned in a judicial tribunal."[408] The Court has, however, indicated elsewhere that the Clause "impl[ies] the duty of such new State to provide itself with [a republican] government, and impose[s] upon Congress the duty of seeing that such form is not changed to one anti-republican."[409]

Pursuant to this principle, a court would presumptively defer to Congress's judgement that education is a necessity of republican government and states must guarantee it in their constitutions. If any Reconstruction Era demand by Congress was subject to question, it was the requirement that Confederate states ratify the Fourteenth Amendment. Some argued that this requirement was beyond Congress's power, but even on a similarly serious claim, the Court has refused to second-guess Congress.[410] Requiring education as a component of republican government pales in comparison to the Fourteenth Amendment's ratification, as education had long been understood as a necessity of republican government. In short, the Court has treated Congress's understanding of the meaning of republican government as effectively definitive.[411]

The only obvious limit on Congress's Guarantee Clause power is the "equal footing" doctrine, which prohibits Congress from imposing unique burdens on new states.[412] New states must have "all of the powers of sovereignty" as other states.[413] The most plausible objection to imposing education through the Guarantee Clause might, ironically, be the equal footing doctrine. Confederate states, particularly the last three whose admissions were conditioned on education,[414] could argue their education condition was a unique burden.

The argument, however, would be misplaced on several grounds. First, the equal footing doctrine does not constrain Congress's authority to assess and enforce a republican form of government. A condition can be unique so long as it pertains to republican form of government. The Court in *Coyle v.*

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[407] 48 U.S. 1, 38–40 (1849).

[408] *Id.* at 42.

[409] *Coyle*, 221 U.S. at 567–68.

[410] *See* Coleman v. Miller, 307 U.S. 433, 449–50 (1939).

[411] *See, e.g.*, Mountain Timber Co. v. Washington, 243 U.S. 219, 234 (1917) ("As has been decided repeatedly, the question whether this guaranty has been violated is not a judicial but a political question, committed to Congress and not to the courts."); *see also* Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 863 (1994) (indicating that since *Pacific States* the Court has left these questions to Congress).

[412] *Coyle*, 221 U.S. at 567–68.

[413] *Id.* at 573.

[414] *Supra* notes 325–326 and accompanying text.

Smith distinguished admission conditions that "are within the scope of the conceded powers of Congress over the subject" of a republican form of government and conditions that "restrict the powers of such new States in respect of matters which would otherwise be exclusively within the sphere of state power."[415] The equal footing doctrine prevents Congress from misusing Guarantee Clause power to achieve the latter, not the former.[416] Thus, insofar as education is necessary to a republican form of government or otherwise within Congress's power to address, the equal footing doctrine is of little concern.

Second and more substantively, the meaning of a republican form of government is neither static nor definite. The Court in *Minor v. Happersett* explained that the "several provisions of the Constitution must be construed in connection with the other parts of the instrument, and in the light of the surrounding circumstances" to arrive at the meaning of a republican form of government.[417] As the circumstances and the Constitution itself change, Congress can demand compliance with an evolved understanding of republican government.[418] The constitutional Amendments of the Reconstruction Era, no doubt, substantially changed both the terms under which existing states operated and the meaning of a republican form of government. To state the obvious, Congress admitted slave states prior to the Civil War and appropriately refused readmission to those states after the War.[419] Thus, the fact that a post-Civil War condition may have been new or unique is not dispositive of Congress's authority to impose it. The fundamental question remains whether Congress was ensuring a republican form of government when it imposed conditions on Confederate states, not whether those conditions were new or unique.

The historical record leaves no doubt that Congress was acting on its judgment that education was a necessity of republican government—just as it had been since the American Founding.[420] What had changed was simply

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[415] 221 U.S. at 568.

[416] *Id.*

[417] *See* 88 U.S. 162, 175–76 (1875).

[418] For instance, today Congress could condition the admission of a new state on the ability of eighteen-year-olds to vote, even though such a condition would have been beyond Congress's power in 1792. Louk, *supra* note 348, at 744–45.

[419] Justice Harlan's famous dissent in *Plessy v. Ferguson*, for instance, argued that segregation violated the Guarantee Clause in addition to equal protection. 163 U.S. 537, 563–64 (1896) (Harlan, J., dissenting); *see also* Chemerinsky, *supra* note 411, at 863–64 (arguing for a more robust conceptualization of the protections afforded by the Guarantee Clause, namely that they are justiciable).

[420] *See* CONG. GLOBE, 40th Cong., 1st Sess. 168 (1867) (statements of Sens. Patterson, Morton, Hendricks & Sumner); *see also A Century of Lawmaking, for a New Nation: U.S. Congressional Documents and Debates, 1774–1875*, H.R. J., 39th Cong., 1st Sess. 69 (1865) (including a resolution

Congress's recognition that a more proactive approach to ensuring republican government through education was necessary.[421] Requiring that state constitutions conform to this new approach did not reduce Confederate states to second-class status; it simply demanded that they comply with the newly amended Constitution and republican government. Congress, moreover, was entirely consistent regarding education once it arrived at this new approach, never admitting another state to the Union without an education clause.[422] And again, by 1875, every state but one provided for education in its constitution.[423]

Finally, Congress did, in fact, impose education conditions on new states prior to the Civil War. The Northwest Ordinance's explicit requirement that the territories reserve land and resources for schools got translated into statehood conditions,[424] which the Court has enforced and applied on several occasions. In 1855, for instance, the Court in *Cooper v. Roberts* wrote that "Michigan was admitted to the Union, with the unalterable condition 'that every section No. 16, in every township . . . shall be granted to the State for the use of schools.'"[425] The purpose, the Court wrote, was to "consecrate the same central section of every township of every State which might be added to the federal system" to promote "good government" by the spread of education.[426] Neither Michigan, nor any other state, had been singled out; Congress had simply required these states "to plant in the heart of every community the same sentiments of grateful reverence for the wisdom, forecast, and magnanimous statesmanship of those who framed the institutions for these new States, before the constitution for the old had yet been modelled."[427] Thus, the Court in *Roberts* and other cases treated those land provisions as valid and enforced them in subsequent land disputes.[428]

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directing the Joint Committee on Reconstruction to investigate the creation of a Bureau of Education, in furtherance of republican government); CONG. GLOBE, 39th Cong., 1st Sess. 3044 (1866) (statement of Rep. Moulton) (arguing in favor of the Bureau of Education as a continuation of the republican principles on which the nation was founded).

421 *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 3045 (1866) (statement of Rep. Moulton) (arguing that prior efforts to establish and grow a public education system had failed in Illinois and additional steps by Congress were necessary).

422 *See* INST. FOR EDUC. EQUITY & OPPORTUNITY, *supra* note 155, at 29.

423 Calabresi & Perl, *supra* note 158, at 458 n.132.

424 *See, e.g.*, Cooper v. Roberts, 59 U.S. (18 How.) 173, 179 (1855) (affirming binding nature of the pact to use lot No. 16 for schools as a part of agreement for Michigan to join the Union).

425 *Id.*; *see also id.* at 178 (discussing the establishment of Ohio and the requirement of land reservation for schools).

426 *Id.* at 178.

427 *Id.*

428 *Id.*; Beecher v. Wetherby, 95 U.S. 517, 523–24 (1877).

5. Implications for the Right to Education

The Guarantee Clause implicates at least three distinct types of education claims. First, a plaintiff might claim that a state is directly violating the Guarantee Clause because its education system falls short of what a republican form of government requires. In other words, the Guarantee Clause independently establishes a right to education. Second, a plaintiff might assert that education is a fundamental right of substantive due process and cite the Guarantee Clause, among other provisions, as constitutional support. Third, a plaintiff might claim that a state has violated its statutory terms of admission to the Union, thereby only indirectly implicating the Guarantee Clause. The first claim is the broadest and the last the narrowest.

The Court has typically avoided the Guarantee Clause as a source of rights and, instead, sought to locate rights elsewhere.[429] Voting inequalities and irregularities, for instance, present a strong Guarantee Clause claim.[430] Early challenges to malapportioned voting districts relied on the Guarantee Clause,[431] arguing that affording some citizens more electoral power than others distorts the will of the people and, thus, is not republican in form.[432] The Court and scholars acknowledged the obvious logic, but when the Court finally intervened in voting, it grounded its analysis in equal protection instead.[433]

The prospects of the Court recognizing an independent claim to education under the Guarantee Clause, when it has refrained from doing so in voting, is low. This Article's premise, however, is that the right to education is rooted in various constitutional provisions and concepts. Thus, the important question is whether the Guarantee Clause adds substantial weight to the overall claim to a right to education. The answer to that is yes.

Education has been part of the nation's theory of a republican form of government since its founding, and the right to education vested in state constitutions is inextricably linked to Congress's exercise of its Guarantee Clause power. These facts speak directly to the Court's standard for identifying fundamental rights: whether the right is "'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were

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[429] For example, in *Baker v. Carr*, 369 U.S. 186, 209 (1962), the Court did not rely on the Guarantee Clause, even though it was implicated, and instead went to equal protection.

[430] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 118–19 (1980).

[431] *Baker*, 369 U.S. at 209.

[432] *Id.* at 298 (Frankfurter, J., dissenting).

[433] *Id.* at 209–10 (majority opinion); *see generally* ELY, *supra* note 430, at 117 n.* (explaining that the Court could have avoided equal protection concerns in voting rights cases by deciding them based on the Guarantee Clause).

sacrificed.'"[434] Guarantee Clause history alleviates some analytical pressures on the Court in answering this question. Rather than recognizing a right to education based on its own view of tradition and liberty, the Court could rely on and defer to longstanding congressional action.[435]

A claim that a state is violating its terms of admission to the Union with its education policies would even further isolate and relieve constitutional pressures. Such a claim still requires historical inquiries into Congress's imposition of education through its Guarantee Clause power, but the claim would not require a court to directly decide whether education is a constitutionally required necessity of republican government. The most obvious contexts in which to explore this history are Mississippi, Texas, and Virginia, whose statutory readmissions were explicitly conditioned on education during Reconstruction.[436] In fact, Mississippi plaintiffs are currently pursuing this theory. Recognizing the uphill battles of a direct state or federal constitutional claim,[437] the plaintiffs framed a federal statutory claim that drew on the state's constitutional history and alleged that Mississippi is violating its 1870 terms of readmission with a state constitutional education clause that currently affords fewer rights than the state constitution of 1870.[438]

This Mississippi claim shifts the frame of reference away from today's conventional wisdom regarding the right to education and places the state on the defensive in a way it otherwise would not be. Mississippi has clearly violated its admission terms in the past and likely continues to do so today.[439] Unable to easily contest those facts, the state's primary defense is that it is immune from suit under the Eleventh Amendment and only Congress—and not courts—can enforce readmission terms.[440] While that line of argument succeeded in the district court, the Fifth Circuit Court of Appeals disagreed.[441] The Fifth Circuit reasoned that the legislation readmitting

[434] Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (first quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion); and then quoting Palko v. Connecticut, 302 U.S. 319, 325–26 (1937)).

[435] The Court's concern with intervening in complex education issues weighed heavily in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 42 (1973).

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

[437] *See generally* LaJuana Davis, *Emerging School Finance Litigation in Mississippi*, 36 MISS. C.L. REV. 245 (2018) (discussing the difficulty in challenging Mississippi's school inequities).

[438] Williams v. Reeves, 954 F.3d 729, 732–33 (5th Cir. 2020).

[439] *See generally* Davis, *supra* note 437, at 250 (discussing Mississippi's voter disenfranchisement and attempt to undermine *Brown v. Board of Education*).

[440] *See* Brief of Appellees at 18–19, 46–51, Williams v. Bryant, No. 19-60069 (5th Cir. Apr. 24, 2019), 2019 WL 1961033, at *18–19, *46–51; *Williams*, 954 F.3d at 734–35.

[441] *Williams*, 954 F.3d at 739.

Mississippi to the Union was a federal law under which plaintiffs could allege a claim and that the plaintiffs had alleged facts of an ongoing violation of that law.[442] Thus, they were entitled to proceed with the case.[443] The court did not have to address the myriad constitutional issues raised in this Article.

Statutory litigation of this sort, however, has its limits. While Mississippi, Texas, and Virginia had their admission conditioned on the nonregression of education rights, no other states had those precise terms. Education terms of other states' admission are less substantive and pertain to the reservation of school lands.[444] Terms of that nature would not necessarily give rise to statutory claims regarding equity and adequacy in schools. Admission and readmission litigation, nonetheless, has value beyond the states in which it might occur.

If education admissions terms are enforceable against Mississippi, Texas, and Virginia, for instance, it raises the question of whether those terms do, in fact, amount to a necessity of republican form of government. Enforcing those terms could, otherwise, implicitly create equal footing concerns among states. But if courts can validly enforce the terms, the terms represent an important building block both for republican form of government theories and for the right to education under other constitutional provisions. A measured statutory strategy for slowly exploring those broader constitutional issues, moreover, would be akin to the NAACP's strategy prior to *Brown v. Board of Education*.[445] It was only after the NAACP had firmly established states' failure to provide "separate but equal education" in a series of other cases that it finally argued that separate education was inherently unequal.[446]

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[442] *Id.* at 738.

[443] *Id.* at 738–39.

[444] *Compare* Act of Mar. 30, 1870, ch. 39, 16 Stat. 80, 81 ("[The] constitution of Texas shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the constitution of said State."), *with* Cooper v. Roberts, 59 U.S. 173, 178 (1855) (referencing Michigan's admission: "The first of these articles is, 'that the section No. 16 in every township, and where such section has been sold, granted, or disposed of, other lands equivalent thereto and most contiguous to the same, shall be granted to the inhabitants of such township, for the use of schools'").

[445] For the definitive account of the NAACP strategy, see RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 283, 472, 522 (2004).

[446] *See, e.g.*, McLaurin v. Okla. State Regents, 339 U.S. 637, 642 (1950) ("Appellant, having been admitted to a state-supported graduate school, must receive the same treatment at the hands of the state as students of other races."); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 345 (1938) (holding that lack of legal education from the state to Black students, when such education is available to white students, constitutes denial of equal protection); Sipuel v. Bd. of Regents, 332 U.S. 631, 632–33 (1948) (holding that the denial of legal education to a Black student when such education is available to white students is a violation of the Equal Protection Clause).

CONCLUSION

Deeply concerned with common people's access to public education, the Founders developed a plan to provide it. Their animating ideas have been with the nation ever since, guiding several of the nation's most consequential legislative and constitutional acts. At the nation's two most pivotal periods—Independence and Reconstruction—Congress embedded education in our legal and constitutional fabric. The point was to secure an ideal form of democracy.

Those plans and intentions, however, have never fully secured adequate education for all. Securing adequate education, like so many other of our constitutional ideas, has been a work in progress. The fact that the nation has failed, as a practical matter, to achieve adequate education for all is not, however, evidence that the right to education lacks a constitutional basis. Rather, the nation's past failures are a reminder, particularly during current times of widening inequality and cultural division, that more affirmative steps are necessary, including the formal recognition of the right to education under the federal Constitution.

This Article demonstrates that this right is more complex and deeply rooted than courts and scholars have ever appreciated. Pigeonholing education into a single constitutional provision or Supreme Court test of fundamental rights only weakens it. While the right to education easily meets the Supreme Court's fundamental rights test and most obviously emanates from the Fourteenth Amendment's protection of liberty, the right to education is broader than that, reaching across multiple aspects of the Constitution. It is, in effect, the tie that binds the Thirteenth Amendment's protection against the badges and incidents of slavery to the Fourteenth Amendment's guarantees of liberty, privileges and immunities, and citizenship. And even more broadly, the right to education binds the Thirteenth and Fourteenth Amendments to the constitutional guarantee of a republican form of government. In short, the right to education is fundamental not just to equal protection or liberty but to the structure of our constitutional system of government itself.

These connections have been lost, in part, due to the legacy of Jim Crow segregation and discrimination. Jim Crow laws and concepts did more than subjugate Black Americans; they also submerged and distorted the history of slavery, Reconstruction, and a republican form of government.[447] The right to education was just one of many innocent bystanders. But by carefully

[447] *See generally* James W. Fox Jr., *Intimations of Citizenship: Repressions and Expressions of Equal Citizenship in the Era of Jim Crow*, 50 HOW. L.J. 113, 130–61 (2006) (analyzing the various ways in which Jim Crow subordinated democracy and its goals, including political participation).

revisiting slavery and Reconstruction, this Article reveals what should otherwise be relatively obvious: for decades, enslaved people made unrelenting efforts to acquire education and, once free, many Black Americans led a full-fledged movement to constitutionalize public education—and succeeded.

That movement was bolstered by its direct alignment with the nation's founding understanding of a republican form of government and citizens' role in it. Congress finally saw what enslaved people and freedmen already knew: education is the dividing line between the various aspects of liberty and subjugation. History had also taught an equally important lesson: liberty and freedom would not exist as a practical matter without the affirmative provision of public education. Thus, the right to education need not rest on any grand new constitutional theories or the appalling facts of current education deprivations. The right to education rests on reconnecting it to our history and its lessons.