

*Note: Just when the law reviews are cutting back on pages, I've decided to become long-winded. Instead of the whole draft, here are the Introduction (pp. 1-12), Part IV (pp. 45-65), and Part V (pp. 66-100) of the piece I will present at the 8/29 brown bag. These will give you a sense of the constitutional picture I'm trying to paint, and I will fill in the policy perspective at the talk. I look forward to your comments and insights.*

## EDUCATION, EQUALITY, AND NATIONAL CITIZENSHIP

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For the past half century, legal efforts to promote greater equality in educational opportunity have largely focused on two structural problems. The first—the main preoccupation of school desegregation—is inequality between schools within school districts. The second—the principal target of school finance litigation—is inequality between school districts within states. This Article focuses on a third and bigger problem in the distribution of educational opportunity: inequality between states across the nation.

As the many recent commemorations of *Brown v. Board of Education* have made clear, the equality revolution initiated by *Brown* has transformed many aspects of law and society.<sup>1</sup> In education, the decision focused legal and policy attention on disparities in opportunity between black and white schools within the same district. Although *Brown* assumed equality in the “tangible factors in the Negro and white schools,”<sup>2</sup> the reality was that dual school systems relegated minority schoolchil-

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<sup>1</sup> See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). Recent examinations of *Brown*'s legacy include Symposium, *Brown at Fifty*, 117 HARV. L. REV. 1302 (2004); Symposium, *Brown@50*, 47 HOW. L.J. 471 (2004); Symposium, *50 Years of Brown v. Board of Education*, 90 VA. L. REV. 1537 (2004); and Symposium, *Brown v. Board of Education at Fifty: Have We Achieved Its Goals?*, 78 ST. JOHN'S L. REV. 253 (2004).

<sup>2</sup> *Brown*, 347 U.S. at 492.

dren to inferior learning environments. In the decades between the Civil Rights Act of 1964 and retrenchment by the Supreme Court in the early 1990s, administrative and judicial actors sought to remedy these educational disparities through desegregation.

Although desegregation has eliminated some intradistrict disparities,<sup>3</sup> its efficacy as a general strategy for attacking educational inequality has been circumscribed by demographic forces and judicial indifference. As middle-class white families moved from central cities to surrounding suburbs, the problem of educational inequality took on an interdistrict character. In 1973, the Supreme Court held that interdistrict disparities in school funding based on local property wealth do not violate the Equal Protection Clause,<sup>4</sup> and in 1974, it all but declared interdistrict segregation to be beyond the reach of busing remedies.<sup>5</sup> These decisions left few options in federal court for minority schoolchildren in high-poverty districts, setting in motion thirty years of ongoing effort in state courts and state legislatures to narrow educational disparities between districts. Relying on education clauses in state constitutions, advocates have filed lawsuits in forty-five states arguing for greater equity and adequacy in school finance.<sup>6</sup> Educational adequacy claims, in particular, have found a receptive audience in state courts in recent years,<sup>7</sup> and the available

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<sup>3</sup> A continuing source of intradistrict variation in educational quality is the application of teacher seniority rules that enable the most experienced teachers to work in the most affluent schools with the least disadvantaged students. See EDUCATION TRUST-WEST, CALIFORNIA'S HIDDEN TEACHER SPENDING GAP: HOW STATE AND DISTRICT BUDGETING PRACTICES SHORTCHANGE POOR AND MINORITY STUDENTS AND THEIR SCHOOLS (2005); Marguerite Roza & Paul T. Hill, *How Within-District Spending Inequities Help Some Schools to Fail*, in BROOKING PAPERS ON EDUCATION POLICY 201 (Diane Ravitch ed., 2004). In addition, *de facto* segregation persists in many districts, and voluntary efforts to combat it have been challenged in the courts in recent years. See *Comfort v. Lynn Sch. Committee*, — F.3d —, 2005 WL 1404464 (1st Cir. June 16, 2005) (upholding voluntary integration plan); *Parents Involved in Community Schs. v. Seattle Sch. Dist.*, No. 1, 377 F.3d 949 (9th Cir. 2004) (invalidating voluntary integration plan), *reh'g en banc granted*, 395 F.3d 1169 (9th Cir. 2005).

<sup>4</sup> See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

<sup>5</sup> See *Milliken v. Bradley*, 418 U.S. 717 (1974); *cf.* *Milliken v. Bradley*, 433 U.S. 267 (1977) (upholding compensatory funding for predominantly minority districts as a desegregation remedy).

<sup>6</sup> Up-to-date information on the status of school finance litigation in all 50 states is maintained by the ACCESS Project at [www.schoolfunding.info](http://www.schoolfunding.info).

evidence shows that successful litigation has resulted in a modest reduction of interdistrict inequality within states.<sup>8</sup>

The legacies of segregation and school finance inequality suggest the important role of state law and policy in structuring educational inequality. However, a national goal of equal educational opportunity cannot be fully achieved through strategies that focus on inequality within states. The reason is simple: The most significant component of educational inequality across the nation is not inequality within states but inequality *between* states. Even if we were to eliminate disparities between school districts within each state, substantial disparities across states would remain.

Key cases on school finance have familiarized us with interdistrict disparities such as those between Edgewood and Alamo Heights, between Baldwin Park and Beverly Hills, and between Trenton and Princeton.<sup>9</sup> But these disparities tell only part of the tale of educational inequality throughout the nation. The fact is that the median district in New Jersey outspends most of the highest-spending districts in Texas. The *lowest*-spending districts in New Jersey outspend most of the highest-

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<sup>7</sup> See, e.g., *Montoy v. Kansas*, 102 P.3d 1158 (Kan. 2005); *Hoke County Bd. of Educ. v. North Carolina*, 599 S.E.2d 365 (N.C. 2004); *W. Orange-Cove Consol. Indep. Sch. Dist. v. Alanis*, 107 S.W.3d 558 (Tex. 2003); *Campaign for Fiscal Equity v. New York*, 801 N.E.2d 326 (N.Y. 2003); see also Michael A. Rebell, *Adequacy Litigations: A New Path to Equity*, in BRINGING EQUITY BACK: RESEARCH FOR A NEW ERA IN AMERICAN EDUCATIONAL POLICY 291, 297 (Janice Petrovich & Amy Stuart Wells eds., 2005) (observing that “16 of the 18 plaintiff victories in the past 14 years have involved substantial or partial adequacy considerations”).

<sup>8</sup> See Sheila E. Murray, William N. Evans, & Robert M. Schwab, *Education-Finance Reform and the Distribution of Education Resources*, 88 AM. ECON. REV. 789, 806-07 (1998). These authors conclude that the reduction in intrastate inequality has occurred mainly through increased spending in districts at the bottom and middle of the distribution, while spending in top districts remained constant. See *id.* For additional studies of the impact of state school finance litigation, see Douglas S. Reed, *Twenty-Five Years After Rodriguez: School Finance Litigation and the Impact of the New Judicial Federalism*, 32 LAW & SOC. REV. 175 (1998); Michael Heise, *The Effect of Constitutional Litigation on Education Finance: More Preliminary Analyses and Modeling*, 21 J. EDUC. FINANCE 195 (1995); G.A. Hickrod et al., *The Effect of Constitutional Litigation on Education Finance: A Preliminary Analysis*, 18 J. EDUC. FINANCE 180 (1992); David Card & A. Abigail Payne, *School Finance Reform, the Distribution of School Spending, and the Distribution of SAT Scores* (Oct. 1998) (National Bureau of Economic Research Working Paper), available at [www.nber.org/papers/w6766](http://www.nber.org/papers/w6766).

<sup>9</sup> See *Rodriguez*, 411 U.S. at 11-14; *Serrano v. Priest*, 487 P.2d 1241, 1248 (Cal. 1971); *Abbott v. Burke*, 575 A.2d 359, 403 (N.J. 1990).

spending districts in California. Even when these comparisons are adjusted for differences in geographic costs and educational burdens, substantial disparities remain: The median district in California spends nearly 20 percent less per pupil than the median district in Texas, which in turn spends almost 25 percent less than the median district in New Jersey. As economists Sheila Evans, William Murray, and Robert Schwab explain, “differences in spending between . . . New Jersey, California, and Texas are much more important than differences in spending between Trenton, Sacramento, and Austin and their suburbs.”<sup>10</sup> “Because the financing of public education has always been primarily a state and local, not a federal, matter,” observes education researcher Richard Rothstein, “very little policy attention has been devoted to [interstate] inequality. Yet this might be the most serious financing problem in American education.”<sup>11</sup>

The lack of policy attention to this problem mirrors the absence of legal theory or scholarship that treats educational inequality across states as a matter of constitutional concern. Because school systems are run by states, and because the conduct of states is the explicit target of the Equal Protection Clause,<sup>12</sup> it is no surprise that intrastate inequality has been the law’s main preoccupation. *Brown* itself said that educational “opportunity, where the state has undertaken to provide it, must be made available to all on equal terms,” presumably leaving each state free to decide what opportunity, if any, it will provide.<sup>13</sup> Yet the basic claims of contemporary school finance reform resonate beyond state boundaries. If

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<sup>10</sup> Murray, Evans, & Schwab, *supra* note \_\_, at 798; *see id.* at 808 (observing that state-court school finance litigation “is able to attack only a small part of [educational] inequality” and that “it seems unlikely that further litigation will yield large reductions in national inequality in the future”).

<sup>11</sup> Richard Rothstein, *Equalizing Education Resources on Behalf of Disadvantaged Children*, in *A NOTION AT RISK: PRESERVING PUBLIC EDUCATION AS AN ENGINE FOR SOCIAL MOBILITY* 31, 62 (Richard D. Kahlenberg ed., 2000); *see* Wayne Riddle & Liane White, Cong. Res. Serv., Libr. of Cong., *Public School Expenditure Disparities: Size, Sources, and Debates over Their Significance* 19 (1995) (“virtually all current debate over school finance equalization in the United States is focused on equalization among [districts] within states, not on expenditure disparities across states”).

<sup>12</sup> *See* U.S. CONST. amend. XIV, § 1 (“[N]or shall any state . . . deny to any person within its jurisdiction the equal protection of the laws”).

<sup>13</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (emphasis added). *But cf.* *Griffin v. County Sch. Bd.*, 377 U.S. 218 (1964) (invalidating closure of public schools in Prince Edward County, Virginia, to avoid desegregation); *infra* note \_\_.

accidents of geography or local circumstance are “the most irrelevant of factors” in determining the quality of educational opportunity afforded to each child,<sup>14</sup> it is difficult to see why this logic should apply only within states rather than across the nation as a whole.<sup>15</sup> The concern is especially serious because the incidence of educational disadvantage not only within states but also across states falls disproportionately on poor and minority children.

This Article attempts to nationalize our constitutional perspective and public policy on equal educational opportunity. The centerpiece of the constitutional vision I aim to develop here is not the mandate of equal protection, which is the last principle in the text of Section 1 of the Fourteenth Amendment, but rather the very first principle of the Fourteenth Amendment—the guarantee of national citizenship.<sup>16</sup> In addition to naming a legal status, national citizenship encompasses substantive rights essential to the full and equal standing of members of the national political community.<sup>17</sup> Further, Section 5 of the Fourteenth Amendment assigns Congress the power to enforce the national citizenship guarantee.<sup>18</sup> My central claim is that the wide interstate disparities that currently exist in educational opportunity stand in tension with the ideal of national citizenship and that ameliorating those disparities is a constitutional duty of the federal government.

For reasons familiar to students of constitutional law, the Fourteenth Amendment guarantee of national citizenship has never realized its potential to be a generative source of substantive rights. It was rendered

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<sup>14</sup> *Serrano v. Priest*, 487 P.2d 1241, 1253 (Cal. 1971); *see generally* JOHN E. COONS, WILLIAM H. CLUNE III, & STEPHEN D. SUGARMAN, *PRIVATE WEALTH AND PUBLIC EDUCATION* (1970).

<sup>15</sup> At the oral argument in *Rodriguez*, one Member of the Court recognized this point, referring to the plaintiffs’ equal protection claim and asking: “The logic of it—laying aside the Fourteenth Amendment emphasis on state—the logic of it, however, would apply across state lines, would it not? . . . Why should people in Texas, for example, have better schools than the people in Rhode Island—if they are better, and I don’t know whether they are or not.” 76 *LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW* 572, 582 (Philip B. Kurland & Gerhard Casper eds., 1975).

<sup>16</sup> *See* U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . .”).

<sup>17</sup> *See id.* (referring to the “privileges or immunities of citizens of the United States”).

<sup>18</sup> U.S. CONST. amend. XIV, § 5.

stillborn in the *Slaughterhouse Cases* by a reactionary Court that helped undermine Reconstruction and perverted the essential meaning of the Civil War Amendments.<sup>19</sup> Nevertheless, contemporaneous interpreters beyond the blinkered five-Justice majority in *Slaughterhouse* clearly recognized national citizenship as a font of substantive rights that Congress had the power and duty to enforce. The first Justice John Marshall Harlan elaborated this view in his remarkable dissent in the *Civil Rights Cases*, describing the fundamental transformation of nationhood wrought by the Fourteenth Amendment's Citizenship Clause.<sup>20</sup> In addition, it is this understanding of national citizenship that undergirded a series of legislative proposals between 1870 and 1890 seeking to establish a substantial federal role in supporting public education across the nation and specifically in narrowing disparities in educational conditions among the reunified states. These early proposals, which Congress thoroughly debated and in some cases nearly enacted, illuminate what many leaders of the framing generation believed to be the scope of federal authority and responsibility to secure meaningful national citizenship. This Article attempts to recover this strand of constitutional thought and to apply it to the current problem of interstate inequality in educational opportunity and the development of federal policy to address it.

In so doing, this project builds on and contributes to three areas of scholarship. First, it is an effort to instantiate what Professor William Forbath has called the “social citizenship tradition” in our constitutional heritage.<sup>21</sup> At its core, this tradition affirms that there is a “basic human equality associated with the concept of full membership of a community” and that it is the duty of government to ensure not only the civil and political but also the material prerequisites for the realization of this equal-

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<sup>19</sup> See *The Slaughterhouse Cases*, 83 U.S. 36 (1873).

<sup>20</sup> See *The Civil Rights Cases*, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting).

<sup>21</sup> William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 1 (1999); see also Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 59-64 (1977). Although my understanding of citizenship is much informed by Professor Karst's, an important difference between my approach and his is that he relies on the Equal Protection Clause as the constitutional foundation for substantive rights of citizenship, see *id.* at 42-46, whereas I rely on the Citizenship Clause of the Fourteenth Amendment, see *infra* Parts IV and V. In this respect, my approach follows that of Professor Charles Black, see CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 51-66 (1969), whom Professor Karst also credits as a guiding influence, see KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* ix (1989).

ity.<sup>22</sup> The thesis does not urge state intervention to dismantle competitive markets or to fully eradicate economic inequality. Instead, it envisions government in the critical role of securing equal access to the basic opportunities and entitlements necessary for equal standing in the social context of the polity.<sup>23</sup> Central to the social citizenship tradition is the absence of any sharp distinction between negative rights to be free from various forms of disabling discrimination and oppression, and positive rights to material assistance that enable the full and equal enjoyment of civil and political freedom.<sup>24</sup>

Although never fully embraced by the United States throughout its history, the social citizenship tradition has been influential in constitutional law and public policy since the time of Reconstruction and throughout the New Deal.<sup>25</sup> As Professor Cass Sunstein has explained, it provided the moral vision animating President Franklin Roosevelt’s call for a “Second Bill of Rights,” a constitutional agenda of positive rights to security and opportunity that included among other things “the right to a good education.”<sup>26</sup> Doctrinally, it found brief expression in the fundamental rights strand of equal protection doctrine during the 1960s and early 1970s before collapsing in the *Rodriguez* decision in 1973.<sup>27</sup> The

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<sup>22</sup> T.H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS* 8 (1950); *see id.* at 11 (“By the social element [of citizenship] I mean the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in the society. The institutions most closely connected with it are the educational system and the social services.”).

<sup>23</sup> *See id.* at 8 (equal citizenship “is not inconsistent with the inequalities which distinguish the various economic levels in the society”); *id.* at 56 (“Equality of status is more important than equality of income.”). A right to equal educational opportunity figures prominently in Marshall’s articulation of social citizenship. *See id.* at 8, 25-26, 62-67.

<sup>24</sup> *See* CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 197-202 (2004); CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED* 133-35 (1997); Cass R. Sunstein, *Lochner’s Legacy*, 87 *COLUM. L. REV.* 873, 889 (1987) (“Whether rights are treated as ‘negative’ or ‘positive’ turns out to depend on antecedent assumptions about baselines—the natural or desirable functions of government.”).

<sup>25</sup> *See* Forbath, *supra* note \_\_; James W. Fox, Jr., *Citizenship, Poverty, and Federalism: 1787-1882*, 60 *U. PITT. L. REV.* 421, 479-577 (1999).

<sup>26</sup> *See* SUNSTEIN, *supra* note \_\_, at 186-87.

<sup>27</sup> *See id.* at 149-71; Peter B. Edelman, *The Next Century of Our Constitution: Re-thinking Our Duty to the Poor*, 39 *HASTINGS L.J.* 1 (1987); Frank I. Michelman, *Fore-*

late Charles Black sought to renew the basic aspirations of the social citizenship tradition in his valedictory, *A New Birth of Freedom*, positing an “affirmative constitutional duty of Congress” to pursue what he called “the constitutional justice of livelihood.”<sup>28</sup> The concept remains an important if unfulfilled part of our constitutional heritage, and I aim to show that it once was, and should again be, a vital foundation for efforts to secure greater equality of educational opportunity throughout the nation.

Second, in treating interstate inequality as a matter of constitutional concern, this Article aims to advance our understanding of constitutional law as it exists outside of the courts.<sup>29</sup> The elaboration of constitutional meaning through legislation and politics, not merely adjudication, is another key feature of our national experience,<sup>30</sup> and it has figured prominently in efforts to secure positive social and economic rights.<sup>31</sup> As I

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word: *On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

<sup>28</sup> BLACK, *supra* note \_\_\_, at 133 (emphasis omitted); *see also* AKHIL REED AMAR & ALAN HIRSCH, FOR THE PEOPLE: WHAT THE CONSTITUTION REALLY SAYS ABOUT YOUR RIGHTS 183-99 (arguing that minimum material entitlements, including a minimum level of education, are prerequisites for effective citizenship guaranteed by the Republican Form of Government Clause, the Thirteenth Amendment, and the Citizenship Clause of the Fourteenth Amendment).

<sup>29</sup> *See* Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section 5 Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 2022 (2003) (distinguishing between “the Constitution that courts would implement in adjudication” and “the Constitution as it exists within the general constitutional culture of the nation”); Robin West, *The Aspirational Constitution*, 88 NW. U. L. REV. 241, 261-64 (1993) (contrasting the conservative and backward-looking “adjudicated Constitution” that is the province of courts with the progressive, morally inspired, and forward-looking “aspirational Constitution” that is the province of the legislature).

<sup>30</sup> *See, e.g.*, *Nevada Dep’t of Human Resources v. Hibbs*, 538 U.S. 721 (2003) (upholding the Family and Medical Leave Act as proper legislation to enforce constitutional gender equality); *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (upholding federal ban on literacy tests as proper legislation to enforce equal protection in voting rights); *see generally* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); Post & Siegel, *supra* note \_\_\_; Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441 (2000).

<sup>31</sup> *See* 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 255-78 (1998) (discussing presidential leadership during New Deal constitutional moment); Forbath, *supra* note \_\_\_, at 1 (describing social citizenship tradition as “a majoritarian tradition, addressing its arguments to lawmakers and citizens, not to courts”); Fox, *supra* note \_\_\_, at 519-



discuss below, the Reconstruction-era proposals for federal aid to public education comprise an exercise in legislative constitutionalism; they were efforts by Congress to interpret the new guarantee of national citizenship during a moment of transition and possibility. Within this framework, rather than speak of a *right* to education that connotes judicial enforceability by individual plaintiffs, it is perhaps more fitting to emphasize the *duty* of Congress to pursue broad equality-promoting educational policies as a means of enforcing the grant of national citizenship.

Lest it be said that this sort of constitutional duty is weak or not really binding, it is worth recalling Professor Lawrence Sager's cogent insight that it is a mistake "to equate the existence of a constitutional norm with the possibility of its enforcement" in court.<sup>32</sup> As Sager notes, "the notion that to be legally obligated means to be vulnerable to external enforcement can have only a superficial appeal."<sup>33</sup> Congress no less than the Court is bound by the Constitution, and in the case of the Fourteenth Amendment, the text expressly assigns Congress the power and by implication the duty to enforce all of the Amendment's guarantees. Whether or not the courts are willing to help—and there may be valid institutional reasons for judicial restraint—those guarantees remain "legally valid to their full conceptual limits."<sup>34</sup> Thus, the educational duty I have in mind is not one that necessarily gives rise to a judicial finding of liability against the government, but rather one that validly governs the conduct of a "conscientious legislator"<sup>35</sup> who seeks to effectuate the

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45 (discussing Reconstruction-era legislative efforts to combat poverty in order to secure national citizenship).

<sup>32</sup> Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1221 (1978).

<sup>33</sup> *Id.* Consider, for example, the Supreme Court's recent holding that a statute directing the police to "use every reasonable means to enforce a restraining order" does not create a personal entitlement to police enforcement of a restraining order. See *Town of Castle Rock v. Gonzalez*, 125 S. Ct. 2796 (2005). Despite the absence of judicial enforcement, it would be odd to say that the police have no legal duty under the statute to protect the beneficiary of a restraining order.

<sup>34</sup> Sager, *supra* note \_\_\_, at 1221. The classic statement of this position is found in James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

<sup>35</sup> Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975). Although this Article focuses on Congress's duty to ensure educational opportunity, it is worth noting that the Supreme Court has left open whether there is a judicially enforceable constitutional guarantee of a minimally adequate educa-

Constitution's core values, including the guarantee of national citizenship.

Third, because my arguments are addressed primarily to legislators not to judges, this Article combines constitutional principle with policy analysis to diagnose the size and source of interstate educational disparities and to propose legislative solutions.<sup>36</sup> The problem of unequal educational opportunity between states is one that the federal government is uniquely able to address. Yet the current federal role in educational policy does little to ameliorate this inequality. Nevertheless, the path of education reform over past two decades suggests that it may be time to rethink and expand the federal role in order to better secure equal opportunity on a national plane. Although education will remain primarily a state and local function for the foreseeable future, I advocate a stronger national approach to setting educational standards and providing aid to public schools. Some may find the increasing centralization of educational policy a worrisome prospect. But "if we really mean it when we say that every American child (rather than every Californian, or every Arkansan) is entitled to equal educational opportunity, we must be prepared to use Federal means to bring about such equality."<sup>37</sup>

This Article has seven parts. Part I briefly traces the evolution of interstate disparities in educational opportunity. It discusses the differing attitudes toward public education and its varied development from region to region throughout the nineteenth and early twentieth centuries, putting current patterns of interstate inequality in historical context.

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tion. See *Papasan v. Allain*, 478 U.S. 265, 285 (1986) ("this Court has not yet definitively settled . . . whether a minimally adequate education is a fundamental right"); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36-37 (1973).

<sup>36</sup> The somewhat sparse literature on the federal role in addressing interstate inequality includes Rothstein, *supra* note \_\_; Stephen D. Sugarman, *Two School-Finance Roles for the Federal Government: Promoting Equity and Choice*, 17 ST. LOUIS UNIV. PUB. L. REV. 79 (1997); Allan R. Odden & Lori Kim, *Reducing Disparities Across the States: A New Federal Role in School Finance*, in *RETHINKING SCHOOL FINANCE: AN AGENDA FOR THE 1990s* 260 (Allan R. Odden ed., 1992); Lawrence L. Brown, III & Alan L. Ginsburg, *A Federal Role in the General Program of School Finance*, in *THE FEDERAL INTEREST IN FINANCING SCHOOLING* 119 (Michael Timpane ed., 1978). An importantly early work was PAUL R. MORT, *FEDERAL SUPPORT FOR PUBLIC EDUCATION* (1936).

<sup>37</sup> PRESIDENT'S COMMISSION ON SCHOOL FINANCE, *SCHOOLS, PEOPLE, AND MONEY: THE NEED FOR EDUCATIONAL REFORM* 94 (1972) (comment by John Fischer, president of Teachers College, Columbia University).

Part II describes current educational inequality between states along a variety of dimensions. Based on recent school spending data adjusted for geographic cost differences and students' educational needs, it is clear that per-pupil spending varies considerably from state to state and tends to decrease as one moves from north to south or from east to west. These spending disparities are more strongly associated with state fiscal capacity than with state and local tax effort, suggesting the need for a greater federal role in equalizing school funding. Educational standards and student achievement also show substantial variation across states. Perhaps most importantly, the existing pattern of interstate inequality disfavors poor children, minority children, and children with limited English proficiency.

Part III shows that the federal government has done little to narrow interstate educational inequality. Although the reform movement culminating in the federal No Child Left Behind Act of 2001 has played a dominant role in educational policy, it has not yielded national standards for public education or a significant commitment of federal aid to narrow resource disparities between states. Remarkably, the largest program of federal education aid—Title I of the Elementary and Secondary Education Act of 1965—reinforces rather than reduces interstate inequality in spending on disadvantaged children. This distributive scheme, I argue, has no persuasive rationale.

Part IV seeks to problematize interstate inequality in educational opportunity within the framework of the Fourteenth Amendment guarantee of national citizenship. After reviewing the historical context in which the Citizenship Clause came into being, I focus on Justice Harlan's reading of the clause in his dissent in the *Civil Rights Cases*. Justice Harlan's dissent teaches us how to read the national citizenship guarantee (*a*) as a font of substantive rights (*b*) that Congress is authorized to enforce (*c*) as a matter of constitutional duty.

Part V shows how this interpretive approach was put into practice during Reconstruction by legislators seeking to establish a robust federal role in support of public education. In a series of federal aid bills between 1870 and 1890, members of Congress invoked the constitutional ideal of national citizenship as a basis of federal power and responsibility to ensure that children in all states, white or black, achieve basic literacy. The most well-developed proposals were national, not sectional, in scope, even as they were designed to disproportionately benefit poor states with high rates of illiteracy. Although some legislators raised fed-

eralism-based objections, several bills enjoyed broad bipartisan support and nearly passed. The impressive congressional debates on these measures left a rich legacy informing both constitutional principle and federal education policy. That legacy identifies the guarantee of national citizenship as a source of federal responsibility to ensure a national baseline of educational adequacy through measures that narrow resource disparities between states.

Part VI takes a critical look at national citizenship as a framework for education policy by examining two issues that arise in the context of our diverse and globalizing society. First, as to what educational duties are owed to noncitizen children, I suggest that some citizenship rights may extend to persons lacking citizenship status and that federal policy in the area of education has long followed this approach. Second, treating citizenship as a form of identity or belonging, I consider challenges to education for national citizenship posed by cultural pluralism and emerging transnational or cosmopolitan conceptions of membership. While recognizing the dangers of nativist conformity at home and chauvinistic exceptionalism abroad, I argue that cultivating a liberal nationalism capable of sustaining ambitious redistributive projects on a national level is a worthy goal of our educational policy.

Part VII returns to policy analysis and proposes three recommendations for reshaping the federal education policy. The first is a reinvigoration of legislation enacted but not implemented during the mid-1990s encouraging states voluntarily to adopt national education standards. Without federal leadership, the current patchwork of state standards is unlikely to yield common educational expectations or equal opportunity on a national basis. Second, I recommend a simple revision of Title I in order to treat poor children in all states as equal citizens of the United States in the distribution of federal aid. Third, I propose a national foundation program of federal aid to ensure a high minimum level of educational resources in all states. The main purpose of such a program would be to narrow interstate disparities in fiscal capacity and effort. Although these proposals are potentially far-reaching, they are anchored in the basic ambitions of the current reform movement as well as the enduring constitutional imperative to secure the guarantee of national citizenship.

#### IV. THE GUARANTEE OF NATIONAL CITIZENSHIP

Equal protection principles, though applicable to the federal government,<sup>182</sup> do not supply a ready basis for a federal duty to address interstate inequality. The difficulty is not the implausibility of reading the Equal Protection Clause to imply positive duties. As Professor Jacobus tenBroek observed years ago, the mandate that government “not deny” equal protection can be understood to entail that government is “forbidden to fail to act as well as to act in particular directions.”<sup>183</sup> The problem is that educational disadvantage based on state residence lacks the qualities of invidiousness or group subordination that mark disadvantage by race or poverty and warrant equal protection concern. A distributive pattern that links educational opportunity to state residence may be arbitrary and unjust. But the claim turns not on the “suspect” nature of the classification, but on the importance of the interest affected. Once that is made the focus of inquiry, the basis for remediation is not mere evenhandedness, but a substantive theory of why education merits special concern. Articulating such a theory as a matter of equal protection has proven to be awkward at best because of “interpretive difficulties similar to those that marked the history of substantive due process.”<sup>184</sup>

In this Part and the next, I argue that a federal duty to ameliorate interstate inequality in educational opportunity is properly located in the Fourteenth Amendment guarantee of national citizenship. Before mentioning due process or equal protection, the Fourteenth Amendment de-

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<sup>182</sup> See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

<sup>183</sup> JACOBUS TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* 205 (1951); see *id.* at 206 (“the basic notion of the phrase [‘equal protection of the laws’] is protection; equality is the condition”); Michelman, *supra* note \_\_\_, at 17 (observing that the “injunction against ‘denying’ the ‘equal protection of the laws’ is not so clearly void of a requirement that the quiescent state must ‘act’ (*i.e.*, cease denying protection) in certain circumstances when it would choose not to”). At least one early judicial decision read the Equal Protection Clause in the way that Professor tenBroek suggests. See *United States v. Hall*, 26 F. Cas. 79, 81 (C.C.S.D. Ala. 1871) (No. 15,282) (“Denying includes inaction as well as action, and denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection.”).

<sup>184</sup> KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 794 (14th ed. 2001); see *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30-39 (1973) (limiting the recognition of fundamental rights under equal protection doctrine); *Shapiro v. Thompson*, 394 U.S. 618, 661-62 (1969) (Harlan, J., dissenting) (criticizing the fundamental rights strand of equal protection doctrine).

clares that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States” who possess certain “privileges” and “immunities.”<sup>185</sup> Invoking Justice Harlan’s dissent in the *Civil Rights Cases*, I contend in this Part that the national citizenship guarantee, together with Section 5, (a) gives rise to substantive rights (b) that Congress is authorized to enforce (c) as a matter of constitutional duty. In the next Part, I show that leading members of Congress shortly after the Fourteenth Amendment’s enactment recognized that effective realization of the citizenship guarantee required a substantial federal role in supporting public education and narrowing interstate disparities. I begin with some historical background on the Citizenship Clause.

### A. The emergence of national citizenship

The history of the Fourteenth Amendment is among the most well-studied topics in constitutional law. While much of the literature since *Brown* has focused on the Equal Protection Clause, many scholars locate the primary significance of the Fourteenth Amendment in the guarantee of national citizenship.<sup>186</sup> On the narrowest reading, the Citizenship Clause overruled *Dred Scott*’s holding that black people, whether free or slave, could not be citizens of a state or of the United States.<sup>187</sup> How-

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<sup>185</sup> U.S. CONST. amend. XIV § 1. As I explain below, *see infra* notes \_\_\_ and accompanying text, my argument that national citizenship encompasses substantive rights focuses on the first sentence of the Fourteenth Amendment, the Citizenship Clause, rather than the Privileges or Immunities Clause because I believe such rights are granted affirmatively by the Fourteenth Amendment and not merely protected against state abridgment. The reference to “privileges or immunities of citizens of the United States” in the Privileges or Immunities Clause is, of course, compelling textual evidence that the grant of national citizenship was meant to secure substantive rights, not only a legal status.

<sup>186</sup> *See, e.g.*, BLACK, STRUCTURE AND RELATIONSHIP, *supra* note \_\_\_, at 51-66; Fox, *supra* note \_\_\_; Daniel A. Farber & John E. Muench, *The Ideological Origins of the Fourteenth Amendment*, 1 CONST. COMMENTARY 235 (1994); Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863 (1986); Arthur Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387 (1967).

<sup>187</sup> *See* *Scott v. Sandford*, 60 U.S. 393, 404-05 (1857). In *Slaughterhouse*, the Court acknowledged that the clause “overturns the *Dred Scott* decision by making *all persons* born within the United States and subject to its jurisdiction citizens of the United States. That its main purpose was to establish the citizenship of the negro can admit of no doubt.” *The Slaughterhouse Cases*, 83 U.S. 36, 73 (1873).

ever, to read the clause only as a remedy for the type of legal disability at issue in *Dred Scott*—the precise holding was that Mr. Scott lacked standing to sue in diversity in federal court<sup>188</sup>—is to miss much of its transformative significance. Beyond granting legal status to newly freed blacks, the Citizenship Clause established a *national political community* and made allegiance to it the primary aspect of our political identity. Although its enactment history is somewhat thin,<sup>189</sup> the central role of the Citizenship Clause in literally reconstituting the nation after the Civil War is evident against a broader historical backdrop.

The gravity of the accomplishment was put in context by Justice Field’s dissent in *Slaughterhouse*:

The first clause of [the fourteenth] amendment determines who are citizens of the United States, and how their citizenship is created. Before its enactment there was much diversity of opinion among jurists and statesmen whether there was any such citizenship independent of that of the State, and, if any existed, as to the manner in which it originated. With a great number the opinion prevailed that there was no such citizenship independent of the citizenship of the State.<sup>190</sup>

As Justice Field observed, pro-slavery defenders of states rights like John Calhoun believed that “ ‘every citizen is a citizen of some State or Territory’ ” and that any independent citizenship rooted in natural law or national law was illusory.<sup>191</sup>

The diversity of opinion also included Justice Curtis’s dissent in *Dred Scott*, which undertook a careful and extensive inquiry into the ex-

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<sup>188</sup> *Scott*, 60 U.S. at 427.

<sup>189</sup> The language that became the Citizenship Clause was added in the Senate in May 1866 after the proposed constitutional amendment had emerged from the Joint Committee on Reconstruction and passed the House. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2560, 2768-69, 2869 (1866); HORACE EDGAR FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 83-84, 88-89 (1908). The late addition of the language does not suggest its insignificance. Rather, the inclusion of the clause memorialized the key assumptions that the framers believed to be implicit in the amendment process—namely, that blacks would be guaranteed citizenship, that national citizenship would have primacy over state citizenship, and that certain privileges and immunities would attach to national citizenship. *See* TENBROEK, *supra* note \_\_, at 71-93.

<sup>190</sup> 83 U.S. 36, 94 (1873) (Field, J., dissenting).

<sup>191</sup> *Id.* (quoting 1833 speech by John Calhoun).

istence and source of national citizenship.<sup>192</sup> In determining that Mr. Scott was a citizen under Missouri law, Justice Curtis observed that the Constitution, while recognizing “citizens of the United States” as a category,<sup>193</sup> neither defined which native-born persons shall be United States citizens nor empowered Congress to do so.<sup>194</sup> His conclusion was that national citizenship was derivative of state citizenship: “it is left to each State to determine what free persons, born within its limits, shall be citizens of such State, and *thereby* be citizens of the United States.”<sup>195</sup> In support of this view, Justice Curtis looked to the Privileges and Immunities Clause of Article IV:

‘The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.’ . . . [H]ere, privileges and immunities to be enjoyed throughout the United States, under and by force of the national compact, are granted and secured. In selecting those who are to enjoy these national rights of citizenship, how are they described? As citizens of each State. It is to them these national rights are secured. The qualification for them is not to be looked for in any provision of the Constitution or laws of the United States. They are to be citizens of the several States . . . .<sup>196</sup>

According to Justice Field in *Slaughterhouse*, Justice Curtis’s analysis was “generally accepted by the profession of the country as the one containing the soundest views of constitutional law” before the Fourteenth Amendment was adopted.<sup>197</sup> Ironically, however, instead of clarifying the meaning of national citizenship, Justice Curtis’s opinion highlighted the confused nature of the issue by literally misreading the

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<sup>192</sup> See *Scott*, 60 U.S. at 577-88 (Curtis, J., dissenting).

<sup>193</sup> See U.S. CONST. art. I, § 2, cl.2 (members of the House of Representative must have “been seven Years a Citizen of the United States”); U.S. CONST. art. I, § 3, cl.3 (Senators must have “been nine Years a Citizen of the United States”).

<sup>194</sup> See *Scott*, 60 U.S. at 577-79 (Curtis, J., dissenting). In this passage, Justice Curtis distinguished between federal power to establish a uniform rule of naturalization, which exists under Article I, see *id.* at 578, and federal power “to enact what free persons, born within the several States, shall or shall not be citizens of the United States,” *id.* at 577, which in his view did not exist in 1857.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 580.

<sup>197</sup> *Slaughterhouse*, 83 U.S. at 94 (Field, J., dissenting).



Article IV Privileges and Immunities Clause. The last five words of that clause do not read “citizens *of* the several States,” as the above block quotation from his opinion states, but rather “citizens *in* the several States.”<sup>198</sup> This textual distortion undergirds Justice Curtis’s insistence that national citizenship rights flow only from one’s status as a citizen *of* a particular state.<sup>199</sup>

A correct reading of the text yields different interpretive possibilities, as Justice Washington’s opinion in the 1825 case *Corfield v. Coryell* illustrates.<sup>200</sup> In deciding whether a state law that reserved fishing rights in state waters to state residents violated Article IV, Justice Washington (George Washington’s nephew), sitting as Circuit Justice, posed the question “what are the privileges and immunities of citizens in the several states?”<sup>201</sup> His answer was that the words denote “those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments.”<sup>202</sup> *Corfield* implied that national citizenship was tantamount to a kind of general citizenship, giving rise to fundamental rights inherent to membership in a free society.

In *Dred Scott*, Chief Justice Taney similarly understood “citizens in the several States” to possess national citizenship independent of state citizenship, but with a distinctively nationalist not universalist gloss.<sup>203</sup> Unlike Justice Washington, Chief Justice Taney located the source of national citizenship rights not in concepts of natural law but in the legal authority of the duly constituted United States. The Constitution, according to Taney, memorialized

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<sup>198</sup> U.S. CONST. art. IV, § 2, cl.1 (emphasis added).

<sup>199</sup> The *Slaughterhouse* Court made the same textual error—substituting the words “*of* the several States” for “*in* the several States”—in discussing both the Article IV Privileges and Immunities Clause and the interpretation of the clause in *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823). See *Slaughterhouse*, 83 U.S. at 75-76; TRIBE, *supra* note \_\_, at 1306 (criticizing *Slaughterhouse* on this ground); BLACK, *supra* note \_\_, at 83-84 (same). As explained the next paragraph above, the Article IV language is quoted correctly in *Corfield*, leading to a different construction.

<sup>200</sup> See *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (upholding trespass action against an out-of-state resident caught dredging for oysters in New Jersey waters in violation of a New Jersey statute limiting the right to fish in state waters to state residents).

<sup>201</sup> *Id.* at 551.

<sup>202</sup> *Id.*

<sup>203</sup> See *Scott*, 60 U.S. at 405-06.

the union of those who were at that time members of distinct and separate political communities into one political family . . . . And it gave to each citizen rights and privileges outside of his State which he did not before possess, and placed him in every other State upon a perfect equality with its own citizens as to rights of person and rights of property; it made him a citizen of the United States.<sup>204</sup>

Taney believed that no state could “introduce a new member into the political community” of the United States “by making him a member of its own.”<sup>205</sup> While the rights and privileges of state citizenship remained subject to state law, the rights of national citizenship were held “under the paramount authority of the Federal Government.”<sup>206</sup> Since the government at the Founding had granted blacks “no rights which the white man was bound to respect,”<sup>207</sup> it was easy for Taney to conclude that blacks could not have been citizens under the federal Constitution.

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

The first clause of the fourteenth amendment changes this whole subject, and removes it from the region of discussion and doubt. It recognizes in express terms, if it does not create, citizens of the United States, and it makes their citizenship dependent upon the place of their birth, or the fact of their adoption, and not upon the constitution or laws of any State or the condition of their ancestry. A citizen of a State is now only a citizen of the United States residing in that State. The fundamental rights, privileges, and immunities which belong to him as a free man and a free citizen, now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any State.<sup>208</sup>

In short, the first sentence of the Fourteenth Amendment effected a dramatic transformation of American political identity. As Professor Dan

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<sup>204</sup> *Id.* at 406-07.

<sup>205</sup> *Id.* at 406.

<sup>206</sup> *Id.* at 423.

<sup>207</sup> *Id.* at 407.

<sup>208</sup> *Slaughterhouse*, 83 U.S. at 95 (Field, J., dissenting).

Farber and John Muench have observed, “[b]efore the Civil War, American citizenship was an ill-defined and largely insignificant concept. The Civil War changed all that by establishing that a citizen’s primary allegiance was to the federal government. . . . The creation of American citizenship was one of the great accomplishments of the fourteenth amendment.”<sup>209</sup>

### **B. Securing the guarantee of national citizenship**

It is familiar history that the substance of this great accomplishment was undone by the Supreme Court before the ink was barely dry. In 1873, on the Court’s first occasion to interpret the Fourteenth Amendment, a five-Justice majority in the *Slaughterhouse Cases* held that the Citizenship Clause did not bring the essential attributes of national and state citizenship under federal protection, but rather served to keep state citizenship distinct from national citizenship and thereby preserve state authority over civil rights.<sup>210</sup> The Court narrowed the rights of national citizenship to an anemic and eclectic array, including the right to interstate travel, the right to federal protection when on the high seas or in a foreign nation, the right to use the nation’s navigable waters, the right to peaceably assemble and petition for redress of grievances, and the right to habeas corpus.<sup>211</sup> Yet those rights already existed *before* the adoption of the Fourteenth Amendment. To refer to them as exemplifying national citizenship rights effectively rendered the new guarantee “a vain and idle enactment, which accomplished nothing.”<sup>212</sup> At the heart of the Court’s opinion was its unwillingness to accept that the Fourteenth Amendment “radically change[d] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people.”<sup>213</sup>

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<sup>209</sup> Farber & Muench, *supra* note \_\_\_, at 276.

<sup>210</sup> *See* The *Slaughterhouse Cases*, 83 U.S. 36, 74, 77 (1873).

<sup>211</sup> *See id.* at 79-80 (limiting the privileges or immunities of national citizenship to rights “which owe their existence to the Federal government, its National character, its Constitution, or its laws”).

<sup>212</sup> *Id.* at 96 (Field, J., dissenting).

<sup>213</sup> *Id.* at 78 (opinion of the Court); *see id.* (“We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them.”).

Ten years later, in the *Civil Rights Cases*, the Court ignored the Citizenship Clause in striking down the Civil Rights Act of 1875 and establishing the state action doctrine.<sup>214</sup> It held that Section 1 of the Fourteenth Amendment “is prohibitory in its character, and prohibitory upon the states,”<sup>215</sup> and treated the prohibitions on the states as the only enforceable mandate in Section 1. Without examining the first sentence of the Fourteenth Amendment, the Court construed Congress’s enforcement power under Section 5 to apply only to the second sentence of Section 1:

[T]he last section of the amendment invests congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited state law and state acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon congress, and this is the whole of it.<sup>216</sup>

Although *Slaughterhouse* and the *Civil Rights Cases* remain on the books, they have been widely and vigorously condemned.<sup>217</sup> Rather than

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<sup>214</sup> See *The Civil Rights Cases*, 109 U.S. 3 (1883). The Civil Rights Act of 1875 banned racial discrimination in public accommodations, *see id.* at 9 (quoting statute); it was a precursor to Title II of the Civil Rights Act of 1964, *see* 42 U.S.C. § 2000a.

<sup>215</sup> *Id.* at 10.

<sup>216</sup> *Id.* at 11.

<sup>217</sup> On *Slaughterhouse*, see *TRIBE*, *supra* note \_\_\_, at 1303-11; *id.* at 1324 & n.17 (“several members the Court . . . and a host of academic commentators have candidly and persistently questioned the correctness of the *Slaughter-House* decision” (collecting sources)); *BLACK*, *supra* note \_\_\_, at 87 (describing “the footless scramble to judgment” in *Slaughterhouse* as “one of the most outrageous actions of our Supreme Court”); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 998-1000 (1995) (describing *Slaughterhouse*’s reading of the Fourteenth Amendment as “implausible” for “nearly incontrovertible reasons”); Howard Jay Graham, *Our “Declaratory” Fourteenth Amendment*, 7 STAN. L. REV. 3, 25 (1954) (“To reach the conclusion of Justice Miller and the majority, one must disregard not only all antislavery from 1834 on, but one must ignore virtually every word said in the debates of 1865-66.”). On the *Civil Rights Cases*, see Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503 (1985); Ira Nerken, *A New Deal for the Protection of Fourteenth Amendment Rights: Challenging the Doctrinal Bases of the Civil Rights Cases and State Action Theory*, 12 HARV. C.R.-C.L. L. REV. 297 (1977); Kinoy, *supra* note \_\_\_; Charles L. Black, Jr., *Foreword: ‘State Action,’ Equal Protection and California’s Proposition 14*, 81 HARV. L. REV. 69, 97 (1967) (“The *Civil Rights Cases* are cut from the same bolt of historical cloth as *Plessy v. Ferguson*.”). See also *FLACK*, *supra* note \_\_\_, at 7 (observing in 1908 that *Slaughterhouse* and the *Civil Rights Cases* have been criticized for “giv[ing] to the Four-

rehearse the criticisms, I want to advance a different understanding of the Fourteenth Amendment that draws its inspiration from Justice Harlan’s lone dissent in the *Civil Rights Cases*. In that dissent, Justice Harlan faulted the Court for failing to treat innkeepers and railroad companies as state actors and for failing to find state action in the unwillingness of state authorities to protect black citizens.<sup>218</sup> But these concerns were decidedly secondary. His primary argument in construing the Fourteenth Amendment was that the guarantee of national citizenship gave rise to affirmative rights that Congress had the power and duty to enforce, irrespective of state action. The Court’s narrow focus on state action defeated the intent of “[c]onstitutional provisions, adopted . . . for the purpose of securing, through national legislation, if need be, rights inhering in a state of freedom, and *belonging to American citizenship*.”<sup>219</sup>

Justice Harlan elaborated this thesis in a remarkable passage, unrebutted by the Court, describing the relationship between Section 1 and Section 5. It is worth a careful read:

The assumption that [the fourteenth] amendment consists wholly of prohibitions upon state laws and state proceedings in hostility to its provisions, is unauthorized by its language. The first clause of the first section—‘all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside’—is of a distinctly affirmative character. . . . It introduced all of [the colored] race, whose ancestors had been imported and sold as slaves, at once, into the political community known as the ‘People of the United States.’ They became, instantly, citizens of the United States, and of their respective states. . . .

The citizenship thus acquired by that race, in virtue of an affirmative grant by the nation, may be protected, not alone by the judicial branch of the government, but by congressional

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teenth Amendment a meaning quite different from that which many of those who participated in its drafting and ratification intended it to have”).

<sup>218</sup> See *Civil Rights Cases*, 109 U.S. at 57-60 (Harlan, J., dissenting).

<sup>219</sup> *Id.* at 26 (emphasis added). In this quotation, Justice Harlan’s reference to rights “inhering in a state of freedom” as well as “belonging to American citizenship” signaled his reliance on Section 2 of the Thirteenth Amendment as well as Section 5 of the Fourteenth Amendment in sustaining the validity of the Civil Rights Act of 1875. See *id.* at 32-37 (discussing Thirteenth Amendment).

legislation of a primary direct character; this, because the power of congress is not restricted to the enforcement of prohibitions upon state laws or state action. It is, in terms distinct and positive, to enforce ‘the *provisions of this article*’ of amendment; not simply those of a prohibitive character, but the provisions,—*all* of the provisions,—affirmative and prohibitive, of the amendment. It is, therefore, a grave misconception to suppose that the fifth section of the amendment has reference exclusively to express prohibitions upon state laws or state action. If any right was created by that amendment, the grant of power, through appropriate legislation, to enforce its provisions authorizes congress, by means of legislation operating throughout the entire Union, to guard, secure, and protect that right.<sup>220</sup>

As Justice Harlan went on to explain, the Civil Rights Act of 1875 was an appropriate means of enforcing Section 1’s citizenship guarantee, a guarantee that entails “equality of civil rights.”<sup>221</sup>

This exposition of the Fourteenth Amendment is more faithful to the text than the Court’s constricted view in the *Civil Rights Cases*. From Justice Harlan’s dissent, we learn three important things about the guarantee of national citizenship and Congress’s enforcement power.

#### 1. *National citizenship as a source of substantive rights*

First, in addition to defining the political identity of the American people, the citizenship guarantee encompasses substantive rights necessary to make citizenship meaningful and effective. As Harlan put it, the Citizenship Clause “necessarily imports” rights “fundamental in American citizenship.”<sup>222</sup> His thesis echoed one of the core concepts animating the Civil Rights Act of 1866, whose declaration of national citizenship was the precursor to the Fourteenth Amendment’s Citizenship Clause.<sup>223</sup>

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<sup>220</sup> *Id.* at 46-47 (emphases in original).

<sup>221</sup> *Id.* at 48. For an excellent discussion of the theory of national rights, powers, and responsibilities underlying Justice Harlan’s dissent in the *Civil Rights Cases*, see Kinoy, *supra* note \_\_\_\_.

<sup>222</sup> *Id.*

<sup>223</sup> Section 1 of the Civil Rights Act of 1866 provided: “All persons born in the United States, and not subject to any foreign Power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color . . .

Senator Lyman Trumbull of Illinois, the main author of the 1866 act, explained:

To be a citizen of the United States carries with it some rights; and what are they? They are those inherent, fundamental rights which belong to free citizens as free men in all countries such as the rights enumerated in this bill, and they belong to them in all the States of the Union. The right of American citizenship means something.<sup>224</sup>

Both Harlan and Trumbull had in mind a set of natural rights essential to republican citizenship and belonging to all free persons, and the Fourteenth Amendment was intended to secure at the very least the specific rights enumerated in the 1866 statute. But, as many scholars have observed, the framers of the Fourteenth Amendment “understood that citizenship was an evolving concept” and “chose to employ broad rather than specific language” in defining it, thereby “enabl[ing] future generations, and particularly a future Congress acting under Section 5, to develop further the privileges and immunities of citizenship.”<sup>225</sup> In Part V, we will see what the Reconstruction Congress had to say about education and national citizenship. The point here is that national citizenship from its inception was understood as more than a legal status. It has substance—it “means something”—and is thus a proper object of congressional enforcement under Section 5. Congress is authorized to enforce “all of the provisions of the [fourteenth] amendment, including the provisions, *express and implied*, of the grant of citizenship in the first clause of the first section of the article.”<sup>226</sup>

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shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property as is enjoyed by white citizens . . . .” Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27, 27 (1866).

<sup>224</sup> CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866).

<sup>225</sup> Fox, *supra* note \_\_, 504; see KARST, *supra* note \_\_, at 54-56; Farber & Muench, *supra* note \_\_, at 274-75; Kaczorowski, *supra* note \_\_ at 923-26; see also *infra* notes \_\_ and accompanying text.

<sup>226</sup> *Civil Rights Cases*, 109 U.S. at 54 (Harlan, J., dissenting).

## 2. *Federal enforcement through primary, direct legislation*

Second, in emphasizing the affirmative character of the Citizenship Clause, Justice Harlan made clear that the substantive protections of the clause are guaranteed not only against state invasion but also as a matter of positive right. Accordingly, Congress’s Section 5 power is “not restricted to the enforcement of prohibitions upon state laws or state action” and instead may be used to enact “legislation of a primary direct character” to secure citizenship rights.<sup>227</sup>

This reading of the Citizenship Clause and Section 5—authorizing direct federal enforcement of the citizenship guarantee—parallels the well-established interpretation of Congress’s power to enforce Section 1 of the Thirteenth Amendment. The latter “is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.”<sup>228</sup> As the Court explained in upholding a federal antipeonage law, the Thirteenth Amendment “denounces a status or condition, irrespective of the manner or authority by which it is created.”<sup>229</sup> The Citizenship Clause guarantees a status or condition, irrespective of the manner or authority by which its realization is impeded. In both instances, Congress’s enforcement power is correspondingly broad. Just as the Thirteenth Amendment authorizes primary and direct federal legislation to secure “those fundamental rights which are the essence of civil freedom,”<sup>230</sup> the Fourteenth Amendment authorizes similar legislation to secure rights “fundamental in American citizenship.”<sup>231</sup>

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<sup>227</sup> *Id.* at 46.

<sup>228</sup> *Id.* at 20 (opinion of the Court).

<sup>229</sup> *Clyatt v. United States*, 197 U.S. 207, 216 (1905).

<sup>230</sup> *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441 (1968) (quoting *Civil Rights Cases*, 109 U.S. at 22) (internal quotation marks omitted); *State v. Washington*, 36 Cal. 658, 664 (1869) (Thirteenth Amendment authorizes Congress to secure rights “essential to the full enjoyment of personal liberty”).

<sup>231</sup> *Civil Rights Cases*, 109 U.S. at 48 (Harlan, J., dissenting); *see id.* at 52 (Fourteenth Amendment does not “stay[] the hand of the nation, until [citizenship rights are] assailed by state laws or state proceedings”); *see also* *United States v. Given*, 25 F. Cas. 1328, 1329 (C.C.D. Del. 1873) (“Congress . . . can select any means it deems appropriate to render available and secure th[e] constitutional right . . . and is not limited to such measures as may be directed to a denial or abridgement of the right by the general government or the states.”). *Given* addressed Congress’s enforcement power under Section 2 of the Fifteenth Amendment, whose scope “has always been treated as coextensive” with the



Objections to this expansive view of congressional authority largely rest on inferences from the text and history of the Fourteenth Amendment that do not withstand close scrutiny. Textually, it is said that Section 1 protects “the privileges or immunities of citizens of the United States” from *state* abridgment and nothing more;<sup>232</sup> thus Congress has no obligation or authority under Section 5 to secure the rights of national citizenship except against state invasion.<sup>233</sup> This inference is bolstered, the argument goes, by the Fourteenth Amendment’s legislative history—in particular, the decision by the Joint Committee on Reconstruction to discard a February 1866 draft amendment in favor of the language that was ultimately ratified. The February 1866 draft read:

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.<sup>234</sup>

This language assigned Congress the role of securing substantive rights of citizenship regardless of state action. According to the Supreme Court in *City of Boerne v. Flores*, the February 1866 proposal “encountered immediate opposition” on the ground that it “would give Congress a power to intrude into traditional areas of state responsibility.”<sup>235</sup> After the House voted to postpone consideration of the proposal—an action the

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scope of Congress’s power under Section 5 of the Fourteenth Amendment. *See* *City of Rome v. United States*, 446 U.S. 156, 208 n.1 (1980) (Rehnquist, J., dissenting).

<sup>232</sup> *See* U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .”).

<sup>233</sup> *Cf.* Michael W. McConnell, Opinion concurring in the judgment, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* 158, 166 (Jack M. Balkin ed., 2002) (“Even assuming that there are certain rights that pertain to Americans as citizens, the plain language of the [Privileges or Immunities] clause begins: ‘No State shall make or enforce any law. . . .’ There is no provision of the Constitution preventing Congress from making or enforcing laws that abridge the privileges or immunities of citizens, except insofar as they are enumerated in the Bill of Rights or deducible from other provisions of the Constitution.”).

<sup>234</sup> CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866).

<sup>235</sup> 521 U.S. 507, 520-21 (1997) (quoting statements of Members of Congress opposing the February 1866 draft).

Court describes as “marking [its] defeat”<sup>236</sup>—the Joint Committee reported a new draft on April 30, 1866 that began with what is now the second sentence of Section 1 and that included Section 5.<sup>237</sup> The revision was approved, according to the *Boerne* Court, because it made “Congress’ power . . . no longer plenary but remedial” and “did not raise the concerns expressed earlier regarding broad congressional power to prescribe uniform national laws with respect to life, liberty, and property.”<sup>238</sup>

This reading of the Fourteenth Amendment has several weaknesses that make it unconvincing. First, the idea that the Privileges or Immunities Clause limits rather than augments the scope of protection for national citizenship rights cannot be squared with prior understandings of the federal government’s authority and responsibility in relation to such rights. Although rights of national citizenship were not clearly defined before the Civil War, the notion had unmistakable resonance in one area: the preservation of slavery. In upholding the Fugitive Slave Act of 1793, the Court in *Prigg v. Pennsylvania* determined that Congress had power under the Fugitive Slave Clause to enforce by primary legislation “a positive, unqualified right on the part of the owner of the slave.”<sup>239</sup> The Court described the right as “uniform in remedy and operation throughout the whole Union . . . however many states [the owner] may pass with his fugitive slave in his possession.”<sup>240</sup> The right belonged to the slaveowner as a national citizen; as such, it implied “the power and duty of the national government” to protect it.<sup>241</sup> Moreover, in *Dred Scott*, the Court made clear that this right was secure against federal abridgment.<sup>242</sup>

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

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<sup>236</sup> *Id.* at 522.

<sup>237</sup> See CONG. GLOBE, 39th Cong., 1st Sess. 2286 (1866).

<sup>238</sup> *Boerne*, 521 U.S. at 522-23.

<sup>239</sup> 41 U.S. 539, 612 (1842).

<sup>240</sup> *Id.* at 624.

<sup>241</sup> *Id.* at 616; see also *Ableman v. Booth*, 62 U.S. 506 (1858) (upholding Fugitive Slave Act of 1850).

<sup>242</sup> See *Scott v. Sandford*, 60 U.S. 393 (1857) (invalidating Missouri Compromise).

from the nation that efficient protection which heretofore was accorded to slavery and the rights of the master.”<sup>243</sup> The more sensible view is that the Privileges or Immunities Clause, read together with the Citizenship Clause, does not circumscribe but instead “*expands* the protection that American citizens would otherwise have the right to expect.”<sup>244</sup> In other words, “the prohibition upon state laws hostile to the rights belonging to citizens of the United States, was intended only as an express limitation on the powers of the states, and was not intended to diminish, in the slightest degree, the authority which the nation has always exercised, of protecting, by means of its own direct legislation, rights created or secured by the constitution.”<sup>245</sup>

Moreover, the Court’s assertion in *Boerne* that the February 1866 draft amendment was revised in order to assuage concerns about federal overreaching is likely wrong and debatable at best. As Professor James Fox has observed, “the debates over the *adopted* proposal demonstrate that its opponents continued to express concerns about federal power identical to those put forward earlier.”<sup>246</sup> Its proponents likewise maintained a broad reading of federal power under the revised language<sup>247</sup>—a position consistent with Republican resolve galvanized by President Johnson’s veto of the Civil Rights Act of 1866 on March 27 of that year.<sup>248</sup> Given Congress’s desire to put the Civil Rights Act on a firm

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<sup>243</sup> *Civil Rights Cases*, 109 U.S. at 57 (Harlan, J., dissenting).

<sup>244</sup> Bruce Ackerman, Concurring opinion, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID*, *supra* note \_\_, at 100, 115.

<sup>245</sup> *Civil Rights Cases*, 109 U.S. at 55 (Harlan, J., dissenting).

<sup>246</sup> Fox, *supra* note \_\_ at 507; *see id.* at 507-08 & n.317 (citing statements of Rep. Rogers, Rep. Shanklin, and Rep. Hendricks opposing the final proposal because of over-expansion of federal power).

<sup>247</sup> *See id.* at 508 & n.318 (citing statements of Rep. Broomall, Rep. Thayer, and Rep. Bingham).

<sup>248</sup> President Johnson’s veto was accompanied by a lengthy message expressing alarm that the Act was a stride “toward centralization and the concentration of all legislative power in the national Government.” CONG. GLOBE, 39th Cong. 1st Sess. 1681 (1866). Dissatisfaction with Johnson’s veto led Congress to “a realization that the constitutional assertion of congressional power was essential to [Reconstruction].” Fox, *supra* note \_\_, at 510. According to Professor Fox, this realization likely explains why at least two House members, Representatives Davis and Hale, who opposed the February 1866 draft on federalism grounds, *see Boerne*, 521 U.S. at 521, but voted to override Johnson’s veto in April 1866, *see infra* note \_\_, eventually voted in favor of the Fourteenth Amendment. *See* Fox, *supra* note \_\_, at 510. Fox further observes that Senator William Stewart of

constitutional footing<sup>249</sup> and its determination to override President Johnson's veto,<sup>250</sup> it is improbable that the revision between February and April of 1866 was intended to lessen federal power to act directly to secure the rights of national citizens.

In addition, the Court in *Boerne* ignored an alternative explanation for the revision that is apparent in the legislative history. Toward the end of debate on the February 1866 draft, Congressman Giles Hotchkiss of New York complained that the proposal, by merely authorizing Congress to secure national citizenship rights, left open the possibility that a future Congress might leave those rights unprotected.<sup>251</sup> Calling the draft "not sufficient radical," Hotchkiss urged the use of self-executing language that would protect citizenship rights while expressing support for broad congressional enforcement power too.<sup>252</sup>

Furthermore, passage of the Ku Klux Klan Act of 1871, which criminalizes conspiracies to violate the Constitution or federal laws,<sup>253</sup> showed that a contemporary Congress understood the Fourteenth Amendment to grant broad federal power to protect national citizens, including the power to "ma[ke] conduct unlawful irrespective of the existence of state action."<sup>254</sup> In the debate on the Act, Senator Bingham, when asked about the difference between the February 1866 draft of the Fourteenth Amendment and its final language, confirmed that the ratified

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Nevada, though worried that the amendment would pose "increasing danger of a consolidated and despotic Government," CONG. GLOBE, 39th Cong., 1st Sess. 2964 (1866), voted in favor of the amendment anyway. See Fox, *supra* note \_\_, at 509 n.321.

<sup>249</sup> Senator Bingham, among others, had worried that the Thirteenth Amendment did not provide Congress with adequate authority to enact the Civil Rights Bill of 1866. See CONG. GLOBE, 39th Cong., 1st Sess. 1290-93 (1866) (Sen. Bingham).

<sup>250</sup> The Civil Rights Act was adopted over the President's veto by the necessary two-thirds majority in the Senate on April 6, 1866 and in the House on April 9, 1866. See *id.* at 1809, 1861.

<sup>251</sup> See *id.* at 1095 (Rep. Hotchkiss)

<sup>252</sup> *Id.* ("I desire that the very privileges for which the gentleman [Senator Bingham] is contending shall be secured to the citizens; but I want them secured by a constitutional amendment that legislation cannot override. Then if the gentleman wishes to go farther, and provide by laws of Congress for the enforcement of these rights, I will go with him."); see Kaczorowski, *supra* note \_\_, at 914 (discussing Hotchkiss's views).

<sup>253</sup> See 42 U.S.C. § 1985(3).

<sup>254</sup> Ruth Colker, *The Supreme Court's Historical Errors in City of Boerne v. Flores*, 43 B.C. L. REV. 783, 814 (2002); see *id.* at 812-17.

language was not meant to reduce federal power but to “embrace[] all and more than did the February proposition.”<sup>255</sup>

In sum, the Citizenship Clause together with Section 5 gives Congress broad authority to legislate directly to secure substantive rights of national citizenship. “When Congress was authorized to enforce the provisions of the Amendment, it was authorized to enforce national citizenship and its privileges and immunities, to act as the national legislative body over the basic aspects of citizenship.”<sup>256</sup> As Professor Robert Kaczorowski has explained:

The framers did not understand the amendment’s prohibition against state infringement of the privileges and immunities of United States citizens to be the full extent of its guarantee of fundamental rights, or of the authority it delegated to Congress to enforce fundamental rights. Republicans understood the amendment’s citizenship clause, as well as its prohibition on the states from infringing the privileges and immunities of United States citizens, to be an affirmative recognition of the fundamental rights of these citizens. Under the Republicans’ theory of constitutionalism, the amendment did not merely secure the right to be free from state infringements [sic] of fundamental rights, it delegated to Congress the requisite authority to secure these rights directly . . . .<sup>257</sup>

### 3. *Federal enforcement as a constitutional duty*

Third, Justice Harlan’s dissent in the *Civil Rights Cases* teaches not only that the national citizenship guarantee gives rise to substantive rights and that Congress is authorized to secure those rights through direct legislation, but also that the grant of congressional enforcement power implies a federal duty to secure those rights. The parting words of his dissent hint at Section 5’s dual character as a conferral of authority and responsibility. After stating the constitutional principle that “there cannot be, in this republic, any class of human beings in practical subjec-

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<sup>255</sup> CONG. GLOBE, 42d Cong., 1st Sess. app. at 83 (1871); see Fox, *supra* note \_\_, at 510 (“Although Bingham’s 1871 speech, which is more detailed than his 1866 discussions of the changes in the Amendment, has the character of a post-hoc explanation, it is entirely consistent with his prior position.”).

<sup>256</sup> Fox, *supra* note \_\_, at 511.

<sup>257</sup> Kaczorowski, *supra* note \_\_, at 915.

tion to another class,” he went on to say that the principle is one “for the *due enforcement* of which, by appropriate legislation, congress has been invested with express power.”<sup>258</sup> The notion of “due” enforcement suggests the obligatory character of Section 5. Congressional enforcement of Section 1 guarantees satisfies “a need, obligation, or duty.”<sup>259</sup>

Justice Harlan’s choice of words was not meant to suggest the existence of a legal duty in the narrowest sense, such that failure to enact the Civil Rights Act of 1875 would have exposed members of Congress to suit in federal court. At the same time, however, the legal norm at issue in the *Civil Rights Cases*—the prohibition of racial discrimination in public accommodations—is today understood to have something akin to constitutional status, such that repeal of the Civil Rights Act of 1964 would seriously undermine the constitutional principle of racial equality declared in *Brown*. Although upheld as commerce legislation,<sup>260</sup> the 1964 Act was unmistakably the crowning legal achievement of the civil rights movement’s “project of entrenching *Brown*.”<sup>261</sup> To borrow Archibald Cox’s evocative phrase, the Civil Rights Act made the principles of *Brown* “more firmly law.”<sup>262</sup> Notwithstanding the Court’s holding in the *Civil Rights Cases*, it seems fair to say that the Act, no less than *Brown* itself, has become a necessary and enduring expression of the constitutional guarantee of equal citizenship. It has the status of “mandatory” legislation in our constitutional culture.

The Civil Rights Act of 1964 is not alone in this regard. The Americans with Disabilities Act is also rightly understood as an exercise of federal responsibility to ensure equal citizenship.<sup>263</sup> Similarly, the Fam-

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<sup>258</sup> The *Civil Rights Cases*, 109 U.S. 3, 62 (1883) (Harlan, J., dissenting) (emphasis added).

<sup>259</sup> [get 1880 dictionary definition of “due”]

<sup>260</sup> See *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *id.* at 250 (validity of the Act under Section 5 is “a question upon which we do not pass”).

<sup>261</sup> Post & Siegel, *Equal Protection by Law*, *supra* note \_\_\_, at 518; see *id.* at 489 (“It deeply misconceives the constitutional issues posed by the Act to imagine that it was merely a logical entailment of the [New Deal] revolution.”).

<sup>262</sup> Archibald Cox, *The Supreme Court, 1966 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 94 (1966).

<sup>263</sup> See *Tennessee v. Lane*, 541 U.S. 509, 536 (2004) (Ginsburg, J., concurring) (“The Americans with Disabilities Act of 1990 . . . is a measure expected to advance equal citizenship stature for persons with disabilities.”); Samuel R. Bagenstos, *Subordination*,

ily and Medical Leave Act is part of a long line of federal legislation to secure constitutional gender equality.<sup>264</sup> Although resembling a “substantive entitlement program” instead of a mere ban on employment discrimination, the FMLA serves the constitutional imperative of rooting out gender stereotypes that disproportionately exclude women from the workplace.<sup>265</sup> In addition, as historian Carl Kaestle has observed, it is appropriate to characterize compensatory education programs like Title I of the Elementary and Secondary Education Act as “virtually mandatory” in order to realize the meaning of equal opportunity in our constitutional culture.<sup>266</sup>

The element of duty implicit in the grant of Section 5 power arises from an “institutionally differentiated” view of how the Fourteenth Amendment should be enforced.<sup>267</sup> As Professor Lawrence Sager has argued, concerns about the institutional role and competence of courts result in judicial underenforcement of constitutional norms. Such norms, though underenforced, remain “legally valid to their full conceptual limits.”<sup>268</sup> The practical consequence of this view, according to Professor Sager, is that

government officials have a *legal obligation* to obey an underenforced constitutional norm which extends beyond its interpretation by the federal judiciary to the full dimensions of the concept which the norm embodies. This obligation to obey constitutional norms at their unenforced margins *requires*

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*Stigma, and “Disability,”* 86 VA. L. REV. 397, 471 (2000) (the Act “guarantee[s] a baseline of equal citizenship by protecting against stigma and systematic exclusion from public and private opportunities, and protecting society against the loss of valuable talents”).

<sup>264</sup> See Post & Siegel, *Legislative Constitutionalism*, *supra* note \_\_, at 1980-2020.

<sup>265</sup> Nevada Dep’t of Human Resources v. Hibbs, 538 U.S. 721, 737-38 (2003); *see id.* at 754 (Kennedy, J., dissenting) (characterizing the FMLA as a “substantive entitlement program”).

<sup>266</sup> Carl F. Kaestle, *Federal Aid to Education Since World War II: Purposes and Politics*, in CENTER FOR EDUCATION POLICY, THE FUTURE OF THE FEDERAL ROLE IN ELEMENTARY AND SECONDARY EDUCATION 13, 28 (Jack Jennings ed., 2001) (“One can imagine a lot of things happening to Title I, but it is hard to imagine Congress abolishing all federal efforts at providing more equal opportunity.”).

<sup>267</sup> Post & Siegel, *Equal Protection by Law*, *supra* note \_\_, at 500, 517; *see* Post & Siegel, *Legislative Constitutionalism*, *supra* note \_\_, at 1950 (“Congress and the Court each possess distinct institutional perspectives, competencies, and purposes.”).

<sup>268</sup> See Sager, *supra* note \_\_, at 1221.

government officials to fashion their own conceptions of these norms and measure their conduct by reference to these conceptions.<sup>269</sup>

In the Fourteenth Amendment context, the legal obligation to effectuate the full dimensions of Section 1's guarantees does not entail a specific array of policies that Congress must implement. For example, neither Title I of the Elementary and Secondary Education Act nor the Family and Medical Leave Act "is required by the Fourteenth Amendment in the same sense that a judicial judgment vindicating a right is."<sup>270</sup> However, to the extent that "constitutional rights function as values" that guide judicial and legislative conduct "rather than as principles that mandate specific remedial entailments,"<sup>271</sup> Congress no less than the Court is duty-bound to exert its best efforts to give meaning to those values. It is in this spirit that the Court, construing Section 5, has acknowledged and (before *Boerne*) deferred to "congressional responsibility for implementing the [Fourteenth] Amendment."<sup>272</sup>

The dual character of Section 5 as a font of congressional authority and responsibility accords with historical understandings. As Professor Ruth Colker notes, although the framers revised Section 1 so that its basic commands would be self-executing and susceptible to judicial enforcement, "their primary faith was in Congress"<sup>273</sup>—an unsurprising choice given their distrust of the Supreme Court after *Dred Scott*. The clearest statement of this faith appears in a May 1866 speech by Senator Jacob Howard of Michigan introducing the Fourteenth Amendment as it

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<sup>269</sup> *Id.* at 1227 (emphases added).

<sup>270</sup> Post & Siegel, *Legislative Constitutionalism*, *supra* note \_\_\_, at 2005.

<sup>271</sup> *Id.* at 2006.

<sup>272</sup> *Katzenbach v. Morgan*, 384 U.S. 641, 648 (1966) (emphasis added); *see Ex parte Virginia*, 100 U.S. 339, 345 (1879) ("It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective.").

<sup>273</sup> Colker, *supra* note \_\_\_, at 817; *see* WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 122 (1988) ("[T]he framing generation anticipated that Congress rather than the courts would be the principle [sic] enforcer of section one."); Michael W. McConnell, Comment, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 174-83 (1997).



emerged from the Joint Committee on Reconstruction.<sup>274</sup> Describing Section 5, Senator Howard said:

It gives to Congress power to enforce by appropriate legislation all the provisions of this article of amendment. . . . It casts upon Congress the *responsibility* of seeing to it, for the future, that all the sections of the amendment are carried out in good faith . . . . I look upon this clause as indispensable for the reason that it thus imposes upon Congress this power and *this duty*.<sup>275</sup>

This coupling of power and duty in the context of Section 5 has deep resonance in view of the Supreme Court’s earlier use of the same formulation in characterizing Congress’s implied authority under the Fugitive Slave Clause. Recall that *Prigg v. Pennsylvania* declared protection of the master’s right to the return of fugitive slaves to be within “the power and duty of the national government.”<sup>276</sup> Senator Howard’s statement suggests an equitable symmetry between the antebellum era of slavery and the postbellum era of freedom and equal citizenship. In both periods, “[t]he character of . . . substantive rights . . . determine[d] both the extent of national responsibility for the protection of the rights and the existence of national power to meet this responsibility.”<sup>277</sup> In sum, Section 5 envisions federal power coupled with federal duty, federal authority coupled with federal responsibility.

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<sup>274</sup> See CONG. GLOBE, 39th Cong., 1st Sess. 2764 (1866) (Sen. Howard).

<sup>275</sup> *Id.* at 2768 (emphases added). In *Katzenbach v. Morgan*, the Court observed that “[t]his statement of § 5’s purpose was not questioned by anyone in the course of the debate.” 384 U.S. at 648 n.8 (citing FLACK, *supra* note \_\_, at 138). Three years later, Senator Howard’s phrasing was echoed in the course of debate on voting rights legislation. See CONG. GLOBE, 40th Cong., 3d Sess. 559 (1869) (Rep. Boutwell) (“[B]y the fifth section of the fourteenth article, Congress has power to enforce by appropriate legislation the provisions of the article. Does anybody doubt—in the presence of this provision of the Constitution, in view of the unlimited power under the fourteenth article to legislate so as to secure to citizens of the United States the privileges and immunities of citizens of any one of the States—does anybody doubt our duty?”).

<sup>276</sup> 41 U.S. 539, 616 (1842).

<sup>277</sup> Kinoy, *supra* note \_\_, at 395.

## V. EDUCATION AND NATIONAL CITIZENSHIP

If the Fourteenth Amendment gives Congress the power and duty to legislate directly to secure the guarantees of national citizenship, then it remains to ask whether education is properly understood as one of those guarantees.

Broadly speaking, two main interpretive strategies have been used to determine what substantive rights inhere in national citizenship. The first attempts to determine what rights the framers had in mind when they established national citizenship.<sup>278</sup> Under this approach, there is general agreement that citizenship rights were to include all the rights contained in the Civil Rights Act of 1866. Beyond that, there is evidence that the framers sought to incorporate the Bill of Rights among the protections that United States citizens could invoke against state power.<sup>279</sup> In addition, some thought national citizenship entailed protection of “fundamental rights” inhering in the very concept of citizenship, as Justice Washington described them in *Corfield v. Coryell*.<sup>280</sup> Although proponents of this view believed that the rights of national citizenship “are not and cannot be fully defined in their entire extent and precise nature,”<sup>281</sup> education was not widely regarded as among them at the time.<sup>282</sup>

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<sup>278</sup> For examples of scholarship taking this approach, see FLACK, *supra* note \_\_, at 84-85; Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 456-64 (2004); Farber & Muench, *supra* note \_\_, at 272-75; John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992); Timothy S. Bishop, Comment, *The Privileges or Immunities Clause of the Fourteenth Amendment: The Original Intent*, 79 NW. U. L. REV. 142 (1984).

<sup>279</sup> See FLACK, *supra* note \_\_, at 94, 96; CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (Sen. Howard). *But see* RAOUL BERGER, GOVERNMENT BY JUDICIARY 20-36 (1977) (arguing that privileges and immunities of citizenship include only the rights specified in the 1866 Act).

<sup>280</sup> 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823); see CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (Sen. Howard) (quoting *Corfield*); *id.* at 1757 (Sen. Trumbull) (“To be a citizen of the United States carries with it some rights; and what are they? They are those inherent, fundamental rights which belong to free citizens or free men in all countries . . .”); see also Barnett, *supra* note \_\_, at 458-62 (arguing that the framers understood the Privileges or Immunities Clause to protect inalienable natural rights inherent to citizenship).

<sup>281</sup> CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (Sen. Howard). Justice Washington’s opinion in *Corfield* suggested the open-ended nature of citizenship rights by listing a few examples and then stating that “[t]hese, and many others which might be men-

The second interpretive strategy, associated with Alexander Bickel,<sup>283</sup> acknowledges that the specific rights contemplated by the framers were limited. However, this approach distinguishes between “congressional understanding of the immediate effect of the enactment on conditions then present” and “what if any thought was given to the long-range effect, under future circumstances, of provisions necessarily intended for permanence.”<sup>284</sup> Although “no specific purpose going beyond the coverage of the Civil Rights Act is suggested” by the legislative history of the Fourteenth Amendment, according to Bickel, there was “rather an awareness on the part of these framers that it was *a constitution* they were writing, which led to a choice of language capable of growth.”<sup>285</sup> The framers neither indulged radical theories of rights and equality that would have roused opposition, nor did they limit themselves to a mere enumeration of the specific guarantees of the Civil Rights Act of 1866. Instead, they chose generic language “sufficiently elastic to permit reasonable future advances” through legislation and judicial interpretation.<sup>286</sup> As Charles Fairman has explained, invoking Justice Bradley’s dissent in *Slaughterhouse*:

[T]hose conditions to which one is entitled by virtue of being a citizen of the United States—the protection and dignity that are his due, the opportunities, associations and relationships that ought to be open to him . . . [are] not static. As the nation experiences change—in its transportation, commerce and industry—in its political practices—in the way in which people live and work and move about—in the expectations they entertain about the quality of American life—surely the privilege of

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

<sup>282</sup> See McConnell, *supra* note \_\_, at 1036-43; Kaczorowski, *supra* note \_\_, at 926-28.

<sup>283</sup> See Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 59-65 (1955).

<sup>284</sup> *Id.* at 59.

<sup>285</sup> *Id.* at 63.

<sup>286</sup> *Id.* at 61; see Kaczorowski, *supra* note \_\_, at 926 (“The Republicans’ understanding of the fourteenth amendment and the Civil Rights Act thus encompassed a developmental conception of these civil rights provisions. The conception permitted the future inclusion of rights within [its] protective guarantees that the framers might not have intended to protect in 1866.”); see also Farber & Muench, *supra* note \_\_, at 275 (“The entire theory behind the amendment argues against giving it an unduly crabbed interpretation.”).

membership in this national community must broaden to include what has become essential under prevailing circumstances.<sup>287</sup>

It is thus “legitima[te] . . . to interpret the Fourteenth Amendment as a guarantee of citizenship rights defined more generously than [sic] the amendment’s framers would have defined them” in the event that “a later generation should have a larger conception of what it means to belong to America, to be a citizen.”<sup>288</sup>

In this Part, I examine some of the first steps that the Reconstruction Congress took along the interpretive path described by Professor Bickel. Between 1870 and 1890, Congress repeatedly sought to effectuate the guarantee of national citizenship through ambitious efforts to provide funding, leadership, and support for public education. During this period, Congress carefully studied and nearly enacted a series of proposals designed to benefit whites and blacks in the North and South, promising federal aid or intervention where state efforts were inadequate. In essence, they were the earliest proposals for the kind of federal role in public education we have today.<sup>289</sup>

Although the constitutional ideas they embodied were not free of controversy, these proposals, crafted during an era of constitutional change and possibility, illuminate notions of federal responsibility that are now among the “forgotten alternatives” of the Reconstruction pe-

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<sup>287</sup> CHARLES FAIRMAN, RECONSTRUCTION AND REUNION 1864-88: PART ONE 1388 (1971)

<sup>288</sup> KARST, *supra* note \_\_, at 54.

<sup>289</sup> These Reconstruction-era proposals were quite different from the Northwest Ordinances of 1785 and 1787, which reserved sections of public lands for the support of common schools. Although these ordinances are often included in the legacy of federal involvement in public education, their primary purpose was to encourage westward settlement and to raise revenue through land sales after the Revolutionary War. Their “effect . . . on common schooling was almost nil,” owing to “speculation, mismanagement, and fraud” in the use of school funds derived from land sales. Carl F. Kaestle & Marshall S. Smith, *The Federal Role in Elementary and Secondary Education, 1940-1980*, 52 HARV. EDUC. REV. 384, 387-88 (1982). The Morrill Act of 1862, which provided land-based federal aid for agricultural and engineering colleges, was closer to the type of federal role contemplated during Reconstruction, although it did not address elementary or secondary education. *See* Act of July 2, 1862, ch. 130, 12 Stat. 503 (codified at 7 U.S.C. §§ 301-308).

riod.<sup>290</sup> At that time, the grant of national citizenship, like other clauses of the Fourteenth Amendment, was an open-ended mandate, couched in generic terms with no specific entailments. The early education bills show how Congress sought to particularize and make meaningful—how Congress sought to enforce—its substantive guarantees.

This Part begins with a brief discussion of the Freedmen’s Bureau and the creation of a federal Department of Education. It then focuses on three education aid bills—the first sponsored by Representative George Frisbie Hoar of Massachusetts in 1870, the second by Representative Legrand Perce of Mississippi in 1872, and the third by Senator Henry William Blair of New Hampshire in the mid-1880s. In seeking to give content to the new guarantee of national citizenship, these bills feature Congress in the role of “expounding the Constitution outside the courts.”<sup>291</sup>

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

Standard accounts of the federal role in education during Reconstruction focus on the Freedmen’s Bureau.<sup>292</sup> From 1866 to 1870, under the leadership of General Oliver Otis Howard, the Bureau spent over two-thirds of its funds and leveraged the resources of private charities to educate approximately 100,000 students each year.<sup>293</sup> These efforts were substantial and had lasting significance, especially in higher education.<sup>294</sup>

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<sup>290</sup> C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 31 (4th ed. 2002); see Daniel W. Crofts, *The Black Response to the Blair Education Bill*, 37 J. SO. HIST. 41, 44 (1971) (noting that the early federal education bills emerged “when some compromise between federal authority and state prerogative remained a practical possibility”).

<sup>291</sup> Forbath, *supra* note \_\_, at 23.

<sup>292</sup> For a short and lucid history of the Freedmen’s Bureau, see Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753, 754-83 (1985).

<sup>293</sup> See Schnapper, *supra* note \_\_, at 780-81 & n.146 (citing annual reports of the commissioner of the Freedmen’s Bureau for the years 1866 to 1870). The Bureau began under the authority of an 1865 act signed by President Lincoln. See Act of Mar. 3, 1865, ch. 90, 13 Stat. 507. The 1866 Freedmen’s Bureau bill, which Congress passed over President Johnson’s veto, extended the Bureau’s operations until July of 1868. See Act of July 16, 1866, ch. 200, 14 Stat. 173. In July of 1868, Congress again extended the Bureau’s activities but terminated its authority to collect funds from rental of abandoned lands, which had been its primary source of income. See Act of July 6, 1868, ch. 135, 15

Yet the Bureau's activities were driven less by a general theory of welfare provision for effective citizenship than by a specific interest in providing just recompense for slavery. While proposing to enable "all loyal refugees and freedmen . . . to become self-supporting citizens of the United States,"<sup>295</sup> the Freedmen's Bureau Act of 1866 limited educational programs to newly freed blacks,<sup>296</sup> and the Bureau in fact served very few white children.<sup>297</sup> During debate over the Act, opponents criticized its racial exclusivity, invoking the plight of poor and equally needy whites.<sup>298</sup> In response, its supporters "stressed the special needs of blacks,"<sup>299</sup> making clear that "[f]rom the beginning to the present time [blacks] have been robbed of their wages, to say nothing of the scourgings they have received"<sup>300</sup> and that "[w]e owe something to these freedmen."<sup>301</sup> Proponents saw the bill as a necessary remedy authorized

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Stat. 83; Act of July 25, 1868, ch. 245 15 Stat. 193. The Bureau became insolvent in 1870 and finally closed in 1872.

<sup>294</sup> The Bureau "provided funds, land, and other assistance to help establish more than a dozen colleges and universities for the education of black students," including half a million dollars to help build Howard University. Schnapper, *supra* note \_\_, at 781-82.

<sup>295</sup> Act of July 16, 1866, ch. 200, § 2, 14 Stat. 173, 174.

<sup>296</sup> *See id.* §§ 12-13, 14 Stat. 173, 176.

<sup>297</sup> *See* Schnapper, *supra* note \_\_, at 781 & n.147 (observing that white children comprised less than one percent of enrollment in Bureau-operated schools, according to Bureau reports).

<sup>298</sup> *See id.* at 765-67 (quoting statements by members of Congress opposed to the 1866 legislation).

<sup>299</sup> *Id.* at 767.

<sup>300</sup> CONG. GLOBE, 39th Cong., 1st Sess. 630 (Rep. Hubbard).

<sup>301</sup> *Id.* at 2779 (Rep. Eliot); *see id.* at 365 (Sen. Fessenden) ("[T]he Constitution has now been changed so that slavery no longer exists in this country. A large body of men, women, and children, millions in number, who had received no education, who had been laboring from generation to generation for their white owners and masters, able to win nothing, to accomplish nothing, are thrown, without protection, without aid, upon the charities of the world . . ."); *id.* at 939 (Sen. Trumbull) ("[N]ever before in the history of this Government have nearly four million people been emancipated from the most abject and degrading slavery ever imposed upon human beings; never before has the occasion arisen when it was necessary to provide for such large numbers of people thrown upon the bounty of the Government, unprotected and unprovided for.").

by Section 2 of the Thirteenth Amendment, lest the freedmen “be taken and reduced into slavery again.”<sup>302</sup>

When the Bureau ran out of money in 1870, it left an ambiguous legacy in the development of federal responsibility for education. As historian Gordon Lee has observed, the Bureau’s “basic reliance upon private and local support of educational effort and the fact that it was concerned only with one segment of the population suggest the question as to whether or not it should rightly be considered a measure of federal aid in the sense that the term has come to imply.”<sup>303</sup> For some the Bureau’s work was “the beginning of recognition of federal responsibility,” while for others it was “a military measure devoid of any status as precedent.”<sup>304</sup>

Although the work of the Freedmen’s Bureau is well-known, a separate yet concurrent initiative—the creation of a federal Department of Education in 1867—was “[c]onsiderably more important, in terms of both its influence on long-range educational developments and its effect upon immediate post-Civil War thinking.”<sup>305</sup> Most significantly, the Department helped stimulate recognition of education as a national concern beyond the moral duty owed to the new freedmen. In Congress, the committee that drafted the authorizing bill was charged to conceive a department “whose duty it shall be to enforce education, without regard to race or color, upon the population of all such States as shall fall below a standard to be established by Congress.”<sup>306</sup> As it turned out, Congress limited the Department’s functions to collecting data and reporting on the condition of education throughout the country, and even this modest role elicited complaints about federal overreaching.<sup>307</sup> Nevertheless, its pro-

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<sup>302</sup> *Id.* (Sen. Trumbull); *see id.* at 366 (Sen. Fessenden) (invoking Thirteenth Amendment); *id.* at 631 (Rep. Moulton) (same).

<sup>303</sup> GORDON C. LEE, *THE STRUGGLE FOR FEDERAL AID, FIRST PHASE: A HISTORY OF THE ATTEMPTS TO OBTAIN FEDERAL AID FOR THE COMMON SCHOOLS, 1870-1890*, at 21 (1949).

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*; *see* Act of Mar. 2, 1867, ch. 158, 14 Stat. 434.

<sup>306</sup> CONG. GLOBE, 39th Cong., 1st Sess. 60 (1865) (resolution introduced by Rep. Donnelly).

<sup>307</sup> *See id.* at 2968 (Rep. Rogers) (urging that “towns, cities, and States” be allowed to “carry out and regulate the system of education without interference, directly or indirectly, . . . [by] the Federal Government”); *id.* at 3047 (Rep. Pike) (“[H]ere we have . . . a scheme of governmental control of all the common schools.”); CONG. GLOBE, 39th Cong., 2d Sess. 1843 (1867) (Sen. Davis) (educational matters “belong peculiarly to the

ponents stressed the national interest in “universal education” for whites and blacks<sup>308</sup> and the need for “a controlling head by which the various conflicting systems in the different States can be harmonized, by which there can be uniformity.”<sup>309</sup>

The Department reflected an emerging concept of federal responsibility rooted in the idea that

every child of this land is, by natural right, entitled to an education at the hands of somebody, and . . . this ought not to be left to the caprice of individuals or of States so far as we have any power to regulate it. At least, every child in the land should receive a sufficient education to qualify him to discharge all the duties that may devolve upon him as an American citizen.<sup>310</sup>

In today’s parlance, we might describe this as a call for a national standard of educational adequacy based on national citizenship. Within weeks of the Department’s creation, the House of Representatives established its first standing committee on education, and two years later the Senate followed suit.<sup>311</sup> Moreover, as we will see, the data collection and analysis performed by the Department substantially informed early debates on federal education policy.

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States, and were intended to be left exclusively to State management”); *id.* at 1893 (Sen. Hendricks) (same). However, the idea of creating the Department was not “thrust upon this House without anybody asking for its passage,” but instead arose from the recommendation of “men who inaugurated the existing systems of their own States, and are at the head of those systems at the present time.” CONG. GLOBE, 39th Cong., 1st Sess. 3044 (1866) (Rep. Moulton) (observing that education chiefs of Illinois, Ohio, and Vermont among others supported the Department).

<sup>308</sup> *Id.* (Rep. Moulton); *see id.* at 2967 (Rep. Donnelly); *id.* at 3049 (Rep. Garfield).

<sup>309</sup> *Id.* at 3044 (Rep. Moulton); *see* CONG. GLOBE, 39th Cong., 2d Sess. 1843-44 (1867) (Sen. Yates) (“[W]e are a nation, not States merely . . . . [W]e need a center for our educational system . . . .”); *id.* at 1893 (Sen. Stewart) (“The object of this bill is . . . to collect information as to the very good systems of the States, and lay it before the whole country, so as to enable the States that have not perfected their systems . . . to know what is being done in other parts of the country.”).

<sup>310</sup> CONG. GLOBE, 39th Cong., 1st Sess. 3045 (1866) (Rep. Moulton).

<sup>311</sup> *See* HISTORY OF THE COMMITTEE ON LABOR AND HUMAN RESOURCES, 1869-1979, S. DOC. No. 96-71 (1980); U.S. House of Representatives Committee on Education and the Workforce, History of the Committee on Education and the Workforce and the Members Who Have Served As Chairman, at [http://www.house.gov/ed\\_workforce/committee/history.htm](http://www.house.gov/ed_workforce/committee/history.htm).



In its early years, the Department had limited capacity and was soon demoted to an “Office of Education” or “Bureau of Education” within the Department of the Interior.<sup>312</sup> But the larger ambitions behind the initiative did not fade. In 1870, President Grant appointed John Eaton, a brigadier general who had received thousands of black soldiers into the Union army, to head the Office of Education. In that capacity, Eaton pressed for an expanded federal role, echoing the sentiments of many state and local education leaders.<sup>313</sup> President Grant himself, in an unusual message to Congress on March 30, 1870, proclaiming the ratification of the Fifteenth Amendment, focused on the educational needs of newly enfranchised citizens and affirmed the framers’ belief that “a republican form of government could not endure without intelligence and education generally diffused among the people.”<sup>314</sup> He concluded his message by “call[ing] upon Congress to take all the means within their constitutional power to promote and encourage popular education throughout the country.”<sup>315</sup>

#### **B. 1870-71: The Hoar bill to establish a national system of education**

One month earlier, Congressman George Hoar of Massachusetts had introduced the first major proposal for federal supervision of public education,<sup>316</sup> and he reported it out of the House Committee on Education

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<sup>312</sup> See CONG. GLOBE, 40th Cong., 2d Sess. app. 521 (1868).

<sup>313</sup> See LEE, *supra* note \_\_, at 37-38 (discussing Eaton); MCAFEE, *supra* note \_\_, at 105-06. According to Professor Lee, by 1870 support for “more nation-wide uniformity and standardization of educational activity” as well as “equalizing the educational funds of the states” had come from the National Association of School Superintendents, the incipient National Education Association, and the *American Educational Monthly*, which was “the official organ of certain state teachers’ associations and the most widely circulated periodical of its class at the time.” LEE, *supra* note \_\_, at 24, 36-37, 41.

<sup>314</sup> “All Men Free and Equal,” The XVth Amendment Proclaimed, Message to Congress—Proclamation of the President (Mar. 30, 1870), *available at* <http://memory.loc.gov/rbc/rbpe/rbpe00/rbpe009/00902000/001dr.jpg>. President Grant quoted the famous words of President Washington’s Farewell Address: “Promote, then, as a matter of primary importance, institutions for the general diffusion of knowledge. In proportion as the structure of the Government gives force to public opinion, it is essential that public opinion should be enlightened.” *Id.*

<sup>315</sup> *Id.*

<sup>316</sup> See H.R. 1326, 41st Cong. (1870).

and Labor on the same day as President Grant’s proclamation.<sup>317</sup> A graduate of Harvard Law School and a staunch opponent of slavery, Hoar cut his political teeth in the Free Soil movement and was elected to Congress in 1868 as a “self-acknowledged disciple of [Charles] Sumner.”<sup>318</sup> In his autobiography, he wrote that the debate over the Department of Education in his first term “led [him] to give special study to the matter of National education” and shaped his belief that “[a] complete system of education at the National charge was an essential element of . . . reconstruction policy.”<sup>319</sup> Titling his 1870 proposal “A bill to establish a national system of education,” Hoar observed that the legislation “for the first time sought to compel by national authority the establishment of a thorough and efficient system of public instruction throughout the whole country.”<sup>320</sup>

Under the bill, each state was required to “provide for all the children within its borders, between the ages of six and eighteen years, suitable instruction in reading, writing, orthography, arithmetic, geography, and the history of the United States.”<sup>321</sup> The President of the United States was authorized to determine whether a given state had established “a system of common schools which provides reasonably for all the children therein.”<sup>322</sup> In states deemed unsatisfactory by the President, the bill proposed “national schools” run by the federal Commissioner of Education and several federally appointed administrators below him.<sup>323</sup> The schools, to be built on land secured through eminent domain, were to provide at least six months of education each year.<sup>324</sup> The bill gave the Commissioner wide authority to select schoolbooks and prescribe school

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<sup>317</sup> See CONG. GLOBE, 41st Cong., 2d Sess. 2294 (1870). The thrust and language of President Grant’s proclamation appear to have been influenced by a letter that Hoar sent to Grant on March 29, 1870. See RICHARD E. WELCH, JR., GEORGE FRISBIE HOAR AND THE HALF-BREED REPUBLICANS 23 (1971) (quoting Hoar’s letter).

<sup>318</sup> *Id.* at 21.

<sup>319</sup> 1 GEORGE F. HOAR, AUTOBIOGRAPHY OF SEVENTY YEARS 256, 265 (1903).

<sup>320</sup> CONG. GLOBE, 41st Cong., 2d Sess. app. 478 (1870); see H.R. 1326, 41st Cong. (1870).

<sup>321</sup> H.R. 1326, 41st Cong. § 19 (1871).

<sup>322</sup> *Id.*

<sup>323</sup> *Id.* §§ 1-3.

<sup>324</sup> *Id.* §§ 4-5.

regulations.<sup>325</sup> National schools were to be financed with a federal tax of fifty cents per person, with the revenue allocated to each state based on population.<sup>326</sup>

The bill's heavy-handed approach prompted an array of objections.<sup>327</sup> Critics seized on the absence of standards by which the President would adjudge a state school system to be satisfactory.<sup>328</sup> The cadre of federal school officials contemplated by the bill was assailed as a "system of functionarism"<sup>329</sup> involving "reckless expenditure"<sup>330</sup> and "patronage."<sup>331</sup> Opponents also criticized the eminent domain provision as an invitation to abuse<sup>332</sup> and the federal authority to select school-books as a means by which "[t]he very foundations of knowledge might be poisoned."<sup>333</sup> Moreover, a recurring theme of the bill's detractors was the "the utter want of power in Congress to enforce the provisions of this bill."<sup>334</sup> Nothing in the Constitution, they argued, authorized the "Federal interference in the educational affairs of the States" envisioned by the bill.<sup>335</sup>

From a policy perspective, there is no doubt that the bill proposed an overbearing and unworkable approach. The enormous bureaucracy it authorized and the unfettered discretion it gave to the President and other federal officials were easy targets for criticism. Hoar himself, writing in 1872, said that he did not introduce the bill "with any confident expecta-

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<sup>325</sup> *Id.* §§ 6, 13.

<sup>326</sup> *Id.* § 15 (as amended by Rep. Hoar).

<sup>327</sup> The key speeches against the bill appear at CONG. GLOBE, 41st Cong., 3d Sess. app. 77 (1871) (Rep. Bird); *id.* app. at 94 (Rep. McNeely); *id.* at 1370 (Rep. Kerr); *id.* at 1374 (Rep. Rogers); *id.* at 1378 (Rep. Booker); and *id.* app. at 240 (Rep. Dockery).

<sup>328</sup> *See id.* app. at 78 (Rep. Bird) ("Beware of politics in your schools."); *id.* app. at 97 (Rep. McNeely) (noting lack of clarity on whether the President would evaluate state school systems based on state laws or on the actual condition of schools).

<sup>329</sup> *Id.* app. at 78 (Rep. Bird).

<sup>330</sup> *Id.* at 1372 (Rep. Kerr).

<sup>331</sup> *Id.* app. at 94 (Rep. McNeely); *see id.* app. at 240 (Rep. Dockery).

<sup>332</sup> *See id.* app. at 79 (Rep. Bird); *id.* at 1372 (Rep. Kerr); *id.* at 1374 (Rep. Rogers).

<sup>333</sup> *Id.* at 1372 (Rep. Kerr); *see id.* at 1374 (Rep. Rogers). Opponents of the bill also condemned the tax to finance the schools as "oppressive in the extreme." *Id.* app. at 241 (Rep. Dockery); *see id.* at 1372 (Rep. Kerr).

<sup>334</sup> *Id.* app. at 80 (Rep. Bird).

<sup>335</sup> *Id.* app. at 94 (Rep. McNeely).

tion that it would get through Congress.”<sup>336</sup> Nevertheless, his proposal drew attention to the problem of education and also garnered many defenders.<sup>337</sup> Most importantly, for our purposes, it brought into focus the constitutional understandings that Hoar and his supporters believed to be the source of Congress’s power and duty to make education universally available. Their principal arguments did not sound in general welfare; they sounded in citizenship.

On June 6, 1870, Hoar gave his most extensive speech in support of the bill.<sup>338</sup> In discussing the constitutional authority for a substantial federal role in education, Hoar looked to the new guarantee of citizenship in the postbellum order and its nationalizing influence:

The Constitution, as now completed, provides that every person born or naturalized in the United States shall be a citizen thereof, and that the right of any citizen to vote shall not be abridged by reason of race, color, or previous servitude. By the system thus established all national questions are to be decided in the last resort by the opinion of the majority of the voters. . . . The vote of the humblest black man in Arkansas affects the value of the iron furnace in Pennsylvania, the wheat farm in Iowa, or the factory in Maine as much as does the vote of its owner.<sup>339</sup>

With this backdrop, Hoar asserted his central claim: “Now, if to every man in every State is secured by national authority his equal share in the Government surely there is implied the corresponding power and duty of securing the capacity for the exercise of that share in the Government.”<sup>340</sup> The following year, Hoar reiterated that “[t]he Constitution not only establishes a national Government, but since the [fourteenth and fifteenth]

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<sup>336</sup> LEE, *supra* note \_\_\_, at 53 (quoting George F. Hoar, *Education in Congress*, OLD & NEW, May 1872, at 600).

<sup>337</sup> The key speeches in support of the bill, other than Hoar’s, appear at CONG. GLOBE, 41st Cong., 3d Sess. app. 100 (1871) (Rep. Arnell); *id.* at 1072 (Rep. Clark); *id.* at 1243 (Rep. Lawrence); *id.* at 1375 (Rep. Townsend); *id.* app. at 189 (Rep. Prosser).

<sup>338</sup> See CONG. GLOBE, 41st Cong., 2d Sess. app. 478 (1870).

<sup>339</sup> *Id.* app. at 479. The Fifteenth Amendment, to which this passage refers, is an elaboration of national citizenship rights. See U.S. CONST. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”).

<sup>340</sup> CONG. GLOBE, 41st Cong., 2d Sess. app. 479 (1870).

amendments have been added to that instrument it establishes a Government which it declares shall be administered by the intelligent voice of every citizen within its borders.”<sup>341</sup> The “clear and direct” implication, according to Hoar, is that “if the Government cannot be administered in a constitutional way, to wit, by the intelligent voice of the people, unless that people is educated,” then “of direct logical necessity it becomes the constitutional duty of Congress to secure [public education].”<sup>342</sup>

Importantly, the bill’s supporters made clear that the scope of constitutional concern went beyond the new freedmen. Among the 3.5 million people who could not read or write, blacks and whites comprised almost equal shares,<sup>343</sup> and among school-aged children who did not attend school in 1860, there were more than twice as many whites as blacks.<sup>344</sup> Unlike the racially targeted approach of the Freedmen’s Bureau, Hoar’s proposal sought to provide education universally to whites and blacks. For either race, the principle was the same. Just as educational deprivation threatened to defeat the newly won citizenship of freedmen, “there is a terrible amount of illiteracy among the whites, especially in the southern States, whereby such are rendered unfit for the proper discharge of their political duties and are ignorant of their political rights.”<sup>345</sup> Noting the “three great amendments” recently adopted, Hoar concluded his June 1870 speech by urging: “let us, in extending the charter of freedom over a new race, reaffirm that declaration with wider and more beneficent scope” by extending education “to every citizen in every State and in every locality.”<sup>346</sup>

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<sup>341</sup> CONG. GLOBE, 41st Cong., 3d Sess. 1040 (1871) (Rep. Hoar.).

<sup>342</sup> *Id.*; see also *id.* at 1041. With similar arguments, supporters of the bill also invoked the Guarantee Clause of Article IV, Section 4—“The United States shall guarantee to every State in this Union a Republican Form of Government,” U.S. CONST. art. IV, § 4—as a source of congressional duty to secure public education. See CONG. GLOBE, 41st Cong., 3d Sess. 808-09 (1871) (Rep. Lawrence); *id.* at 1243-44 (Rep. Lawrence); *id.* at 1377 (Rep. Townsend).

<sup>343</sup> See CONG. GLOBE, 41st Cong., 2d Sess. app. 479 (1870) (Rep. Hoar) (estimating that 1,777,779 whites and 1,734,551 blacks were illiterate in 1870 based on Bureau of Education data).

<sup>344</sup> See CONG. GLOBE, 41st Cong., 3d Sess. 1377 (1871) (Rep. Townsend) (citing Bureau of Education statistics showing that 3,821,972 white children and 1,707,800 black children were not attending school in 1860 and that the total (5,529,772) was roughly equal to the number of children who did attend school (5,680,356)).

<sup>345</sup> *Id.* (Rep. Townsend).

<sup>346</sup> CONG. GLOBE, 41st Cong., 2d Sess. app. 486 (1870) (Rep. Hoar).

Like the Freedmen’s Bureau, however, Hoar’s proposal in practice would have targeted the South, where none of the states had a well-developed school system in 1870.<sup>347</sup> In this respect, the Hoar bill was an essential step toward completing the work of Reconstruction but not an example of a genuinely national federal role in public education. Nevertheless, states’ rights objections to the bill pushed its proponents to articulate a notion of federal responsibility that could be applied more broadly than the bill envisioned. Hoar’s basic belief was that illiteracy in the South was not merely a Southern problem but a national problem. His argument for federal responsibility called on Americans not to “slink back into their state boundaries and define themselves again as citizens of Massachusetts, Ohio, or Illinois,” but to “claim their common nationality and fully and finally become Americans, one people, indivisible.”<sup>348</sup> In response to a legislator opposed to federal interference “with educational matters belonging properly to the jurisdiction of the States,”<sup>349</sup> a supporter of the bill explained that “[m]y colleague, in his zeal for State rights, forgets that the citizens of a State are citizens of the nation as well [and] that the nation’s claims upon them are paramount to those of a State.”<sup>350</sup> If the nation “can call on [its citizens] to sit on its juries, to exercise offices of trust and profit, to become law-makers, and assist in

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<sup>347</sup> See CONG. GLOBE, 41st Cong., 3d Sess. 1039-40 (1871) (Rep. Hoar); *id.* app. at 101 (Rep. Arnell) (the Hoar bill “might well be entitled ‘A bill for the better reconstruction of the South’ ”). This sectional focus prompted cries of hypocrisy from Southern legislators who pointed to the North’s own educational failures. See *id.* app. at 96-97 (Rep. McNeely) (observing that use of child labor in Massachusetts impeded many school-aged children from obtaining an education). Some legislators also complained that Hoar gave Southern states too little credit for the educational efforts they were making. Representative Rogers of Tennessee reported that his state, though poor, “felt the need of education” and hence levied a fifty-cent “tax on dogs, exempting one for each family, to carry forward their school system.” *Id.* at 1375 (Rep. Rogers); see *id.* at 1379 (Rep. Booker) (reporting Virginia’s educational progress and declaring “our people are alive to the importance of education”). Hoar’s bill was supported by some Southern legislators, including Representative Clark of Texas and Representatives Arnell and Prosser of Tennessee. See *supra* note \_\_\_\_.

<sup>348</sup> WARD M. MCAFEE, RELIGION, RACE, AND RECONSTRUCTION: THE PUBLIC SCHOOL IN THE POLITICS OF THE 1870S 107 (1998).

<sup>349</sup> CONG. GLOBE, 41st Cong., 3d Sess. 1377 (Rep. McNeely).

<sup>350</sup> *Id.* at 1377-78 (Rep. Townsend).

discharging all governmental duties,” then “does it not impose on itself the obligation to qualify them for the work they may have to do?”<sup>351</sup>

In the end, Hoar put the point this way:

Among the fundamental civil rights of the citizen is, by logical necessity, included the right to receive a full, free, ample education from the Government, in the administration of which it is his right and duty to take an intelligent part. We neglect our plain duty so long as we fail to secure such provision.<sup>352</sup>

Hoar summed up the federal role in a simple formula: “What, then, is the function of the national Legislature? It is twofold. It is to compel to be done what the States will not do, and to do for them what they cannot do.”<sup>353</sup> The duty of Congress was to secure adequate educational opportunity when states fail to do so “either through indifference, hostility to education, or pecuniary inability.”<sup>354</sup> As discussed below, this concept of national responsibility animated subsequent efforts to extend the federal role in education not only to the South but throughout the country.

### **C. 1872: The Perce bill to apply public land proceeds to education**

The Hoar bill died in 1871 without reaching a vote in the House. In addition to complaints of patronage, bureaucracy, and interference with states’ rights, an additional factor leading to its demise was the Senate’s contemporaneous consideration of a proposal by Senator Sumner to compel racial integration in the public schools of the District of Columbia.<sup>355</sup> Members of both parties opposed the idea, and resistance was not

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<sup>351</sup> *Id.* at 1377.

<sup>352</sup> CONG. GLOBE, 42d Cong., 1st Sess. 335 (1871). This remark came during consideration of the Ku Klux Klan Act of 1871 authorizing military force to protect blacks in their civil rights. While believing the Act to be a “necessary measure of relief,” Hoar took the occasion to emphasize that the only “permanent remedy for the evils of the South” is “general education.” *Id.*

<sup>353</sup> CONG. GLOBE, 41st Cong., 2d Sess. app. 485 (June 6, 1870) (Rep. Hoar).

<sup>354</sup> CONG. GLOBE, 41st Cong., 3d Sess. 1377 (Rep. Townsend).

<sup>355</sup> *See id.* at 1055 (Sen. Sumner).

confined to the South.<sup>356</sup> Although the Hoar bill did not address mixed schooling, the fear that “[r]ules adopted for Washington, D.C., could later be grafted onto a national school system” could not have been far from legislators’ minds.<sup>357</sup>

Despite its failure to advance in Congress, the Hoar bill’s underlying notion of federal responsibility quickly took other forms. On January 15, 1872, Congressman Legrand Perce, a Mississippi Republican who was then chairman of the House Education and Labor Committee, introduced a new proposal for federal education aid, this time avoiding any suggestion of national schools run by federal authorities.<sup>358</sup> The bill sought to apply the proceeds of public lands to education by dedicating half the annual revenue from land sales to a perpetual “national educational fund” and by allocating the other half, plus interest from the fund, on the basis of population to each state that provided free education to all children between the ages of six and sixteen.<sup>359</sup> The bill allowed states to spend ten percent of the funds on teacher education and required the rest to be spent on teacher salaries.<sup>360</sup> Moreover, in response to continuing opposition to racially mixed schools,<sup>361</sup> the bill was amended to make clear that no state would lose funding “for the reason that the laws thereof provide for separate schools for white children and black children, or refuse to organize a system of mixed schools.”<sup>362</sup>

The Perce bill was an early version of federal aid through conditional grants. Although it was a clear improvement from the Hoar bill, its de-

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<sup>356</sup> See MCAFEE, *supra* note \_\_, at 111 (“Mixed schools were the logical extension both of the common school idea and the Republican civil rights movement. But the overwhelming majority of whites at that time refused to consider sending their children to schools with significant numbers of black children.”).

<sup>357</sup> *Id.* at 110.

<sup>358</sup> See H.R. 1043, 42d Cong. (1872); CONG. GLOBE, 42d Cong., 2d Sess. 862-63 (1872) (Rep. Perce) (“[T]he question of the establishment of a national system is not in issue. We propose to aid and assist the educational systems adopted by the several States.”).

<sup>359</sup> H.R. 1043, 42d Cong. §§ 3-5 (1872).

<sup>360</sup> See *id.* § 6.

<sup>361</sup> See CONG. GLOBE, 42d Cong., 2d Sess. 569 (1872) (Rep. Storm) (warning that “this bill is a Trojan horse. In its interior are concealed the lurking foe—mixed schools.”); *id.* at 791 (Rep. Kerr) (worrying that Congress would require states, as a funding condition, to establish “mongrel schools, forced association, and resulting demoralization to my own race”).

<sup>362</sup> See *id.* at 882.



tractors characterized it as a “craftily and cunningly-devised” copy of the Hoar bill—“the old cat disguised in the meal-bag”—that threatened “to take charge of the public-school system of the country.”<sup>363</sup> Opponents renewed the claim that “there is no authority in the Constitution to establish a general national system of education”<sup>364</sup> and accused the bill of trying “to do indirectly what we are not allowed to do directly.”<sup>365</sup>

In response, proponents of the bill invoked Article IV’s grant of congressional power “to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.”<sup>366</sup> Perce himself looked to the general welfare clause of Article I as well as the Guarantee Clause of Article IV, offering arguments similar to Hoar’s thesis on federal responsibility for securing national citizenship.<sup>367</sup> But to the extent that the Guarantee Clause implied the necessity of education for *state* not national citizenship, it did not fully capture the constitutional import of Perce’s own proposal. Unlike the Hoar bill, the Perce bill had genuinely national scope. In addition to addressing the needs of whites and blacks,<sup>368</sup> the bill extended the federal role to the North as well as the South on the ground that insufficient education was “a national calamity, and not necessarily sectional.”<sup>369</sup> Moreover,

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<sup>363</sup> *Id.* at 569 (Rep. Storm).

<sup>364</sup> *Id.* app. at 19 (Rep. Herndon).

<sup>365</sup> *Id.* at 569 (Rep. Storm); *see id.* at 788 (Rep. McHenry) (“This bill gives the proceeds of the sale of the lands to the States for school purposes, but reserves to the General Government a superintendence, through its officials, over the expenditure of the money. . . . Congress cannot thus go into the States and control their internal affairs.”); *id.* at 791 (Rep. Kerr) (“the logical effect of [the bill] will unquestionably be to transfer the ultimate control of education in the country to Federal tribunals”); *id.* at 793 (Rep. Parker) (“The bill permits Congress to take possession of the State governments.”).

<sup>366</sup> U.S. CONST. art. IV, § 3, cl.2; *see* CONG. GLOBE, 42d Cong., 2d Sess. 594 (1872) (Rep. Burchard) (“The power to dispose of the public lands by the Congress of the United States, I do not suppose will be questioned by any one”).

<sup>367</sup> *See id.* at 862 (Rep. Perce) (“A republican Government, based upon the will of the people, . . . presupposes an amount of intelligence in the citizen necessary to grasp the various questions presented to him for action.”).

<sup>368</sup> *See id.* at 863 (Rep. Perce) (observing that “in the whole country the number of white persons unable to read or write exceed the number of colored persons by over a hundred thousand”).

<sup>369</sup> *Id.* app. at 16 (Rep. Rainey). Congressman Joseph H. Rainey was the first black elected to the House of Representatives. *See* MCAFEE, *supra* note \_\_\_, at 116-17 (discussing Rainey’s speech in support of the Perce bill); *see also* CONG. GLOBE, 42d Cong., 2d

Perce’s proposal sought to apply a common educational standard throughout the Union. Although the original bill allocated funds based on population, the final version proposed distributing funds on the basis of illiteracy, thereby directing more aid to states with greater need and less fiscal capacity.<sup>370</sup>

Thus the Perce bill in its final version reflected an underlying policy goal of ensuring that “the children of [each] State, who will be called on to discharge the duties of citizens of the United States, shall be educated” to a national standard of literacy, whatever the fiscal capacity of each state.<sup>371</sup> Urging Congress to “step in and lend us a helping hand,” Perce’s fellow Mississippian, Representative George McKee, reminded his colleagues that “[t]he children of the South, white and colored, are not the children of the South alone; they are the children of the nation.”<sup>372</sup> Similarly, echoing President Grant’s proclamation two years earlier, Congressman Henry Dawes of Massachusetts described the bill as a means of securing rights of national citizenship guaranteed by the Fifteenth Amendment. As Dawes put it, the bill sought to discharge “the obligation we took upon ourselves” to ensure that “those we clothed with the ballot should have the means of casting that ballot intelligently”—an obligation now with special importance because “a ballot cast in Massachusetts or Arkansas, or upon the Pacific slope or in Pennsylvania, not only affected the locality where it was dropped, but the whole nation alike.”<sup>373</sup> Dawes saw federal aid to public education as consonant with emerging advances in commerce, transportation, and communications: “we are becoming by means of these forces one people and one nation.”<sup>374</sup>

The Perce bill passed the House on February 8, 1872, by a vote of 117 to 98, with twelve Democrats voting for and twenty Republicans

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Sess. 862 (1872) (Rep. Perce) (observing that the North had 1,356,302 illiterates while the South had 4,189,972).

<sup>370</sup> See *id.* at 882; *id.* at 861-62 (Rep. Perce); *id.* at 795 (Rep. McKee). But after the first ten years, allocations would be based on the number of children in each state. See *id.* at 882.

<sup>371</sup> *Id.* at 794 (Rep. Townsend).

<sup>372</sup> *Id.* at 795 (Rep. McKee).

<sup>373</sup> *Id.* at 861 (Rep. Dawes).

<sup>374</sup> CONG. GLOBE, 42d Cong., 2d Sess. 861 (1872) (Rep. Dawes).

voting against the measure.<sup>375</sup> In December 1872, as the bill went to the Senate, President Grant hailed it as “a measure of such great importance to our real progress and is so unanimously approved by the leading friends of education that I commend it to the favorable attention of Congress.”<sup>376</sup> However, the bill never reached a vote in the Senate “mainly because Senator Morrill . . . insisted that the money should go to the agricultural colleges, in which he took great interest, and not to common schools.”<sup>377</sup> When the bill came up for consideration on February 11, 1873, Senator Morrill moved that it be “passed over,”<sup>378</sup> and it did not surface again.

The Perce bill was significant to the evolving conception of the federal role in several ways. First, it packaged federal aid in the form of conditional grants to the states. Second, its scope was truly national; it was intended to benefit blacks and whites in the North and South. Third, it sought to allocate funds based on a uniform standard of educational need. By targeting illiteracy, the bill served “the purpose of stimulating education to such portions of the country as most greatly need it.”<sup>379</sup> Its funding formula was designed to achieve a degree of equalization across states. Finally, the constitutional debate on federal aid to public education included a restatement of Congress’s power and duty to secure rights of national citizenship.

#### **D. 1882-90: The Blair bills to aid public schools through direct appropriations from the national treasury**

The Perce bill turned out to be the most vigorous effort in the 1870s to extend federal aid to public education. In 1873, Congressman Hoar

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<sup>375</sup> See *id.* at 903; see also LEE, *supra* note \_\_, at 83-84 (analyzing the vote by party and region).

<sup>376</sup> President Ulysses S. Grant, Fourth Annual Message to Congress (Dec. 2, 1872), available at John Woolley & Gerhard Peters, The American Presidency Project, University of California at Santa Barbara, <http://www.presidency.ucsb.edu/ws/-index.php?pid=29513>.

<sup>377</sup> I HOAR, *supra* note \_\_, at 265; see MCAFEE, *supra* note \_\_, at 120 (“As the Republican father of federal aid to agricultural and industrial colleges, Morrill did not like the bill’s diversion of federal land proceeds to primary and elementary education.”).

<sup>378</sup> CONG. GLOBE, 42d Cong., 3d Sess. 1250 (1873) (Sen. Morrill); see MCAFEE, *supra* note \_\_, at 121.

<sup>379</sup> CONG. GLOBE, 42d Cong., 2d Sess. 861 (1872) (Rep. Perce).

introduced legislation that attempted to revive the Perce bill,<sup>380</sup> and throughout the decade, Presidents Grant and Hayes supported federal measures to ensure universal education.<sup>381</sup> In 1875, Grant proposed a constitutional amendment whereby “the States shall be required to afford the opportunity of a good common-school education to every child within their limits.”<sup>382</sup> After the Perce bill, however, these initiatives failed to gain momentum for several reasons. First, the depression of 1873 signaled a period of retrenchment, focusing the attention of legislators on “simple economic survival” and “away from patriotic consideration of national long-term needs.”<sup>383</sup> In this environment, new expenditures by the federal government, and especially redistributive measures, were politically untenable. Second, the subject of mixed schools was brought to the fore by Senator Sumner’s uncompromising advocacy for the inclusion of a ban on segregated schooling in the Civil Rights Act of 1875.<sup>384</sup> Although the Senate voted for the ban in 1874, the move was highly toxic and corroded consideration of the federal role in public education.<sup>385</sup> Third, the *Slaughterhouse* decision in 1873 bolstered opponents of an enlarged federal role in securing rights of national citizenship.<sup>386</sup>

Yet the issue did not disappear and made a strong comeback in the following decade. In 1880, the Senate passed a bill sponsored by Senator Ambrose Burnside of Rhode Island that, like the Perce bill, proposed

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<sup>380</sup> See CONG. GLOBE, 43d Cong., 1st Sess. [104, 149-50, 463-66, 489-91].

<sup>381</sup> See LEE, *supra* note \_\_, at 72-74.

<sup>382</sup> President Ulysses S. Grant, Seventh Annual Message to Congress (Dec. 7, 1875), available at Woolley & Peters, *supra* note \_\_.

<sup>383</sup> MCAFEE, *supra* note \_\_, at 121.

<sup>384</sup> See *id.* at 125-49; McConnell, *supra* note \_\_, at 984-1092.

<sup>385</sup> The Senate’s vote to ban segregated schools was a key factor, along with the depression and political corruption in the Grant administration, in the dramatic losses suffered by Republicans in the 1874 mid-term election. See MCAFEE, *supra* note \_\_, at 166-67; WILLIAM GILLETTE, RETREAT FROM RECONSTRUCTION, 1869-1879, at 211-58 (1979). The ban was stripped out of the civil rights bill before it was passed in 1875. See McConnell, *supra* note \_\_, at 1080-86. Sumner’s strident advocacy on mixed schools could not have helped Hoar’s 1873 effort to revive the Perce bill, especially since Sumner and Hoar both hailed from Massachusetts and were close friends. See MCAFEE, *supra* note \_\_, at 123.

<sup>386</sup> See *id.* at 146 (“That spring [1874], Democrats enjoyed reminding Republicans that a Republican Court had ruled in the *Slaughterhouse Cases* of the year before that the privileges and immunities of United States citizens did not include public education.”).

establishing a national education fund from the proceeds of public lands.<sup>387</sup> The brief three-day discussion on the bill made little mention of constitutional issues.<sup>388</sup> Unlike the Perce bill in the House, the Burnside bill cleared the Senate with a wide bipartisan margin: twenty-two Republicans and nineteen Democrats voted in favor of the bill, while only six Democrats opposed it.<sup>389</sup> As Professor Lee has noted, the lopsided majority was significant because the South by that time had reverted to Democratic control: “Southern Democrats had joined Northern Republicans in leading the campaign for federal aid to common schools.”<sup>390</sup> But the Burnside bill met “a ceaseless campaign of obstruction in the House” and never reached a vote.<sup>391</sup>

The Hoar, Perce, and Burnside bills, along with the early work of the federal Bureau of Education, set the stage for the most significant education aid proposal of the postbellum period. Sponsored by Senator Henry Blair of New Hampshire, chairman of the Committee on Education and Labor,<sup>392</sup> the proposal intensely engaged the Senate throughout much of the 1880s and won passage in that chamber in 1884, 1886, and 1888 before failing in 1890.<sup>393</sup> For several reasons, the Blair bill was the high-

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<sup>387</sup> [cites: Lee 58-59; Cong. Rec., 46th Cong., 1st Sess. 147] The Burnside bill differed from the Perce bill in two key respects. First, all proceeds from public lands, not merely half, were to be kept in a permanent fund, with only the interest available for annual distributions to the states. [cite] Second, one-third of the money annually available would be distributed to land-grant colleges. [cite]

<sup>388</sup> [Cong. Rec., 46th Cong., 1st Sess. 147; 3d Sess. 147-154, 180-185, 213-229, 1908]

<sup>389</sup> [cite to Cong Rec]; LEE, *supra* note \_\_, at 85.

<sup>390</sup> *Id.*

<sup>391</sup> *Id.* at 86.

<sup>392</sup> Henry William Blair, a Republican Senator from 1879 to 1891, is not to be confused with Francis Preston Blair, a Missouri Democrat who served in the Senate from 1871 to 1873. Francis Blair was an opponent of radical Republicanism who once advocated the removal of blacks from the United States and their resettlement “within the tropics of America.” CONG. GLOBE, 42d Cong., 2d Sess. 3252 (1872).

<sup>393</sup> Senator Blair first introduced the bill in 1882, *see* [Cong. Rec., 47th Cong., 1st Sess. 4833 (1882)], but it did not receive thorough consideration until the next session in 1884, *see* 15 CONG. REC. 1999 (1884). In describing the bill, I will refer to the version passed by the Senate on April 7, 1884 (S. 398), and reintroduced by Blair in 1885 (S. 194) and in 1887 (S. 371). *See* S. 398, 48th Cong. (1884), *reprinted in* 17 CONG. REC. 1282 (1886); S. 194, 49th Cong. (1886) (as amended); S. 371, 50th Cong. (1887) (as amended).

water mark in the early development of the federal role in public education.

First, the Blair bill introduced the idea of granting federal aid to the states—\$77 million over an eight-year period—in the form of direct appropriations from the national treasury, not from public lands.<sup>394</sup> Subsequent federal aid proposals have treated support for education as part of the general operations of the national government. Second, like the Perce and Burnside bills, the Blair bill proposed a distribution of funds based on the rate of illiteracy in each state among persons ten years of age and over.<sup>395</sup> This allocation envisioned an equalizing federal influence across the states. Southern states would have received over three-fourths of the appropriations, which helped secure Southern support for the bill.<sup>396</sup>

Third, the Blair bill further developed the notion of state and local administration of public schools within a framework of conditions on federal aid.<sup>397</sup> While allowing racially segregated schools, the bill required participating states to provide “by law a system of free common schools for all of its children of school age, without distinction of race or color, either in the raising or distributing of school revenues or in the school facilities afforded.”<sup>398</sup> After the backlash against Sumner’s mixed-schools proposal, a separate-but-equal standard may have been the only viable option in the 1880s for “giving to each child, without distinction of race or color, an equal opportunity for education” or anything

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<sup>394</sup> See S. 194, 49th Cong. § 1 (1886). Senator Blair characterized his bill as a “temporary aid” measure intended to coexist with the perpetual education fund from public land sales proposed by the Burnside bill, whose passage Blair also urged in 1884. See S. Rep. 101, pt. 2, 48th Cong., 1st Sess. 28-29 (1884), *reprinted in* 17 CONG. REC. 1248-49 (1886).

<sup>395</sup> See *id.* § 2.

<sup>396</sup> See LEE, *supra* note \_\_\_, at 131-35 (describing support for the bill among Southern newspaper editors); *id.* at 157 (vote tally showing that a majority of Southern Democrats supported the bill in 1884, 1886, and 1888).

<sup>397</sup> Distinguishing itself from the Hoar bill, the Blair bill described its “design” as “not being to establish an independent system of schools, but rather to aid for the time being in the development and maintenance of the school system established by local government.” S. 194, 49th Cong. § 7 (1886).

<sup>398</sup> *Id.* § 3; see *id.* § 14 (requiring participating states to “distribute the moneys raised for common school purposes equally for the education of all the children, without distinction of race or color”).

close to it.<sup>399</sup> In addition, the Blair bill required each state to spend at least as much from its own funds as it received from the federal government,<sup>400</sup> introducing a simple model of cooperative federalism. The bill also prohibited the use of federal funds for school construction or parochial schools,<sup>401</sup> and it required instruction in federally funded schools to include “reading, writing, and speaking the English language, arithmetic, geography, [and] history of the United States.”<sup>402</sup>

Fourth, the Blair bill is notable for the quality and thoroughness of the debates leading up to its passage by the Senate in three consecutive sessions.<sup>403</sup> Spanning hundreds of pages in the *Congressional Record*, the debates showed Blair and his colleagues on both sides of the bill to be formidable policy wonks and able constitutional lawyers.<sup>404</sup> In his opening remarks on the bill in 1884, Blair began by laying an empirical foundation for the consideration of public education as a national issue. This foundation took the form of twenty-seven tables of education statistics, mostly compiled by the federal Bureau of Education.<sup>405</sup> Altogether, the tables furnished “practically all the statistical information that exists

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<sup>399</sup> *Id.* § 10. As historian Daniel Crofts has shown, the Blair bill garnered significant support from blacks. *See* Crofts, *supra* note \_\_, at 46. “Implicit in their support for this legislation was the assumption—or at least the hope—that Redeemer governments could be trusted to treat black schools fairly and to supply them with an equitable share of any federal aid. Such an expectation may not have been completely farfetched when the Blair bill was drafted in the early 1880s.” *Id.* *But cf.* ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* 323-24 (1997) (taking less sanguine view of Southern support for equal education for blacks).

<sup>400</sup> S. 194, 49th Cong. § 7 (1886).

<sup>401</sup> *Id.* §§ 9-10.

<sup>402</sup> *Id.* § 5. Like the Perce bill, the Blair bill also authorized states to use up to 10 percent of federal aid for teacher training. *See id.* § 8.

<sup>403</sup> Although writing before passage of the Elementary and Secondary Education Act of 1965, historian Gordon Lee observed in 1949 that the debates on the Blair bill “[u]nquestionably . . . rank among the finest ever held in Congress on any legislation dealing with educational affairs.” LEE, *supra* note \_\_, at 147.

<sup>404</sup> Blair himself was nominated by President Harrison to a federal judgeship at the end of his Senate term in 1891, but he declined the post. *See* Biographical Directory of the United States Congress, at <http://bioguide.congress.gov/scripts/biodisplay.pl?index=B000524> (last visited May 10, 2005).

<sup>405</sup> *See* 15 CONG. REC. 2013-29 (1884).

in this country in the possession of the Government . . . bearing on the subject-matter of education.”<sup>406</sup>

This unprecedented compilation of data revealed large interstate variations in terms of educational needs, school expenditures, and revenue-raising capacity. The per capita value of real and personal property in New England, where enrollment rates were high and illiteracy rates low, was 40 percent greater than in the mid-Atlantic states, two times greater than in the Midwest and West, and four times greater than in the South, where enrollment rates were low and illiteracy rates high.<sup>407</sup> Disparities in education spending reflected these disparities in revenue-raising capacity, as New England states spent three or four times more per pupil than Southern states.<sup>408</sup> With these data, owing largely to the creation of a federal education agency, Blair established a strong predicate for the necessity of federal aid.

In addition to policy details, constitutional considerations also received thorough treatment from the bill’s supporters and opponents. Much of the debate addressed the Spending Clause, framing issues that would not be settled for another half-century.<sup>409</sup> Yet Blair made his ar-

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<sup>406</sup> *Id.* at 2029 (Sen. Blair). Among other things, Blair’s presentation included state-by-state data on the school-age population, public school enrollment, average daily attendance, number of schools, number of teachers, length of school year, and extent of illiteracy in the general population and among school-age children, broken down by race. *See id.* at 2014-19 tbls.3, 5-8, 10. It also included state-by-state data on per-pupil expenditures, property values, tax rates, indebtedness, and the expected distribution of funds based on illiteracy. *See id.* at 2014-15 tbl.3; *id.* at 2019-29 tbls.11, 12, 14-18, 20-24.

<sup>407</sup> *See id.* at 2014-15 tbl.3; *id.* at 2016-18 tbls.5-7; *id.* at 2022-23 tbl.15; *see also* S. Rep. 101, pt. 2, 48th Cong., 1st Sess. 22 (1884) (showing that, among the states, educational “necessity is most pressing where the ability to meet its requirements is least, making assistance from a central power indispensable”), *reprinted in* 17 CONG. REC. 1246 (1886).

<sup>408</sup> *See* 15 CONG. REC. 2014-15 tbl.3 (1884) (showing “Expenditure in the year—per capita of pupils enrolled in public schools”).

<sup>409</sup> Opponents of the bill argued that Congress has no power “to tax the people of the United States in order to raise revenue to be expended on a subject, unless the Government of the United States has jurisdiction over that subject.” *Id.* at 2373 (Sen. Coke). Because the Constitution does not give Congress authority over education—“the common schools of this country pertain only to the jurisdiction of the States,” *id.* at 2460 (Sen. Coke)—it “is not a proper object for the appropriation of money out of the Federal Treasury.” *Id.* at 2066 (Sen. Saulsbury); *cf. id.* at 2213 (Sen. Vest) (contending that Congress may aid the states in public education but may not “prescribe the details of the system of education in the State”). In response, the bill’s supporters argued that the Spending Clause authorizes taxation and appropriation for “any purpose of a national and



guments on a different constitutional axis. His committee report accompanying the bill began by invoking the “power” and “duty” of Congress to ensure that citizens, newly defined by the Citizenship Clause, have sufficient education for self-government:

Our leading proposition is that the General Government possesses the power and has imposed upon itself the duty of educating the people of the United States whenever for any cause those people are deficient in that degree of education which is essential to the discharge of their duties as citizens either of the United States or of the several States wherein they chance to reside.<sup>410</sup>

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

I say public life with no reference to the incumbency of political office. By the public life of an American citizen I refer to his life as a sovereign; to his constant participation in the active government of his country; to the continual study and decision of political issues which devolve upon him whatever may be his occupation; and to his responsibility for the conduct of national and State affairs as the primary law-making, law-construing, and law-executing power, no matter whether or not he is personally engaged in the public service as policeman or President, as any State official whatever, member of Congress, Chief-Justice of the United States, or a humble justice of the peace. In republics official stations are servitudes. The citizen is king.<sup>411</sup>

Thus, Blair argued, the nation must secure to each person a degree of education “commensurate with the character and dignity of the station which he occupies by the theory of the government of which he is a

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general character” as determined by Congress, *id.* at 2506 (Sen. George), citing the Morrill Act and other examples as precedent. *See id.* at 2205 (Sen. Garland); *id.* at 2373-75 (Sen. George). These debates were later resolved in favor of federal power. *See* *South Dakota v. Dole*, 483 U.S. 203 (1987); *United States v. Butler*, 297 U.S. 1 (1937).

<sup>410</sup> S. Rep. 101, pt. 2, 48th Cong., 1st Sess. 1-2 (1884), *reprinted in* 17 CONG. REC. 1240 (1886).

<sup>411</sup> 15 CONG. REC. 2000 (1884) (Sen. Blair).

part.”<sup>412</sup> “We think it is clear,” he concluded, “that the nation has the power, which implies the duty of its exercise when necessary, to educate the children who are to become its citizens.”<sup>413</sup>

Echoing this theme, Democratic Senator Joseph Emerson Brown of Georgia, a graduate of Yale Law School and former chief justice of the Georgia Supreme Court, described the Blair bill as an expression of Congress’s power and duty to secure the constitutional guarantee of national citizenship. Quoting the Citizenship Clause, Brown drew an analogy between the Blair bill and the voting rights enforcement acts recently passed by Congress and partially sustained by the Supreme Court.<sup>414</sup> “If Congress has power to protect the voter in the free exercise of the use of the ballot,” he argued, “it must have power to aid in preparing him for its intelligent use. And without educating the voter, . . . without, in other words, preparing him for the duty of citizenship, he can not be a citizen, at least not a useful citizen.”<sup>415</sup>

Similarly, Senator Charles William Jones of Florida, also a Democrat and a lawyer, saw no need to anchor the bill in the general-welfare clause, instead emphasizing the “revolution” and “great fundamental change” effected by the Civil War amendments and especially by the Citizenship Clause.<sup>416</sup> “The Constitution of the United States having made citizens and voters out of 5,000,000 of slaves and cast upon the people of the States the duty of educating them for the exercise of political power, surely there can be nothing very unreasonable in the Govern-

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<sup>412</sup> *Id.*

<sup>413</sup> S. Rep. 101, pt. 2, 48th Cong., 1st Sess. 28 (1884), *reprinted in* 17 CONG. REC. 1248 (1886). Like Congressman Perce before him, Senator Blair also invoked the Guarantee Clause as a ground of federal duty to aid the states in public education, although this argument, which spoke to state citizenship, was in Blair’s view secondary to the necessity of education for national citizenship. *See* S. Rep. 101, pt. 2, 48th Cong., 1st Sess. 4 (1884), *reprinted in* 17 CONG. REC. 1240 (1886); 15 CONG. REC. 1999-2000 (1884) (Sen. Blair).

<sup>414</sup> *See* *Ex parte Yarborough*, 110 U.S. 651 (1884) (sustaining conviction of private individual under Ku Klux Klan Act of 1871 for assaulting black voters to deter their participation in a congressional election); *Ex parte Siebold*, 100 U.S. 371 (1879) (sustaining application of Enforcement Act of 1870 to convict local election officials of stuffing the ballot box in federal election).

<sup>415</sup> 15 CONG. REC. 2251 (1884) (Sen. Brown).

<sup>416</sup> *Id.* at 2151-52 (Sen. Jones).

ment of the United States aiding the States in educating these people.”<sup>417</sup> The Blair bill sought to discharge “the obligation that rests upon the Union to prepare those people who were made citizens for the preservation of the Union for the exercise of intelligent citizenship in the Union.”<sup>418</sup>

Although the citizenship argument called attention to the plight of the new freedmen, Blair conscientiously articulated the federal duty to secure education in more universal terms, thereby garnering support from both Northern Republicans and Southern Democrats.<sup>419</sup> As the Perce bill had shown, the use of illiteracy as the basis for distributing aid ensured that the scope of educational need, though most acute among Southern blacks, would radiate outward to the rest of the nation. Blair’s statistics made it difficult for legislators to ignore white illiteracy in the South or black illiteracy in the North.<sup>420</sup> Eager to avoid the sectionalism of the Hoar bill and the racial identifiability of the Freedmen’s Bureau, Blair explained that his “bill endeavors carefully to avoid all recognition of distinctions of race or color. There is no appeal to Northern or Southern prejudice in the bill. Illiteracy is taken as the basis of distribution, because illiteracy is the only mathematical, available, pertinent measure of the necessity of the case . . . .”<sup>421</sup> “Of course,” he acknowledged, “the necessity is less in the New England States . . . . Yet if the census is at

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<sup>417</sup> *Id.* at 2151 (Sen. Jones). Although *Slaughterhouse* misconstrued the significance of the Citizenship Clause, Senator Jones put his best gloss on the case, reading the Court’s recognition that “a person could be a citizen of the United States without being a citizen of a State” to imply the primacy of national citizenship. *Id.* at 2151. Senator Blair simply ignored *Slaughterhouse* in suggesting that education is a privilege of both state and national citizenship and is thus subject to state and federal authority concurrently. His bill did not threaten states’ rights, he argued, because “[t]he fact that the same individual child is to become a citizen of both governments does not deprive the National Government of its power to qualify that child to be its own citizen, to vote and act intelligently so far as the creation or the maintenance of the national powers are [sic] concerned.” *Id.* at 2063 (Sen. Blair).

<sup>418</sup> *Id.* at 2251 (Sen. Brown).

<sup>419</sup> See Crofts, *supra* note \_\_, at 43-44.

<sup>420</sup> According to the 1880 census, the rate of illiteracy among Southern whites age 10 or older, though lower than among Southern blacks, was still 20 percent or higher in Alabama, Arkansas, Florida, Georgia, Kentucky, North Carolina, South Carolina, and Tennessee. The illiteracy rate among Northern blacks, though lower than among Southern blacks, was at least 20 percent in almost all Northern states and, in some cases, higher than 30 percent. See 15 CONG. REC. 2017 tbl.6 (1884) (Sen. Blair).

<sup>421</sup> *Id.* at 2069.

all reliable it is a fact that there is a great deal of illiteracy prevailing even in New England . . . .<sup>422</sup> Moreover, he declared, “I am not willing to stand here and say that the son of a confederate officer or soldier shall not be educated as well as the child of his former slave. Give them both equal privileges in the direction of education, give them both the same chance to prepare for the future of American citizenship.”<sup>423</sup>

The citizenship argument drew few objections. Like Justice Bradley’s opinion for the Court in the *Civil Rights Cases*, Senator Randall Lee Gibson of Louisiana argued that the Civil War amendments “are limitations and restraints upon the power of the States” and “do not afford a basis for affirmative legislation.”<sup>424</sup> Senator Eli Saulsbury of Delaware complained that the authority to “educate for the purpose of qualification for citizenship” had “no limit” and might encompass “moral and perhaps religious training” if deemed necessary by Congress.<sup>425</sup> But these concerns were not amplified by other critics of the bill, who mainly worried that the measure would produce an unhealthy dependence on the

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<sup>422</sup> *Id.* at 2070; *see also* S. Rep. 101, pt. 2, 48th Cong., 1st Sess. 21-23 (1884) (showing that, in many Northern cities, over half the school-age population was not enrolled in school and concluding that “there is as great danger to the future of the country from the Northern cities as from the Southern States”), *reprinted in* 17 CONG. REC. 1246 (1886).

<sup>423</sup> 17 CONG. REC. 1726 (1886) (Sen. Blair). Blair’s concern for educating whites stemmed not only from considerations of equity but also from his belief in the ability of education to temper white racism. Citing KKK-led violence perpetrated by “the ignorant and degraded white man,” Blair said “[w]e but half perceive our duty when we say we discharge it by educating the colored man” and declared it essential that his “white brothers be educated, be refined by a higher form of civilization, be taught to respect his rights.” *Id.* at 1730.

<sup>424</sup> 15 CONG. REC. 2589 (1884) (Sen. Gibson).

<sup>425</sup> *Id.* at 2467 (Sen. Saulsbury).

federal government,<sup>426</sup> a federal takeover of public schools,<sup>427</sup> or wasteful or inequitable spending.<sup>428</sup>

The Blair bill won impressive backing in the Senate from a bipartisan, geographically diverse coalition. In presenting his bill, Blair had amassed dozens of letters, testimony, and memorials from school superintendents, education experts, and influential leaders in the North and South urging the establishment of national aid to education.<sup>429</sup> The Senate votes on the bill reflected this wide-ranging support.<sup>430</sup> In 1884, the bill passed the Senate by a margin of thirty-three to eleven, with nineteen Northern and Western Republicans together with fourteen Southern Democrats voting in favor. Similarly, in 1886, the bill passed by a vote of thirty-six to eleven, with the majority comprised of eighteen Republicans and eighteen Democrats. In 1888, the bill passed by a narrower margin, thirty-nine to twenty-nine, but still managed to attract bipartisan support spanning all regions of the country. The political viability of the Blair bill is underscored by the virtual certainty that, had the House passed it in 1884, President Arthur would have signed it into law.<sup>431</sup> The bill's fate would have been less certain in 1886 or 1888 had it reached the desk of

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<sup>426</sup> See *id.* at 2103 (Sen. Plumb) (“the beneficence of the General Government . . . will shrivel up all [the] aspirations of the people themselves, will induce them . . . to put out their children to nurse to the General Government, take away the interest of the people in regard to this great subject, and substitute for it the idea of leaning upon the General Government for everything” concerning education); *id.* at 2246 (Sen. Maxey) (same).

<sup>427</sup> See *id.* at 2292 (Sen. Butler) (“My prediction is that if this money is appropriated under this bill . . . ten years will not roll around before the National Government will have control of every common school in the United States.”); *id.* at 2102 (Sen. Plumb) (same).

<sup>428</sup> See *id.* at 2062, 2252-54 (Sen. Sherman) (arguing that the bill lacked sufficient controls to ensure that states do not discriminate on the basis of race in the use of federal funds); *id.* at 2100 (Sen. Wan Vyck) (same).

<sup>429</sup> See *id.* at 2002-09; see also LEE, *supra* note \_\_, at 94-139 (discussing attitudes toward the Blair bill among labor unions, the business community, the education profession, the media, churches, and other interest groups); Crofts, *supra* note \_\_ (discussing support for the bill among blacks).

<sup>430</sup> The votes described in the next three sentences are helpfully summarized in LEE, *supra* note \_\_, at 157. The recorded votes on the Blair bill appear at 15 CONG. REC. 2724 (1884), 17 CONG. REC. 2105 (1886); 19 CONG. REC. 1223 (1888), and 21 CONG. REC. 2639 (1890).

<sup>431</sup> See LEE, *supra* note \_\_, at 141-42 (crediting President Arthur with “the most decisive and direct challenges to Congress on behalf of federal aid of any nineteenth century president” based on his annual messages to Congress).

President Cleveland, a states' rights Democrat,<sup>432</sup> yet the Senate votes showed that many Democrats were willing to support it.

In any event, the Blair bill never came to a vote in the House. Although as many as two-thirds of the House favored the measure,<sup>433</sup> a determined minority led by House Speaker and Rules Committee Chairman John Carlisle, a Kentucky Democrat, repeatedly referred the bill to unfriendly committees that refused to report it for consideration or reported on it adversely.<sup>434</sup> By 1890, the bill faced growing resistance to federal intervention and racial equalization among Southern Democrats, compounded by signs of economic recovery in the South that undermined the argument for federal aid.<sup>435</sup> When Blair brought his bill to a vote in the Senate for the fourth time, it failed by a margin of thirty-seven to thirty-one, as Democrats for the first time mustered a majority in opposition to the measure.<sup>436</sup> The demise of the Blair bill was part of developments indicating that “the federal government had washed its hands of the South,”<sup>437</sup> and it effectively silenced consideration of federal aid to education for the next thirty years.

In sum, the Hoar, Perce, and Blair bills sought to strengthen the ideal of nationhood arising from the creation of a new polity comprised of “citizens of the United States.” These bills engaged Congress in elaborating the meaning of national citizenship in the manner contemplated by Justice Harlan’s dissent in the *Civil Rights Cases*. In seeking to extend educational opportunity to all children, leading proponents of federal aid

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<sup>432</sup> See *id.* at 144-45.

<sup>433</sup> See ELLWOOD P. CUBBERLEY, READINGS IN PUBLIC EDUCATION IN THE UNITED STATES: A COLLECTION OF SOURCES AND READINGS TO ILLUSTRATE THE HISTORY OF EDUCATIONAL PRACTICE AND PROGRESS IN THE UNITED STATES 369, 371 (1934) (reprinting 1887 speech by Senator Blair to the National Education Association in which Blair reported that “a test vote” in the House showed “a majority of 160 in its favor to 76 against it”).

<sup>434</sup> See *id.* at 370-71; see also LEE, *supra* note \_\_, at 158 (observing that, according to Blair and others, the Speaker had packed the House Committee on Education with opponents of federal aid); Crofts, *supra* note \_\_, at 44 (Blair bill “never reached the floor of the House, thanks to the parliamentary intrigues of northern and border state Democrats, who dominated the House leadership”).

<sup>435</sup> See LEE, *supra* note \_\_, at 148, 159.

<sup>436</sup> See 21 CONG. REC. 2639 (1890); LEE, *supra* note \_\_, at 157.

<sup>437</sup> Crofts, *supra* note \_\_, at 44 (noting that the same Congress also defeated legislation to strengthen federal supervision over Southern elections).

understood the measures as an exercise of Congress's power and duty to enforce and give substance to the guarantee of American citizenship. From the Freedmen's Bureau to the Blair bill, the series of proposals steadily expanded the scope of federal responsibility for aiding public education. What began as a racially and sectionally exclusive concern evolved into a broad national priority. Amid persistent worries about federal overreaching and resistance to mixed schools, federal aid took the form of conditional grants that sought to accommodate state prerogatives while mandating racially equal if separate education. Guided by a national standard of literacy for effective citizenship, the proposals envisioned a distribution of aid that would substantially lessen educational inequality across states. This constitutionally informed conception of the federal role garnered sustained bipartisan and regionally diverse support. But for "parliamentary obstructionism" in the House,<sup>438</sup> the Blair bill in all likelihood would have become law.

In 1927, Ellwood Cubberley offered this postmortem on the two decades of legislative activity between 1870 and 1890:

The unsuccessful attempts in Congress after the Civil War to inaugurate a generous system of national education . . . brought before the people for the first time the question of national education and evoked a remarkable series of discussions, particularly in the United States Senate. Though the logic of the arguments presented was clearly in favor of national action, and though any one of the Blair bills would have passed had it ever come to a vote in the House, the persisting bitterness of sectional strife prevented constructive action. That such a grant of national aid would have been good business for the North, as well as just and generous to the South; that it would have aided the South in recovering from the effects of the civil strife; and would have laid the foundations for an extensive system of national aid for education, which probably would have been well developed by now, is generally recognized today.<sup>439</sup>

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<sup>438</sup> LEE, *supra* note \_\_, at 158.

<sup>439</sup> ELLWOOD P. CUBBERLEY, *STATE SCHOOL ADMINISTRATION: A TEXTBOOK OF PRINCIPLES* 52 (1927).

Yet despite the missed opportunities, the constitutional basis and policy design of the Reconstruction-era legislation left important legacies for the development of the federal role in public education.

### E. Educational adequacy and equal citizenship

Given the magnitude of interstate disparities at the time, Senator Blair had no illusion that the federal government could produce absolute equality of educational opportunity across the nation. His bill taxed wealthier states for the benefit of poorer states, and for this he offered no apology: “You may call it a leveling theory, but it is the theory upon which this bill and republican creeds are built.”<sup>440</sup> But Blair understood that the extent of leveling would be modest. Even with the proposed federal aid, he acknowledged, “the Southern colored child as well as the Southern white child is still left greatly to the disadvantage as compared with the Northern child.”<sup>441</sup> Instead of absolute equality, the Blair bill sought to guarantee “[t]he indispensable standard of education for the people of a republic”<sup>442</sup>—what we might call educational adequacy for equal citizenship.

The standard of adequacy Blair envisioned was higher than “the nominal capacity to read and write.”<sup>443</sup> Although basic literacy was the measure for which data were available and thus served as a basis for distributing aid, Blair saw it as “a very low standard of education compared with that which should be set up in the common school.”<sup>444</sup> Basic liter-

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<sup>440</sup> 17 CONG. REC. 1726 (1886) (Sen. Blair). Blair’s proposed “leveling” had a precedent in “the system provided by the Morrill Act whereby lands were taken from those states which possessed them and were made available to those states which had none.” LEE, *supra* note \_\_, at 17.

<sup>441</sup> 15 CONG. REC. 2070 (1884) (Sen. Blair). Under the Blair bill, the average yearly appropriation would have increased the 1880 level of school expenditures across the South by 60 percent and would have more than doubled expenditures in Alabama, Florida, Georgia, Louisiana, North Carolina, South Carolina, and Tennessee. *See id.* at 2027 tbl.22. Even so, per-pupil spending in the South would have continued to lag behind the rest of the country.

<sup>442</sup> *Id.* at 2000 (Sen. Blair).

<sup>443</sup> *Id.*; *see* S. Rep. 101, pt. 2, 48th Cong., 1st Sess. 12 (1884) (“It by no means follows that the person who can read and write is therefore qualified to discharge his duty as a sovereign.”), *reprinted in* 17 CONG. REC. 1242 (1886).

<sup>444</sup> 15 CONG. REC. 2000 (1884) (Sen. Blair).



acy “suffices merely to accomplish the ordinary business of life under the careful supervision of others, and is not really the source of knowledge and the means of interchange of thought.”<sup>445</sup> Educational opportunity, according to Blair, should prepare all citizens to participate actively in self-government and in all the duties of public life, not limited to holding elective office.<sup>446</sup> It should “enable the citizen sovereign to obtain and interchange ideas and knowledge of affairs as well as to transact intelligently and safely all matters of business in the avocations of life.”<sup>447</sup> Blair described these capacities as “indispensable” qualifications “for the duties and opportunities of citizenship.”<sup>448</sup> His ambition was to educate the citizenry to a “high level . . . where equality and sovereignty are convertible terms.”<sup>449</sup>

Of course, public education in the United States has advanced considerably since the Blair bill. Interstate disparities are not as extreme as they once were, and educational attainment has risen far beyond the level that prevailed a century ago. However, educational adequacy for equal citizenship does not imply a static threshold uninformed by societal transformations over time. It is instead an evolving standard shaped by social context from one generation to the next. In the postbellum era, the early aid bills aimed to achieve neither a wholesale leveling of opportunity (much more investment would have been required) nor merely minimum provision for the necessities of life (less than basic literacy would have sufficed). Instead, they sought to provide sufficient opportunity for all persons—from the humblest black man in Arkansas to the factory owner in Maine, from the descendants of Confederate officers to the descendants of their former slaves—to have equal dignity as American citizens.

In our era, as in Blair’s, educational adequacy depends on prevailing norms and expectations. The concept must account for what is required to secure not only a basic level of human functioning, but also a level of

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<sup>445</sup> S. Rep. 101, pt. 2, 48th Cong., 1st Sess. 12 (1884), *reprinted in* 17 CONG. REC. 1242 (1886).

<sup>446</sup> *See* 15 CONG. REC. 2000 (1884) (Sen. Blair).

<sup>447</sup> *Id.*

<sup>448</sup> *Id.*

<sup>449</sup> S. Rep. 101, pt. 2, 48th Cong., 1st Sess. 12 (1884), *reprinted in* 17 CONG. REC. 1242 (1886).

“social functioning” that is typical among one’s fellow citizens.<sup>450</sup> As educational achievement and attainment have increased, so too has the amount of education necessary to enjoy equal citizenship—to have respect as a full member of society, to participate effectively in collective decision-making and public life, to exercise responsibility for oneself and the well-being of one’s community, and “to live the life of a civilised being according to the standards prevailing in the society.”<sup>451</sup> Equal citizenship does not require total elimination of inequality, since not all disparities in educational opportunity impair full belonging to society. But it does demand attention to inequalities that frustrate effective participation in public life.

It would be convenient to think that interstate educational disparities now occur within a sufficiently narrow range or above a sufficiently high threshold that they no longer undermine equal citizenship.<sup>452</sup> But it is

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<sup>450</sup> AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 89 (1999). Sen argues that “the standard of living is . . . not a matter directly of opulence, commodities or utilities” but “really a matter of functionings and capabilities” whose material prerequisites vary with the average wealth of the society in which a person lives. AMARTYA SEN, *THE STANDARD OF LIVING* 16 (1987); *see id.* at 18 (“To lead a life without shame, to be able to visit and entertain one’s friends, to keep track of what is going on and what others are talking about, and so on, requires a more expensive bundle of goods and services in a society that is generally richer . . .”).

<sup>451</sup> MARSHALL, *supra* note \_\_, at 11; *see* Karst, *supra* note \_\_, at 5-11; *see also* FRED HIRSCH, *SOCIAL LIMITS TO GROWTH* 46-51 (1976) (discussing the declining market value of a given educational credential in the context of increasing educational attainment throughout society); Timothy Egan, *No Degree, and No Way Back to the Middle*, N.Y. TIMES, May 24, 2005, at A1 (observing that individuals with only a high school diploma and no college degree now live “at the margins of the middle class”). Although the equality-versus-adequacy debate continues in educational policy, *see, e.g.*, Debra Satz, *Inequalities in Schooling: The Case for Democratic Adequacy* (forthcoming); William S. Koski & Robert Reich, *When Adequate Isn’t: The Retreat from Equality in Educational Law and Policy and Why It Matters* (forthcoming), the perspective I take here seeks to soften the dichotomy by defining adequacy in relative terms. *See* SUNSTEIN, *supra* note \_\_, at 191 (“What qualifies as enough, or a decent minimum, is affected by what other people possess.”); Michelman, *supra* note \_\_, at 18 (arguing that for some of the “just wants” deserving minimum protection in society, including education, “the just minimum is understood to be a function (in part) of the existing maximum”).

<sup>452</sup> *Cf.* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 24 (1973) (crediting the state’s assurance that every child receives “at least an adequate program of education” in upholding Texas’s concededly unequal system of school finance). Although *Rodriguez* said that “[n]o proof was offered at trial persuasively discrediting or refuting the State’s assertion,” *id.*, the record is to the contrary. *See* Brief for Appellees at 17-18, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (No. 71-1332) (citing record evi-

doubtful that low-spending states such as Alabama, California, Mississippi, and New Mexico, where the nation's minority and poor children are concentrated, could be said to offer adequate preparation for citizenship on a par with the basic opportunities afforded by high-spending states such as New York, Wyoming, and Massachusetts. Thoughtful court decisions in recent years have found the educational *floor* in many high-spending states to be inadequate, despite equaling or exceeding the educational *average* in many low-spending states.

In New York, where black and Hispanic student achievement is comparable to average student achievement in Alabama or California, the state high court in 2003 held that the public education system was failing to provide New York City's predominantly minority schoolchildren with the skills and knowledge necessary "to eventually function productively as civic participants capable of voting and serving on a jury" and to address "the public problems confronting the rising generation."<sup>453</sup> In Wyoming, where low-income students outperform the average student in Mississippi or New Mexico, the supreme court in 1995 held that students in poor districts lacked adequate "opportunity to become equipped for their future roles as citizens, participants in the political system, and competitors both economically and intellectually."<sup>454</sup> Similarly, the Supreme Judicial Court of Massachusetts in 1993 declared that the state was not providing adequate education to children in low-wealth districts, where per-pupil spending exceeds the median in many low-spending states.<sup>455</sup> If the low end of educational provision in these high-spending states is cause for concern, then the average level of provision in low-spending states is too.

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dence that "The State Foundation Program Does Not Assure a Minimum Educational Program").

<sup>453</sup> Campaign for Fiscal Equity v. State, 801 N.E.2d 326, 330 (N.Y. 2003).

<sup>454</sup> Campbell County Sch. Dist. v. State, 907 P.2d 1238, 1259 (Wyo. 1995); see State v. Campbell County Sch. Dist., 19 P.3d 518, 526-27 (Wyo. 2001) (providing guidance to the legislature for developing a school finance system that assures each child an education "appropriate for the times"); State v. Campbell County Sch. Dist., 32 P.3d 325 (Wyo. 2001) (further clarifying school finance requirements).

<sup>455</sup> McDuffy v. Secretary of Educ., 615 N.E.2d 516, 555-56 (Mass. 1993); cf. Hancock v. Comm'r of Educ., 822 N.E.2d 1134, 1137-40 (Mass. 2005) (concluding, in light of school finance and other education reforms since *McDuffy*, that state legislature is meeting its constitutional obligation to provide an adequate education to every child).

Although educational inequalities between states have lessened since Reconstruction, it is unlikely that lingering disparities will become much narrower without a more robust federal role. The overall level of interstate inequality in per-pupil spending has changed little over the past thirty years despite school finance litigation and standards-based reforms touting high standards for all children.<sup>456</sup> Unfavorable interstate comparisons have spurred improvement in some states but not others,<sup>457</sup> and substantial disparities in fiscal capacity fundamentally constrain the degree of interstate equalization that states can achieve on their own. In Part VII, I will expand on this point to explain why current federal policy does not provide states with sufficient incentives or resources to maintain uniformly high educational standards. I will also offer some thoughts on how the federal role can be strengthened to ensure that children in every state have adequate educational opportunity for equal citizenship.

My point here, to conclude, is that the key guideposts for federal policy remain the ones established by the early proponents of federal aid—most importantly, a national standard of educational adequacy grounded in the evolving duties and opportunities of national citizenship, candid recognition of the varying ability and willingness of states to support public education, and distribution of aid in inverse proportion to each state’s ability to educate its children to a national standard. More than a century after the Hoar, Perce, and Blair bills, the constitutionally motivated project of securing education for national citizenship remains a work in progress.

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<sup>456</sup> See *supra* notes \_\_ and accompanying text.

<sup>457</sup> Compare *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472, 488-89 (Ark. 2002) (relying on interstate comparison of school achievement and expenditures to find state education system inadequate), and *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 197 (Ky. 1989) (same), with *Charlet v. Legislature*, 713 So.2d 1199, 1206-07 (La. Ct. App. 1998) (rejecting a challenge to Louisiana’s school finance system in part because per-pupil spending “was 94.2% of the average provided by the fifteen southern states”), *writ of review denied*, 730 So.2d 937 (La. 1998), and Eric W. Robelen, *Alabama Voters Reject Gov. Riley’s Tax Plan*, EDUC. WEEK, Sept. 17, 2003, at 19 (reporting defeat of Alabama ballot measure to increase taxes to raise per-pupil spending and lengthen the school year).