

# THE FUNDAMENTAL RIGHT TO EDUCATION

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*New litigation has revived one of the most important questions of constitutional law: Is education a fundamental right? The Court's previous answers have been disappointing. While the Court has hinted that it might recognize some minimal right to education, it has thus far refused to do so.*

*To recognize a fundamental right to education, the Court would have to overcome two basic problems. First, the Court needs an originalist theory for why our Constitution protects education, particularly since the word education does not even appear in the Constitution. Second, the right to education implicates complex questions regarding its scope. Those questions would require the Court to determine the quality of education the Constitution requires. Neither litigants nor scholars have seriously grappled with these problems, which explains why the Court has yet to recognize a right to education. This Article cures both problems.*

*Not only is this Article the first to offer a compelling originalist argument for a fundamental right to education, it demonstrates that the right falls squarely within the Court's existing precedent. It traces the fundamental importance of education from the nation's founding principles through the years immediately following the Fourteenth Amendment. Most importantly, it details how, in the years surrounding the final ratification of the Fourteenth Amendment, Congress demanded that states guarantee access to public education in their state constitutions and linked these demands to the Fourteenth Amendment itself. In fact, after the Fourteenth Amendment, no state would ever again enter the Union without an education clause in its constitution. This history, due to its complexity, has quite simply been overlooked.*

*This Article is also the first to define the scope of a right to education with historical evidence. It demonstrates that the original purpose of public education was to prepare citizens to participate actively in self-government. In the mid-nineteenth century, this required an education that prepared citizens to comprehend, evaluate, and act thoughtfully on the functions and policies of government.*

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## INTRODUCTION

On most major measures, educational inequality is holding steady or on the rise. Achievement, segregation, and funding data all indicate that poor and minority students are receiving vastly unequal educational opportunities.<sup>1</sup> For instance, predominantly minority schools receive about \$2000 less per student than predominantly white schools.<sup>2</sup> Even putting aside this ine-

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1 See G. BOHRNSTEDT ET AL., U.S. DEP'T OF EDUC., SCHOOL COMPOSITION AND THE BLACK-WHITE ACHIEVEMENT GAP 3 (2015) (finding a persistent and large racial achievement gap); NATASHA USHOMIRSKY & DAVID WILLIAMS, EDUC. TRUST, FUNDING GAPS 2015: TOO MANY STATES STILL SPEND LESS ON EDUCATING STUDENTS WHO NEED THE MOST 1 (2015) (finding that nationally, schools with the most low income students receive \$1200 less per pupil than schools serving predominantly wealthy students, and schools serving predominantly minority students receive \$2000 less per pupil than schools serving fewer minority students); Gary Orfield et al., *Brown* at 62: School Segregation by Race, Poverty and State 3 (May 16, 2016) (unpublished manuscript), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-62-school-segregation-by-race-poverty-and-state/Brown-at-62-final-corrected-2.pdf> (indicating the percentage of intensely segregated minority schools has tripled since 1988).

2 USHOMIRSKY & WILLIAMS, *supra* note 1, at 8.

quality, overall government commitment to public education is receding. Since 2008, most states have substantially decreased school funding, some by more than ten percent.<sup>3</sup> The federal government has done little to stem the decline. Not since 2002 has the federal government made any substantial new investment in education.<sup>4</sup> Most disturbing, some states are currently taking steps to amend their state constitutions to weaken support and protection for public schools.<sup>5</sup> Parents increasingly doubt that the public education system can weather these challenges and are exiting the system altogether.<sup>6</sup> In short, public education stands in the midst of practical and constitutional crises.

These crises call for a single solution: a federal fundamental right to education. Yet, for the past half century, that right has proven elusive.<sup>7</sup> In 1973, the Supreme Court in *San Antonio Independent School District v. Rodriguez* explicitly rejected education as a fundamental right and has since refused to reconsider the issue.<sup>8</sup> The Court's most encouraging language merely hints

3 MICHAEL LEACHMAN ET AL., CTR. ON BUDGET & POLICY PRIORITIES, MOST STATES HAVE CUT SCHOOL FUNDING, AND SOME CONTINUE CUTTING 1 (2016).

4 See No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (amended 2015).

5 CONSTITUTION REVISION COMMISSION OF FLORIDA, A PROPOSAL TO AMEND SECTION 1 OF ARTICLE IX OF THE STATE CONSTITUTION (2017), <http://flrcr.org/Proposals/Commissioner/2017/0045/ProposalText/Filed/PDF.pdf> (proposing to take local districts' ability to block charters away); Tim Carpenter, *Kansas GOP Making Moves to Prepare for April Vote on K-12 Constitutional Amendment*, TOPEKA CAP.-J. (Dec. 29, 2017), <https://www.cjonline.com/state-government/news/education/2017-12-29/kansas-gop-making-moves-prepare-april-vote-k-12>. Alabama and Mississippi have previously acted on similarly dubious motivations. See LaJuana Davis, *Emerging School Finance Litigation in Mississippi*, 36 MISS. C. L. REV. 245, 250 (2018) (discussing an amendment to Mississippi's education clause in 1960 "to subvert *Brown's* integration directive"); Derek Black, *Why Schools Still Can't Put Segregation Behind Them*, SALON (June 19, 2017), <https://www.salon.com/2017/06/19/why-schools-still-can-not-put-segregation-behind-them/>.

6 In the last decade, charter school enrollments have doubled nationally. THOMAS D. SNYDER ET AL., U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS 2014, at 204 (50th ed. 2016), <http://nces.ed.gov/pubs2016/2016006.pdf>. In some states, voucher enrollments have more than quadrupled. See, e.g., IND. DEP'T OF EDUC., CHOICE SCHOLARSHIP PROGRAM ANNUAL REPORT: PARTICIPATION AND PAYMENT DATA 6, 22 (2015). Additionally, compare FLA. DEP'T OF EDUC., CORPORATE TAX CREDIT SCHOLARSHIP PROGRAM: JUNE QUARTERLY REPORT (2009), with FLA. DEP'T OF EDUC., FLORIDA TAX CREDIT SCHOLARSHIP PROGRAM: JUNE QUARTERLY REPORT (2018).

7 The initial draft of the Court's opinion in *Brown v. Board of Education*, 347 U.S. 483 (1954), would have declared education a fundamental right, but the Court dropped the crucial language to ensure a unanimous opinion. Hans J. Hacker & William D. Blake, *The Neutrality Principle: The Hidden Yet Powerful Legal Axiom at Work in Brown Versus Board of Education*, 8 BERKELEY J. AFR.-AM. L. & POL'Y 5, 46-50 (2006).

8 *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973); see also *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 458 (1988) ("[Appellants' position] would require us to extend the requirements of the Equal Protection Clause beyond the limits recognized in our cases, a step we decline to take."); *Papasan v. Allain*, 478 U.S. 265, 285 (1986) ("The [Plyler] Court did not, however, measurably change the approach articulated in *Rodriguez*").

that it is open to recognizing some narrow interest in a minimally adequate education.<sup>9</sup> Yet after four decades, the Court has failed to recognize any such interest or right.

Recently, litigants in three different states returned to federal court in the hope that the Court would finally translate its general commitment to education into a doctrinal right.<sup>10</sup> These lawsuits, however, face the same unresolved challenge as those that have preceded them: they need a compelling theory for why the Federal Constitution would protect education. To begin with, the word “education” does not appear in the Constitution. Moreover, its importance in modern society is far from enough for the Court to recognize an implied right.<sup>11</sup> Although scholars have written extensively on the subject, they have done little to close this gap.

Most scholarly theories lack a strong doctrinal argument, operating instead on the questionable premise that evolving educational norms and policy-based arguments are enough to prompt the Court to overturn *Rodriguez*.<sup>12</sup> The strongest theories suffer from the opposite problem. They require the Court to rewrite basic doctrine that would reach well beyond education.<sup>13</sup> And all those that rely on substantive due process shy away from a strict originalist approach, presumably because conventional wisdom has suggested that there is no originalist argument to be made for educa-

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9 See *Rodriguez*, 411 U.S. at 37 (suggesting a possible different outcome if an “absolute denial” of education occurred or a deprivation of “basic minimum skills”).

10 See Class Action Complaint, *Gary B. v. Snyder*, 329 F. Supp. 3d 344 (E.D. Mich. 2018) (No. 16-cv-13292); Complaint, *Martinez v. Malloy*, No. 3:16-cv-1439, 2018 WL 5993924 (D. Conn. Aug. 23, 2016); Emma Brown, *Black Parents Use Civil War–Era Law to Challenge Mississippi’s ‘Inequitable’ Schools*, WASH. POST (May 23, 2017), [https://www.washingtonpost.com/local/education/black-parents-use-civil-war-era-law-to-challenge-mississippi-inequitable-system-of-public-schools/2017/05/23/4a055a14-3f4c-11e7-adba-394ee67a7582\\_story.html?utm\\_term=.829cfae9d874](https://www.washingtonpost.com/local/education/black-parents-use-civil-war-era-law-to-challenge-mississippi-inequitable-system-of-public-schools/2017/05/23/4a055a14-3f4c-11e7-adba-394ee67a7582_story.html?utm_term=.829cfae9d874).

11 *Rodriguez*, 411 U.S. at 35 (“[T]he undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State’s social and economic legislation.”).

12 See, e.g., Stuart Biegel, *Reassessing the Applicability of Fundamental Rights Analysis: The Fourteenth Amendment and the Shaping of Educational Policy After Kadrmas v. Dickinson Public Schools*, 74 CORNELL L. REV. 1078, 1100–16 (1989) (focusing on the grievous injuries that students suffer as a justification for judicial intervention); Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 631–42 (1992) (focusing on the positive policy effects of the recognition of a right to education); Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 814–22 (1985); Note, *A Right to Learn?: Improving Educational Outcomes Through Substantive Due Process*, 120 HARV. L. REV. 1323, 1327 (2007).

13 Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92, 121–48 (2013) (relying heavily on post–Fourteenth Amendment developments to support a substantive due process claim); Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 338–39 (2006) (requiring a reevaluation of privileges and immunities).

tion.<sup>14</sup> To the extent scholars engage history, they rely primarily on practices and educational necessities that arose subsequent to the Fourteenth Amendment.<sup>15</sup> In other words, most commentators have argued that education has developed into a fundamental right, without addressing whether education would have been originally considered a fundamental right at the time of the Fourteenth Amendment.

This Article is the first to offer an originalist argument for a fundamental right to education that falls squarely within the Court's existing precedent. The Court need not reverse its privileges and immunities precedent, change its equal protection scrutiny, develop a theory of the Citizenship Clause, or develop modern qualitative standards for assessing differences in educational opportunity.<sup>16</sup> Instead, the Court need only apply its well-established standard for recognizing fundamental rights: the right must be "'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"<sup>17</sup>

Although the Court's fundamental rights analysis remains unchanged, new historical evidence and insights reveal that, contrary to conventional wisdom, education was originally understood as a fundamental right. Relying on new evidence and insights, this Article demonstrates that, from the United States' founding principles to the final ratification of the Fourteenth Amendment itself, education has always been understood as a fundamental right.<sup>18</sup> In particular, Congress directly linked the ratification of the Fourteenth Amendment to Southern states' readmission to the Union, as well as to new commitments in their state constitutions to provide education. Furthermore, evidence establishes that the Founders held firm beliefs about the necessity of an educated citizenry in a republican form of government,<sup>19</sup> which is also manifest in the distinct educational practices in the United

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14 See Gregory E. Maggs, *Innovation in Constitutional Law: The Right to Education and the Tricks of the Trade*, 86 NW. U. L. REV. 1038, 1046–55 (1992) (arguing that claims of a right to education rely on “tricks of the trade” to obscure the fact that an originalist approach does not support the right).

15 Friedman & Solow, *supra* note 13, at 121–48; Liu, *supra* note 13.

16 See *Rodriguez*, 411 U.S. at 17 (applying the rational basis test to the school financing system being challenged); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 78–79 (1873) (holding that privileges and immunities are not subject to scrutiny in federal court); Liu, *supra* note 13, at 335 (explaining the lack of Citizenship Clause precedent); see also *City of Rome v. United States*, 446 U.S. 156, 182 n.17 (1980) (recognizing over a century of precedent rejecting Guarantee Clause claims).

17 *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (internal citations omitted) (first quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion); and then quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326, (1937)).

18 See *infra* Part II.

19 See, e.g., President George Washington, Eighth Annual Message to Congress (Dec. 7, 1796); Kara A. Millonzi, *Education as a Right of National Citizenship Under the Privileges or Immunities Clause of the Fourteenth Amendment*, 81 N.C. L. REV. 1286, 1286 (2003).

States as compared with other countries.<sup>20</sup> Unsurprisingly, then, when Congress reframed the state-federal relationship through the Fourteenth Amendment, Congress acted decisively on those beliefs, demanding education from every state in the nation.<sup>21</sup> In fact, no state would ever again enter the Union without an education clause in its constitution.

In a prior Article, I detail the three-year period surrounding the ratification of the Fourteenth Amendment and the procedural implications of those events.<sup>22</sup> Although that three-year period is critically relevant under Supreme Court precedent, the Court's historical inquiries would go beyond that period. This Article provides answers to those additional inquiries, examining a broader historical period (from the colonial period through the end of Reconstruction) and its substantive implications for a fundamental right to education.

The Court's recent decisions that recognize a fundamental right to bear arms offer a detailed roadmap for this historical analysis. In *McDonald v. City of Chicago*,<sup>23</sup> the Court methodically examined the historical evidence necessary to recognize a new fundamental right under substantive due process. In this methodical examination, the Court made five categorical inquiries. The five inquiries covered the common-law history of the right well prior to, at the passage of, and decades following the Fourteenth Amendment.<sup>24</sup> Importantly, the inquiries were not intended to identify specific steps that would technically incorporate the right within the text of the Fourteenth Amendment. Rather, the purpose of the Court's five inquiries in *McDonald* was to determine whether those who framed and ratified the Fourteenth Amendment would have generally understood the right to be a fundamental one.<sup>25</sup>

A *McDonald*-style analysis in the context of education resoundingly indicates education's similarly fundamental nature. The first inquiry in *McDonald* is whether the right has historical roots that stretch back to the founding of our nation and societies that preceded it.<sup>26</sup> While other societies lacked a commitment to public education,<sup>27</sup> the Framers' view of education was entirely consistent with its future recognition as a fundamental right in the

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20 See, e.g., Sun Go & Peter Lindert, *The Uneven Rise of American Public Schools to 1850*, 70 J. ECON. HIST. 1, 3 (2010); *infra* notes 188–89.

21 See, e.g., An Act to Admit the State of Texas to Representation in the Congress of the United States, ch. 39, 16 Stat. 80, 81 (1870); An Act to Admit the State of Mississippi to Representation in the Congress of the United States, ch. 19, 16 Stat. 67, 68 (1870); An Act to Admit the State of Virginia to Representation in the Congress of the United States, ch. 10, 16 Stat. 62, 63 (1870).

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

23 561 U.S. 742 (2010).

24 *Id.* at 767–80.

25 *Id.* at 768 (looking to the general intent of those who “drafted and ratified” the Second Amendment).

26 *Id.*

27 See, e.g., Derek Gillard, *Chapter 5: 1750–1860: Towards Mass Education*, EDUC. IN ENG.: A HIST. OF OUR SCH. (May 2018), <http://www.educationengland.org.uk/history/chapter>

United States.<sup>28</sup> At its founding, the United States represented a democratic experiment distinct from those societies that preceded it.<sup>29</sup> Whereas most other societies would have had little reason to treat education as a right, the United States was premised on a citizenry that could engage in intelligent self-rule.<sup>30</sup> Consistent with this premise, the Framers aspired to a more educated and literate citizenry.<sup>31</sup>

The second inquiry is whether Congress and the states may have taken practical steps to protect the right following the framing of the U.S. Constitution.<sup>32</sup> Contemporaneous with and immediately following the framing, Congress and the states took several concerted steps to expand access to education. Congress devoted land and money toward the expansion of education.<sup>33</sup> Several states adopted constitutional clauses recognizing the crucial role education plays in a republican form of government.<sup>34</sup> Acting on these commitments, public education rapidly grew. By the mid-1800s, the only country in the world with more access to education was Prussia.<sup>35</sup>

The third inquiry is whether any “threat” to the right existed prior to the Fourteenth Amendment and whether Congress took any steps to address the deprivation.<sup>36</sup> The historical record on education is particularly persuasive on this point. In the pre-Fourteenth Amendment era, Congress came to view those states with weak education systems as infringing on their citizens’ rights and impeding democracy itself.<sup>37</sup> Southern states, in particular, had made the education of African Americans a crime, and only afforded poor

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05.html (indicating the movement toward a system of public education did not begin in England until the 1800s and there was some hostility toward it).

28 See, e.g., Stephen Earl Bennett et al., *Reading’s Impact on Democratic Citizenship in America*, 22 POL. BEHAV. 167, 167 (2000) (“Puritans at Massachusetts Bay colony in the seventeenth century, visionaries like Thomas Jefferson in the late eighteenth century, [and] the creators of public schools in the early nineteenth century . . . all believed that literacy was a *sine qua non* for effective participation in public affairs.” (internal citations omitted)).

29 See William Van Til, *The American Democratic Experiment*, EDUC. LEADERSHIP, Oct. 1959, at 6.

30 See *id.*

31 John Adams wrote:

[A] memorable change must be made in the system of education and knowledge must become so general as to raise the lower ranks of society nearer to the higher. The education of a nation instead of being confined to a few schools and universities for the instruction of the few, must become the national care and expense for the formation of the many.

DAVID McCULLOUGH, JOHN ADAMS 364 (2001); see also Bennett et al., *supra* note 28, at 167.

32 *McDonald v. City of Chicago*, 561 U.S. 742, 769 (2010).

33 See *infra* notes 214–16.

34 See, e.g., MASS. CONST. pt. II, ch. V, § 2 (ratified 1780); N.H. CONST. of 1784, *reprinted in* 4 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 2467 (Francis Newton Thorpe ed., 1909).

35 Go & Lindert, *supra* note 20, at 3.

36 *McDonald*, 561 U.S. at 770–75.

37 See *infra* notes 231–37.

whites limited access to school.<sup>38</sup> This led to high illiteracy and low voter turnout in the South.<sup>39</sup> The broader effect was to exclude vast numbers of citizens from any realistic opportunity to participate in the democratic process. This allowed Southern elites to dominate government and eventually sparked the Civil War.

Congress responded by passing legislation to address these education deprivations and move the South toward a working democracy. Through the Freedmen's Bureau,<sup>40</sup> Congress directly expanded educational opportunities throughout the South.<sup>41</sup> Congress then used the Reconstruction Act of 1867 to force states to include education clauses in their state constitutions.<sup>42</sup> Weeks after passing the Reconstruction Act, Congress would establish a Department of Education whose practical purpose was to monitor whether states were carrying out their education obligations.<sup>43</sup> The statute indicated the Department would assess "the condition and progress of education in the several States" and "aid" in its further expansion "throughout the country."<sup>44</sup>

The fourth inquiry is whether the Fourteenth Amendment drafters would have understood the right to be fundamental.<sup>45</sup> Senate debates, as well as later formal legislation, reveal that Congress believed that a republican form of government must provide education to its citizens.<sup>46</sup> Thus Congress would not accept state constitutions that excluded this guarantee.<sup>47</sup> As noted above, Congress had just taken several important steps to ensure that Southern states provided education. This alone indicates that Congress saw education as fundamental. No right other than voting (which the Court already recognizes as fundamental) received such favorable treatment by Congress.<sup>48</sup> The clearest evidence of Congress's intent, however, came immediately after the Fourteenth Amendment's final ratification in 1868.

Two years after the ratification of the Fourteenth Amendment, Congress was dealing with the readmission of those remaining Confederate states that were slow to adopt education clauses. As to these states, Congress applied

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38 WILLIAM PRESTON VAUGHN, *SCHOOLS FOR ALL: THE BLACKS & PUBLIC EDUCATION IN THE SOUTH, 1865-1877*, at 51-52 (1974) (noting that in 1853, North Carolina enrolled less than half of eligible children, which did not include African Americans, and by the end of the war the "rudimentary Southern school systems disintegrated"); Jenny Bourne Wahl, *Legal Constraints on Slave Masters: The Problem of Social Cost*, 41 AM. J. LEGAL HIST. 1, 17 n.51 (1997).

39 CONG. GLOBE, 40th Cong., 1st Sess. 167 (1867) (statement of Sen. Sumner) (recounting calculations based on U.S. Census data); JOEL H. SILBEY, *THE AMERICAN POLITICAL NATION, 1838-1893*, at 146 (1991) (noting low voter turnout in the South).

40 See Freedmen's Bureau Act of 1865, ch. 90, 13 Stat. 507.

41 LAWRENCE A. CREMIN, *AMERICAN EDUCATION: THE NATIONAL EXPERIENCE 1783-1876*, at 517-18 (1980).

42 The Reconstruction Act of 1867, ch. 153, 14 Stat. 428.

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

44 *Id.*

45 McDonald v. City Chicago, 561 U.S. 742, 770-77 (2010).

46 See *infra* subpart II.C.4.

47 See *infra* notes 246-52.

48 See Black, *supra* note 22.

noticeably harsher standards. The legislation readmitting those remaining three states mandated that “the constitution[s] of Virginia[, Mississippi, and Texas] shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the constitution of said State.”<sup>49</sup> In other words, the Fourteenth Amendment had made all persons born in this country citizens, and states no longer had the authority to deprive them of their right to education. In fact, Congress would never again admit a state to the Union without an education clause.

The final inquiry is whether those who ratified the Constitution—the states—also understood the right to be fundamental.<sup>50</sup> Here, the constitutional conventions of Southern states are most instructive. The final five votes necessary to ratify the Amendment came from Southern states.<sup>51</sup> Five more Southern states ratified the Amendment shortly thereafter. Prior to the Civil War, none of these Southern states affirmatively guaranteed education.<sup>52</sup> By 1868, however, the year the Fourteenth Amendment was ratified, nine of ten states seeking readmission had rewritten their constitutions to guarantee education.<sup>53</sup> Delegates to the constitutional conventions offered the same explanation as Congress for their change—education was necessary for a republican form of government.<sup>54</sup>

Education in the states, quite simply, divides clearly into a pre- and post-Fourteenth Amendment world. Before the Fourteenth Amendment was proposed, less than half of the states guaranteed education.<sup>55</sup> After the Fourteenth Amendment, every new and readmitted state would guarantee education, and others would voluntarily alter their constitutions soon thereafter.<sup>56</sup> By 1875, only a single state in the nation would lack an education

49 An Act to Admit the State of Virginia to Representation in the Congress of the United States, ch. 10, 16 Stat. 62, 63 (1870).

50 *McDonald*, 561 U.S. at 777–78.

51 John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 380–409 (2001) (describing the historical events that lead to final ratification).

52 *Id.*

53 Black, *supra* note 22, at 788.

54 See, e.g., JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NORTH CAROLINA 486 (Raleigh, Joseph W. Holden 1868) (providing for county governments to carry out the “Republican principle of local self-government” and serve as “schools” in the lessons of “statesmanship” and participatory government, immediately prior to the provision of education); 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA 264 (Charleston, Denny & Perry 1868) [hereinafter CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA] (detailing a committee report supporting an education article because education is “the surest guarantee of . . . republican liberty” and thus is the “duty of the General Assemblies, in all future periods”).

55 See *infra* notes 251–55.

56 See *infra* notes 251–55.

clause, and even that state would have a constitutional provision committed to helping fund education.<sup>57</sup>

While the evidence from these five inquiries strongly indicates that education is a fundamental right, one equally important question remains: What is the scope of the fundamental right to education? Given the wide-ranging implications, the Supreme Court would expect a clear identification of the scope of the right before it would recognize any right to education.<sup>58</sup> Indeed, a failure to offer an originalist account of the scope of the right could be enough, alone, for the Court to reject the right.

The Court's right to bear arms precedent, again, offers a roadmap. In *District of Columbia v. Heller*,<sup>59</sup> the Court looked to the original purpose of the right to help define its scope, along with historical practices and expectations regarding the right.<sup>60</sup> The original purpose and function of the right to education is, therefore, critical to understanding its scope. Those who wrote and ratified the Fourteenth Amendment made their purpose clear. They needed to solve a specific problem and achieve a specific goal. The specific problem was the entrenched effects of slavery, illiteracy, and disenfranchisement in the South.<sup>61</sup> The specific goal was to create an education system that would prepare slaves and illiterate whites for their new roles as citizens in a republican form of government.<sup>62</sup> In particular, those who wrote and ratified the Fourteenth Amendment believed that citizens must participate in self-government and cast their ballots intelligently.<sup>63</sup>

The next step is to determine the skills citizens needed to carry out the citizenship duties that the Framers expected of them. In the mid-nineteenth century, voting intelligently required a relatively high level of literacy. Given the primitive methods of travel and communication of the time, the written word was the only way that the vast majority of citizens could access even the most basic information about their state and federal governments.<sup>64</sup> And the average citizen was keenly interested. The United States had far more news-

57 Steven G. Calabresi & Michael W. Perl, *Originalism and Brown v. Board of Education*, 2014 MICH. ST. L. REV. 429, 458–59 n.132 (explaining that in 1875, New Jersey adopted its education clause, leaving Connecticut as the only state without one).

58 *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973) (“‘[T]here will be more than one constitutionally permissible method of solving [educational problems],’ and . . . ‘the legislature’s efforts to tackle the problems’ should be entitled to respect. On even the most basic questions in this area the scholars and educational experts are divided.” (citation omitted) (quoting *Jefferson v. Hackney*, 406 U.S. 535, 546–47 (1972))).

59 554 U.S. 570 (2008).

60 *Id.* at 576–600.

61 *See supra* notes 38–39 and accompanying text.

62 *See supra* notes 38–39 and accompanying text.

63 *See generally* Molly O’Brien, *Free at Last? Charter Schools and the “Deregulated” Curriculum*, 34 AKRON L. REV. 137, 141 (2000) (“Jefferson thought that citizens must be educated in order to vote, to protect liberty, and to be vigilant against government corruption.”).

64 Margaret H. DeFleur, *James Bryce’s 19th-Century Theory of Public Opinion in the Contemporary Age of New Communications Technologies*, 1 MASS COMM. & SOC’Y 63, 70 (1998).

papers that were read by a far broader cross section of society than any other country in the world.<sup>65</sup>

Through newspapers and other print material, citizens engaged in an ongoing dialogue about public policy and the constitutions on which they were routinely called to vote. Alexis de Tocqueville and James Bryce—two of the most noted commentators of our nineteenth-century democracy—would separately observe that the common man’s avid consumption of these papers and engagement in public dialogue was both a manifestation of our form of government itself and the tool through which he held government accountable.<sup>66</sup> This dialogue was premised on a high level of literacy and a working understanding of government functions and individual rights.<sup>67</sup>

Drawing on the original purpose of public education and the practical demands of citizenship, this Article demonstrates that an originalist account of the fundamental right to education entails a set of skills and competencies largely grounded in literacy and critical thinking.<sup>68</sup> More specifically, the right to education requires that students have access to learning opportunities that prepare them to comprehend, evaluate, and act thoughtfully on the functions and policies of government. Modern perspectives on education might urge a broader education right that also includes math and other skills,<sup>69</sup> but those skills relate more toward the modern workplace and higher education than the demands of democracy.

It is worth noting, however, that the critical literacy and civics-based education that the nineteenth century demanded also remain crucially relevant today. Commentators increasingly warn that far too many students today lack the skills they need to navigate the information age and our fracturing political landscape.<sup>70</sup> They do not possess basic civics knowledge, much less the ability to evaluate public debate and cast their vote intelligently.<sup>71</sup> Only half recognize that the press should be free from government control.<sup>72</sup> Upon graduation, most still cannot name the three branches of government or the purpose of the Declaration of Independence.<sup>73</sup> These educational

65 Richard Carwardine, *Abraham Lincoln and the Fourth Estate: The White House and the Press During the American Civil War*, 7 AM. NINETEENTH CENTURY HIST. 1, 3 (2006).

66 2 JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 929–30 (Liberty Fund 1995) (1888); 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 55, 186 (J.P. Mayer, ed., George Lawrence trans., Harper & Row, 1966) (1835).

67 See, e.g., Leon Botstein, *Damaged Literacy: Illiteracies and American Democracy*, 119 DAEDALUS 55, 60–61 (1990).

68 See *infra* notes 363–81.

69 See, e.g., 91 HIDEYUKI KANEMATSU & DANA M. BARRY, *STEM AND ICT EDUCATION IN INTELLIGENT ENVIRONMENTS* 25–29 (2016).

70 MICHAEL A. REBELL, *FLUNKING DEMOCRACY: SCHOOLS, COURTS, AND CIVIC PARTICIPATION* 7–19 (2018).

71 *Id.*

72 MATTHEW DUBIN, *WE THE PEOPLE: THE CITIZEN AND THE CONSTITUTION, SURVEY RESULTS: 2009 NATIONAL FINALISTS’ KNOWLEDGE AND SUPPORT OF AMERICAN DEMOCRATIC INSTITUTIONS AND PROCESSES* 13 (2009).

73 REBELL, *supra* note 70, at 18.

shortcomings then seriously impact their ability to self-govern as adults. Over the last few election cycles, so many adults have incorrectly read ballots and proposed laws that they shifted the actual outcome of elections and referenda.<sup>74</sup> The cure to these modern ills is the same educational opportunities that the Framers and Ratifiers sought to enshrine a century and a half ago.

This Article proceeds in three Parts. Part I examines the various constitutional clauses through which the Court could recognize a right to education, reasoning that the Citizenship Clause and Guarantee Clause, as a matter of original history, are the most natural fits. But as with equal protection and privileges and immunities, the Court has developed general doctrines over the years that these “natural fits” are unlikely candidates for recognizing a right to education. Part II explains how the Court has used substantive due process as an escape doctrine, recognizing rights through due process so as to not upset its general doctrines elsewhere. Part II then applies the Court’s substantive due process test and its historical inquiries to education, demonstrating that an extremely compelling historical record exists to recognize education as a fundamental right. Part III develops the scope of that right, identifying the original purpose to prepare individuals for self-government and then drawing on prevailing practices to determine what skills those individuals would have needed.

## I. THE BARRIERS TO A RIGHT TO EDUCATION

The conventional wisdom has long been that our constitutional Framers did not intend to provide any particular protection for education.<sup>75</sup> Most litigation and scholarship has been premised on theories that (a) education, as a practical matter, has become so important to individuals’ life chances that the Constitution must protect it,<sup>76</sup> or (b) state and federal laws have evolved so much over the last several decades that they finally justify heightened scrutiny for inequalities and deprivations.<sup>77</sup> In other words, modern education justifies new judicial interpretations.

In the last decade, however, three other authors have made historical arguments in support of a constitutional right to education. Barry Friedman

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74 LAWRENCE NORDEN ET AL., BRENNAN CTR. FOR JUSTICE, BETTER BALLOTS 9 (2008); Amy N. Farley et al., *Democracy Under Fire: Voter Confusion and Influences in Colorado’s Anti-Affirmative Action Initiative*, 83 HARV. EDUC. REV. 432 (2013).

75 *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (“Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.”).

76 Biegel, *supra* note 12, at 1100–16 (focusing on the grievous injuries that students suffer as a justification for judicial intervention); Areto A. Imoukhuede, *Education Rights and the New Due Process*, 47 IND. L. REV. 467, 468 (2014).

77 Derek Black, *Unlocking the Power of State Constitutions with Equal Protection: The First Step Toward Education as a Federally Protected Right*, 51 WM. & MARY L. REV. 1343, 1393–95 (2010); Martha I. Morgan, *Fundamental State Rights: A New Basis for Strict Scrutiny in Federal Equal Protection Review*, 17 GA. L. REV. 77, 101 (1982).

and Sara Solow offer the simplest theory.<sup>78</sup> They argue that the national commitment to education dates from the Fourteenth Amendment to today, growing stronger with each generation.<sup>79</sup> A simple application of the Supreme Court's fundamental rights test to this history can render only one conclusion—our Constitution should protect, at the very least, a minimally adequate education.<sup>80</sup> They do little, however, to identify the substance of that right.

Goodwin Liu offers a more technical argument.<sup>81</sup> He also traces a national commitment to education from the Civil War era to today, but Liu focuses on Congress's support for education immediately following the enactment of the Fourteenth Amendment.<sup>82</sup> He argues that this congressional support, coupled with Fourteenth Amendment debates, establish that education is a privilege and immunity of national citizenship.<sup>83</sup>

While these scholars make important contributions to the historical debate, they overlook an even more specific historical record that reveals Congress and the states did not just favor education. As further detailed below in Part II, Congress and the states mandated the provision of public education in conjunction with the ratification of the Fourteenth Amendment itself. Without the votes of Southern states, the Fourteenth Amendment would not have become part of the U.S. Constitution in 1868. And without their affirmative votes, Congress would not readmit those states to the Union.<sup>84</sup> Not only did Congress condition Southern states' readmission on ratification of the Fourteenth Amendment, Congress also required Southern states to adopt new state constitutions that conformed to a "republican" form of government,<sup>85</sup> which included the provision of education. The result was a complete transformation of the rights of citizenship. By 1868, nine of the ten Southern states seeking readmission had ratified the Fourteenth Amendment and mandated the provision of education in their state constitutions.<sup>86</sup> As a result, the Fourteenth Amendment became an actual amendment to the U.S. Constitution and those Southern states reentered the Union.<sup>87</sup> The most historically honest interpretation of this history is that education was a

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78 Friedman & Solow, *supra* note 13, at 92.

79 *Id.* at 121–48.

80 *Id.* at 96.

81 Liu, *supra* note 13.

82 *Id.* at 368–96.

83 *Id.* at 335–36.

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

85 *Id.*

86 See ALA. CONST. of 1868, art. XI, § 6; ARK. CONST. of 1868, art. IX, § 1; FLA. CONST. of 1868, art. VIII, §§ 1–2; GA. CONST. of 1868, art. VI, § 1; LA. CONST. of 1868, tit. VII, art. CXXXV; MISS. CONST. of 1868, art. VIII, § 1; N.C. CONST. of 1868, art. IX, § 2; S.C. CONST. of 1868, art. X, § 3; TEX. CONST. of 1869, art. IX, § 1.

87 Proclamation No. 13, 15 Stat. 708 (1868) (Secretary of State William Seward) (recognizing ratification of the Fourteenth Amendment based on states' action and the joint resolutions of the U.S. House and Senate).

right secured by the Guarantee Clause, which requires a republican form of government, or the Citizenship Clause of the Fourteenth Amendment.<sup>88</sup>

Current constitutional doctrine, however, presents serious problems for recognizing the right to education on these bases. The history, while fixed, must filter through Supreme Court precedent that has, at times, been contrary to history. After the Civil War, Supreme Court precedent was more intent on undoing the Fourteenth Amendment than enforcing it.<sup>89</sup> The Court has since corrected some of its mistakes,<sup>90</sup> but others remain part of a much larger set of general doctrinal principles that are hard to unravel now.<sup>91</sup> Thus, even if the history supporting a right to education is as plain as day, fitting the right into the Court's existing jurisprudence is not.

For purposes of the right to education, the most relevant doctrines pertain to the Guarantee, Privileges and Immunities, Equal Protection, and Due Process Clauses. All of these constitutional clauses include principles that could plausibly translate the history of education in the United States into a tangible constitutional right. Yet, each of these constitutional provisions entails substantial doctrinal hurdles. For the most part, these doctrinal hurdles have little if anything to do with education and more to do with historical anomalies, federalism concerns, and judicial philosophy regarding the interpretation of the Constitution. Regardless, the barriers remain formidable.

The most obvious constitutional provision to anchor a constitutional right to education is arguably the Guarantee Clause. The Guarantee Clause provided the specific authority for Congress to demand public education systems from states following the Civil War.<sup>92</sup> Congress made the demand not just as a base exercise of power, but on the well-founded belief that education was a necessary component of a republican form of government.<sup>93</sup> Yet, as neatly as an education right might fit within the Guarantee Clause, the prospects of judicially enforcing a right to education through the Guarantee Clause are relatively bleak given the Court's general precedent in the area.

Prior to the Civil War, the Court in *Luther v. Borden* reasoned republican form of government claims raise political questions that are reserved to Congress and are nonjusticiable.<sup>94</sup> The Court has since reaffirmed this general

88 Black, *supra* note 22.

89 See, e.g., *The Civil Rights Cases*, 109 U.S. 3 (1883); *United States v. Cruikshank*, 92 U.S. 542 (1875); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

90 See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 506–08 (4th ed. 2011).

91 See generally *Saenz v. Roe*, 526 U.S. 489 (1999) (discussing the Court's privileges and immunities precedent).

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

93 See, e.g., CONG. GLOBE, 40th Cong., 1st Sess. 168–69 (1867) (indicating that Congress retained the right to withhold admission to states whose constitutions lacked an education clause); *id.* at 572 (statement of Sen. Sumner) (arguing that senators were “entitled” to “refuse to vote for” a constitution that did not provide for education).

94 *Luther v. Borden*, 48 U.S. (7 How.) 1, 42, 46–47 (1849) (writing as to the “guarantee to each State a republican government [that] Congress must necessarily decide what

principle several times.<sup>95</sup> In the 1960s, the Court hinted at an exception to this general rule,<sup>96</sup> but has never explicitly recognized an exception. Thus, as compelling as the recognition of certain education rights through the Guarantee Clause might be, the odds of the Court doing so are low. The Court would need to revisit a long line of cases just to recognize a new exception for education.<sup>97</sup> The Court's dominant approach over the past century has been to work new rights into existing precedent rather than rewrite broad swaths of old precedent.<sup>98</sup>

The Privileges and Immunities Clause offers another theoretically compelling doctrinal filter for education. The Constitution explicitly prohibits states from "abridg[ing] the privileges or immunities of citizens of the United States."<sup>99</sup> Whether understood as a necessary component of a republican form of government or simply something that Congress demanded of all states following the Civil War, education became, alongside voting, a core right and privilege of citizenship.<sup>100</sup> "Privileges or immunities" is an inherently open-ended category that education easily falls within.<sup>101</sup> Yet again, the Court's precedent is highly problematic.

Less than a decade after the Civil War, the Court's holding in the *Slaughter-House Cases*<sup>102</sup> rendered the Privileges or Immunities Clause all but void. The Court wrote that "privileges and immunities . . . are left to the State governments for security and protection, and not by this article placed under the special care of the Federal government."<sup>103</sup> Thus, the Privileges or Immunities Clause does not give rise to federal claims. The Court reached a

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government is established in the State . . . [and] whether it is republican or not. . . . And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal.")

95 See, e.g., *City of Rome v. United States*, 446 U.S. 156, 182 & n.17 (1980) (challenge to the preclearance requirements of the Voting Rights Act); *Baker v. Carr*, 369 U.S. 186, 218–29 (1962) (challenge to apportionment of state legislative districts); *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 140–51 (1912) (challenge to initiative and referendum provisions of state constitution).

96 *Reynolds v. Sims*, 377 U.S. 533, 582 (1964) ("[S]ome questions raised under the Guarantee Clause are nonjusticiable"); see also *New York v. United States*, 505 U.S. 144, 184 (1992) (citing cases pre-*Luther*).

97 Jack Balkin, however, argues that *Luther v. Borden* does not stand for an absolute and broad prohibition of guarantee clause claims. JACK M. BALKIN, *LIVING ORIGINALISM* 241 (2011).

98 Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 OHIO ST. L.J. 1051 (2000) (providing an overview of the Court's incorporation of individual rights in the Fourteenth Amendment).

99 U.S. CONST. amend. XIV.

100 See Black, *supra* note 22.

101 John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1391–97 (1992) (describing privileges or immunities as a mystery, exploring the riddle, and concluding it included the everyday rights of state citizenship).

102 83 U.S. (16 Wall.) 36 (1873).

103 *Id.* at 78.

similarly problematic conclusion in regard to due process and equal protection, only to reverse its position in later cases,<sup>104</sup> but its privileges or immunities holding remains good law.<sup>105</sup>

In only one instance in history has the Court ever used the Privileges or Immunities Clause to invalidate a state law.<sup>106</sup> The issue in the case was particularly unique—involving the right of interstate travel—and not susceptible to extrapolation to education.<sup>107</sup> Unless the Court intends to correct its overall Fourteenth Amendment privileges or immunities precedent, the clause is an unlikely vehicle for the right to education. Only one Justice has shown any serious interest in this larger project.<sup>108</sup>

The remaining mechanisms for protecting the right to education—equal protection and due process—are less obvious, at least as a matter of history. The notion that the Framers did not intend education to be a right of citizenship or a foundation for a republican form of government but would have expected educational deprivations to be subject to rigorous equal protection or due process analysis is hard to justify. Nonetheless, equal protection is the sole mechanism through which the Court has considered a fundamental right to education.<sup>109</sup> In *San Antonio Independent School District v. Rodriguez*, the Court rejected education as a fundamental right under equal protection.<sup>110</sup> The Court reasoned that education is not explicitly mentioned in the Constitution and the importance of education is an insufficient basis to afford it heightened scrutiny.<sup>111</sup>

Scholars have since offered strong arguments for why the underlying facts regarding education have changed enough to warrant a different outcome. For instance, the fact that several state courts have since declared education a fundamental right under state law suggests that *Rodriguez's* logic is no longer sound.<sup>112</sup> No clear rationale explains why federal law would excuse differential access to education when the state itself has already

104 Compare *id.* at 80–81 (rejecting due process and equal protection claims regarding right to practice a profession), with *Lochner v. New York*, 198 U.S. 45 (1905) (recognizing a due process right of economic liberty).

105 See *Saenz v. Roe*, 526 U.S. 489 (1999).

106 *Id.*

107 *Id.* at 503–04 (reasoning that interstate travel is a unique right over which there has been no disagreement).

108 *Id.* at 527–28 (Thomas, J., dissenting).

109 The Court has applied procedural due process, but that is to protect student's statutory property right in the context of school suspensions. *Goss v. Lopez*, 419 U.S. 565 (1975).

110 *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973) (“We have carefully considered each of the arguments supportive of the District Court’s finding that education is a fundamental right or liberty and have found those arguments unpersuasive.”).

111 *Id.* at 32, 35.

112 See, e.g., *Horton v. Meskill*, 376 A.2d 359, 374 (Conn. 1977); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 206 (Ky. 1989); *Leandro v. State*, 488 S.E.2d 249, 255–56 (N.C. 1997); *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W. Va. 1979); *Washakie Cty. Sch. Dist. No. One v. Herschler*, 606 P.2d 310, 333 (Wyo. 1980).

declared education a fundamental or constitutional right.<sup>113</sup> Logic aside, however, the holding in *Rodriguez* remains firmly in place, and the Court has passed on other opportunities to narrow or revisit *Rodriguez*.<sup>114</sup>

The final filter for the right to education—due process—may be the least obvious from a historical standpoint. By its explicit terms, the Due Process Clause requires states to afford individuals fair procedures prior to depriving them of life, liberty, or property.<sup>115</sup> While procedural protections may be helpful in the context of preventing erroneous suspensions from school, procedural protections do not require that states provide education in the first instance or that the education they provide be of some quality.<sup>116</sup> Claims as to these affirmative obligations rest on what the Court calls substantive due process.

Substantive due process evolved from the notion that some individual rights are so important that the state is not free to infringe them, regardless of the advance warning or process a state provides.<sup>117</sup> The key question is whether the state has a good enough reason to infringe on a person's rights.<sup>118</sup> Only those rights that the Court deems fundamental under substantive due process receive heightened scrutiny.<sup>119</sup> To determine whether a right is fundamental, the Court asks whether the right is “‘deeply rooted in this Nation's history and tradition’ and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’”<sup>120</sup>

Several scholars have concluded that education meets this test.<sup>121</sup> They point to the general traditions surrounding education, compulsory attendance laws, state governments' provision of education since the nineteenth century, the federal government's financial support for those efforts, and the federal government's more recent efforts to regulate certain state educational activities.<sup>122</sup> They also emphasize that the Supreme Court has long “extolled the virtues of public education, recognizing ‘the public schools as a most vital civic institution for the preservation of a democratic system of gov-

113 See Black, *supra* note 77, at 1343; Morgan, *supra* note 77, at 101.

114 See, e.g., *Kadmas v. Dickinson Pub. Sch.*, 487 U.S. 450 (1988); *Papasan v. Allain*, 478 U.S. 265 (1986); *Plyler v. Doe*, 457 U.S. 202 (1982).

115 U.S. CONST. amend. XIV.

116 See *Goss v. Lopez*, 419 U.S. 565 (1975).

117 See CHEMERINSKY, *supra* note 90, at 558–61.

118 *Id.*

119 *Washington v. Glucksberg*, 521 U.S. 702, 719–20 (1997).

120 *Id.* at 720–21 (internal citations omitted) (first quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion); and then quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326, (1937)).

121 See, e.g., Imoukhuede, *supra* note 76, at 468; Note, *supra* note 12, at 1327; Michael Salerno, Note, *Reading Is Fundamental: Why the No Child Left Behind Act Necessitates Recognition of a Fundamental Right to Education*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 509, 510 (2007).

122 See Bitensky, *supra* note 12, at 586–90, 596; Friedman & Solow, *supra* note 13, at 96, 112–17, 121–45, 155.

ernment' that is intrinsic to American national identity and culture."<sup>123</sup> This history, they reason, suffices to establish education as a right deeply rooted in this nation's history and tradition, as required by the Court.<sup>124</sup>

This historical treatment, however, remains relatively general and amorphous as compared to the evidence the Court has required in recent cases.<sup>125</sup> Over the last three to four decades, the Court has grown increasingly restrictive in its recognition of new fundamental rights.<sup>126</sup> For instance, in *Washington v. Glucksberg*, the Court expressed the sentiment that it needed "to rein in the subjective elements that are necessarily present in due-process judicial review."<sup>127</sup> The only exception to this trend has been in regard to the rights of same-sex couples,<sup>128</sup> but even here, the extent to which the Court made an exception is unclear.<sup>129</sup> The Court grounded these cases in equal protection, as well as substantive due process,<sup>130</sup> presumably in an attempt to shield itself from the critiques that have plagued substantive due process.<sup>131</sup> This general reluctance in substantive due process cases represents a significant, although not explicit, barrier that the right to education would have to overcome, notwithstanding its general merits.

## II. EDUCATION AS A FUNDAMENTAL RIGHT UNDER SUBSTANTIVE DUE PROCESS

The modern expansion of substantive due process is, at least partly, a byproduct of the Court's historically restrictive privileges or immunities precedent. Substantive due process operates as an escape clause of sorts.<sup>132</sup>

123 Bitensky, *supra* note 12, 588–89 (footnote omitted) (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring)); *see also* Friedman & Solow, *supra* note 13, at 119–20.

124 Bitensky, *supra* note 12, at 596; Friedman & Solow, *supra* note 13, at 96.

125 *See, e.g.,* *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

126 *See* *Reno v. Flores*, 507 U.S. 292, 303 (1993) (fundamental liberty interests must be "so rooted in the traditions and conscience of our people as to be ranked as fundamental" (quoting *United States v. Salerno*, 481 U.S. 739, 751 (1987))); *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) ("[W]e have insisted not merely that the interest denominated as a 'liberty' be 'fundamental' . . . but also that it be an interest traditionally protected by our society.").

127 *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997).

128 *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Lawrence v. Texas*, 539 U.S. 558 (2003).

129 *See, e.g.,* *Obergefell*, 135 S. Ct. at 2623 (Scalia, J., dissenting) ("[The majority's] discussion is, quite frankly, difficult to follow. The central point seems to be that there is a 'synergy between' the Equal Protection Clause and the Due Process Clause, and that some precedents relying on one Clause have also relied on the other.").

130 *See, e.g., id.* at 2590; *Lawrence*, 539 U.S. at 575.

131 *See, e.g.,* John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 496 (1997) (arguing that "the precedential authority of substantive due process is less than it might seem").

132 *See* Harry F. Tepker, Jr., *The Arbitrary Path of Due Process*, 53 OKLA. L. REV. 197, 211–13 (2000). Equal protection, likewise, may have provided an escape clause for voting

Most Framers would have likely been shocked by the notion that after passing the Fourteenth Amendment, states would have retained the power to suppress free speech, strip individuals of property without just compensation, search homes without warrants, or imprison people without full and fair judicial hearings. Yet this is exactly what the *Slaughter-House Cases* allowed.

The modern Court avoids ahistorical results of this sort through an ad hoc substantive due process analysis. Rather than apply the Bill of Rights wholesale against the states through the Privileges or Immunities Clause, the Court has assessed each protection in the Bill of Rights on its own.<sup>133</sup> As to each, the Court asks whether the right in question is “‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’”<sup>134</sup> The Court has further described this inquiry as an assessment of “immutable principles of justice which inhere in the very idea of free government”<sup>135</sup> and “a fair and enlightened system of justice.”<sup>136</sup>

These questions are by their nature philosophical, but the Court’s analysis is largely driven by the historical practices during the relevant periods of our constitutional framing, as well as practices in other ordered societies prior to the United States. These inquiries can be as general or specific as the Court wants. This allows the Court to avoid constitutional technicalities while still adhering to history, tradition, and most of the protections contained in the Bill of Rights.

The Court’s right to bear arms jurisprudence offers a clear example of substantive due process as a bypass. In *United States v. Cruikshank*, the Court held that the Privileges or Immunities Clause of the Fourteenth Amendment did not incorporate the right to bear arms, and so it remained for well over a century.<sup>137</sup> Finally, in 2010 in *McDonald v. City of Chicago*, the Court recognized a fundamental right to bear arms, but still refused to disturb its privileges and immunities precedent.<sup>138</sup> It did not contest the “overwhelming”

gerrymandering challenges. In *Baker v. Carr*, the Court devoted extensive attention to the possibility that gerrymandering claims implicate the Guarantee Clause, under which they would be nonjusticiable, before holding that the claims could be decided under equal protection regardless. *Baker v. Carr*, 369 U.S. 186, 217–29 (1962).

133 See Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253 (1982).

134 *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (internal citations omitted) (first quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion); and then quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326, (1937)).

135 *Twining v. New Jersey*, 211 U.S. 78, 102 (1908) (quoting *Holden v. Hardy*, 169 U.S. 366, 389 (1898)).

136 *Palko*, 302 U.S. at 325; see also *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968) (asking whether “a civilized system could be imagined that would not accord the particular protection”); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (rights that are “so rooted in the traditions and conscience of our people as to be ranked as fundamental”).

137 *McDonald v. City of Chicago*, 561 U.S. 742, 758 (2010) (discussing petitioners’ request that the Court overrule *United States v. Cruikshank*, 92 U.S. 542 (1875)).

138 *Id.* at 756–58.

scholarly consensus that *Slaughter-House Cases* are “egregiously wrong.”<sup>139</sup> But rather than “disturb the *Slaughter-House* holding,” the Court simply resorted to substantive due process as an alternative.<sup>140</sup> The Court attempted to explain how the privileges or immunities inquiry is distinct from substantive due process and thus, conflicting outcomes under the two doctrines can coexist.<sup>141</sup> They can coexist because, unlike the Court’s other doctrines, substantive due process eschews all technicalities. Whatever may have been the Framers’ intent regarding the Bill of Rights, privileges or immunities, or citizenship in a republican form of government, the Court’s substantive due process precedent asks a simpler, albeit historically demanding, question.<sup>142</sup>

The simpler substantive due process inquiry has enormous practical advantages for the recognition of a right to education. First, substantive due process does not rest on narrow questions that the Framers and Ratifiers never considered.<sup>143</sup> Thus, it can moot the technical questions regarding how education fits within the Framers’ and Ratifiers’ intentions regarding citizenship, privileges or immunity, congressional power, and a republican form of government.<sup>144</sup> Second, in place of technical questions, substantive due process asks a set of malleable historical questions, the answers to which all emphatically point toward recognizing education as a fundamental right.<sup>145</sup>

As the following Sections detail, the history supporting education as a fundamental right starts with the founding ideas of our nation and continues through the modern day. The gravity of the right increases at important historical markers. Well before the Fourteenth Amendment, education was embedded in the very concept of democratic government that the nation’s Founders sought to enshrine.<sup>146</sup> Widespread access to education, however, did not exist in many states and locations for the first century of the

139 *Id.*

140 *Id.* at 758.

141 *Id.* at 758–66.

142 *Id.* at 767.

143 See generally Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 866 (1986) (modern legal analysis asks questions distinct from those that the Framers considered).

144 See Jeffrey D. Jackson, *Be Careful What You Wish for: Why McDonald v. City of Chicago’s Rejection of the Privileges or Immunities Clause May Not Be Such a Bad Thing for Rights*, 115 PENN ST. L. REV. 561, 562–64 (2011) (warning that a resurrection of privileges and immunities might be a bad thing).

145 *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (“[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.” (alteration in original) (quoting *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring))); see also Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 677 (2013) (“Arguments that appeal to the Founders or the Framers as an undifferentiated whole, or that conflate different generations (revolutionaries, Framers, politicians of the early federal period) are likely to be arguments from tradition or ethos.”).

146 See *infra* notes 195–217.

nation.<sup>147</sup> In those locations, education remained an idealistic aspiration that the governmental system failed to fully deliver. Several in Congress regarded this failure as playing no small part in the Civil War itself.<sup>148</sup>

Congress acted to correct these education failures after the War. Through the Freedmen's Bureau, the Fourteenth Amendment, and Southern readmission, Congress established and demanded public education.<sup>149</sup> Southern states responded positively and were followed by other states later. Before the end of the nineteenth century, all but one state guaranteed education in its constitution, and even the single outlier included a constitutional provision that set aside funds for education.<sup>150</sup> This history reveals that the right to education is not one that simply evolved due to modern necessities or an expanded federal footprint. Rather, a commitment to education as a fundamental necessity of citizenship was with the nation from the beginning. It was only the practical implementation of this necessity that took time to achieve.

#### A. *The Court's Historical Roadmap for Fundamental Rights*

The Court's opinion in *McDonald* provides a straightforward roadmap for identifying the precise historical facts necessary to establish a right as fundamental. The Court's historical analysis in *McDonald* involves several distinct inquiries. First, as to pre-Fourteenth Amendment history, the Court looked for analogs to and recognition of the right in ancient times, England, and the colonies.<sup>151</sup> Here, the source of the right to bear arms was the more general right of self-defense.<sup>152</sup> Second, the Court looked to ratification debates from the Constitution of 1787 and the Bill of Rights that followed.<sup>153</sup> Here, the Court emphasized the evils the Founders sought to ward off and their sense that the right to bear arms was a necessity.<sup>154</sup> The Court also examined the states' and legal commentators' treatment of the right following the ratification of the original Constitution and the Bill of Rights, pointing out that new state constitutions provided for the right to bear arms and

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147 See, e.g., DOROTHY ORR, *A HISTORY OF EDUCATION IN GEORGIA 175* (1950) (noting that "there were marked differences among the counties in the management of school affairs" in Georgia); VAUGHN, *supra* note 38, at 51–52 (noting that in 1853, North Carolina enrolled less than half of eligible white children and, by the end of the war, the "rudimentary Southern school systems disintegrated").

148 See, e.g., CONG. GLOBE, 41st Cong., 2d Sess. 1333 (1870) (statement of Sen. Edmunds) (stating the aristocratic tendencies of the South and lack of general education led to the Civil War); CONG. GLOBE, 40th Cong., 1st Sess. 167 (1867) (statement of Sen. Sumner) (assigning blame for the War on the lack of education).

149 See *infra* notes 201–30.

150 See *infra* notes 251–55.

151 *McDonald v. City of Chicago*, 561 U.S. 742, 767–68 (2010).

152 *Id.*

153 See *id.* at 768–69.

154 See *id.*

legal commentators described the right as an essential “libert[y] of a republic.”<sup>155</sup>

The Court then turned to the historical events surrounding the Fourteenth Amendment itself. The Court’s third inquiry was of infringements of the right to bear arms, and congressional responses to it before and after the enactment of the Fourteenth Amendment.<sup>156</sup> The Court found evidence of those infringements, for instance, in the fact that the Thirty-Ninth and Fortieth Congresses found it necessary to take steps to prevent the disarmament of former soldiers and citizens at the close of the Civil War.<sup>157</sup> The Court then offered detailed analysis of the legislation most closely connected to and giving rise to the Fourteenth Amendment—Freedmen’s Bureau legislation and the Civil Rights Act of 1866. The Court pointed out that the Freedmen’s Bureau Act explicitly protected the right to bear arms, and reasoned that Congress implicitly incorporated that right in the Civil Rights Act’s broad language protecting “the security of person and property.”<sup>158</sup>

Fourth, the Court examined the Fourteenth Amendment debates. Here, the details may be the sparsest. The Court only offered a quote from a single senator, who argued that the right to bear arms was essential to liberty.<sup>159</sup> The Court then added that even those who opposed the Fourteenth Amendment believed that blacks had a right to bear arms.<sup>160</sup> The Court’s final inquiry was of state practices immediately following ratification, particularly in state constitutions. The Court found that “22 of 37 States . . . had state constitutional provisions explicitly protecting the right to keep and bear arms.”<sup>161</sup>

These final two inquiries reveal two important points. First, a precise intent to incorporate the right to bear arms in the Fourteenth Amendment is unnecessary. The Court’s focus is on whether the Framers and Ratifiers understood the right to be fundamental, not whether they technically took action to create a federal right. The second point is that Congress’s and the states’ understandings are of equal importance. Speaking of them as two parts of a single inquiry into original intent, the Court wrote, “the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.”<sup>162</sup>

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155 *Id.* at 769–70 (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1890, at 746 (Boston, Hilliard, Gray, & Co. 1833)).

156 *Id.* at 770–72.

157 *Id.* at 772–75.

158 *Id.* at 774 (quoting Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27); *id.* at 774–75 (concluding that although the Civil Rights Act did not explicitly protect the right to bear arms, the available debates and circumstantial evidence point to an intent to “protect ‘the constitutional right to bear arms’ and not simply to prohibit discrimination.” (quoting Freedmen’s Bureau Act of 1866, ch. 200, § 14, 14 Stat. 173, 176)).

159 *Id.* at 775–76.

160 *Id.* at 776.

161 *Id.* at 777.

162 *Id.* at 778.

As with the right to bear arms, the Court does not need to reexamine its privileges or immunities precedent to recognize a right to education. It need only follow a compelling historical record demonstrating a pervasive belief among the Framers and Ratifiers that education is a fundamental right in our constitutional democracy. Violations of this right led Congress and the states to take very aggressive steps to ensure it following the Civil War. Not only does the history reveal a right deeply rooted in history as fundamental to the individual, but in the absence of education, the Founders feared our system of democracy and the liberty it protects would crumble.

*B. Pre-Fourteenth Amendment History: Founders, Education,  
and the Demands of Self-Rule*

A general right to public education does not have its roots in ancient times or England, but its absence makes perfect sense. Education in ancient times was not ideologically or practically connected to ancient or common-law forms of government.<sup>163</sup> In monarchies, the common man had little to no ability to engage in self-rule.<sup>164</sup> Moreover, in ancient and common-law societies, a large portion of society fell below the status of America's common man.<sup>165</sup> The vast lower classes were comprised of serfs, slaves, and individuals who were dependent on third parties.<sup>166</sup> The United States was a new experiment in a republican form of government that, at least in theory, required a reversal of these ancient norms.<sup>167</sup>

The original Constitution's Framers and state governments both understood education as important to the nation's values and breaking from prior norms.<sup>168</sup> In his 1796 Annual Message to Congress, President George Washington wrote:

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163 While Greece claimed to be democratic, it had slaves, as did Rome. See WILLIAM L. WESTERMANN, *THE SLAVE SYSTEMS OF GREEK AND ROMAN ANTIQUITY* 12, 63(1955).

164 This problem is a principal premise in Thomas Paine's *Common Sense*. See THOMAS PAINE, *COMMON SENSE* (Dover Publ'ns, Inc. 1997) (1776).

165 See, e.g., Walter Scheidel, *Human Mobility in Roman Italy, II: The Slave Population*, 95 J. ROMAN STUD. 64, 64–65 (2005) (discussing varying estimates of Rome's slave population, many of which believed the slave population as roughly the same size or larger than free society).

166 See, e.g., *id.*

167 The United States, of course, retained the contradiction of slavery at its founding. Congress, through the Reconstruction Act of 1867, would correct this contradiction, demand public education, and ensure the ratification of the Fourteenth Amendment. See *infra* subsection II.C.4.

168 See generally CARL F. KAESTLE, *PILLARS OF THE REPUBLIC, COMMON SCHOOLS AND AMERICAN SOCIETY, 1780–1860*, at 5–6 (Eric Foner ed., 1983) (describing Founders' views that public education would promote national identity and social order); McCULLOUGH, *supra* note 31, at 364 (quoting John Adams, who wrote, “[A] memorable change must be made in the system of education and knowledge must become so general as to raise the lower ranks of society nearer to the higher. The education of a nation instead of being confined to a few schools and universities for the instruction of the few, must become the national care and expense for the formation of the many.”); Steven Forde, *Benjamin Frank-*

[T]he assimilation of the principles, opinions, and manners of our countrymen by the common education of a portion of our youth from every quarter well deserves attention. The more homogenous our citizens can be made in these particulars the greater will be our prospect of permanent union; and a primary object of . . . a national institution should be the education of our youth in the science of government. In a republic what species of knowledge can be equally important and what duty more pressing on its legislature than to patronize a plan for communicating it to those who are to be the future guardians of the liberties of the country?<sup>169</sup>

In his 1806 address to Congress, President Thomas Jefferson made even bolder claims and requests. He proposed that future taxes and excess trust funds be spent on education and explained precisely why:

Education is here placed among the articles of public care [because] . . . a public institution can alone supply those sciences which, though rarely called for, are yet necessary to complete the circle, all the parts of which contribute to the improvement of the country, and some of them to its preservation.<sup>170</sup>

President Jefferson argued that education was so important to the nation that Congress should, if necessary, amend the Constitution to allow for education's support.<sup>171</sup>

The necessity of education to the United States' republican form of government rested on a few basic premises.<sup>172</sup> The first premise was that the people would engage in self-rule, which meant that all (white men) would vote.<sup>173</sup> The second premise was that citizens had a duty to vote.<sup>174</sup> Those eligible to vote took this duty very seriously in the early 1800s, voting at extremely high rates—often hovering around eighty percent and sometimes rising above ninety percent.<sup>175</sup> As these numbers confirm, “[r]ich and poor,

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*lin*, in *THE FOUNDERS' ALMANAC* 45, 55–56 (Matthew Spalding ed., 2002) (discussing Franklin's rejection of the European model of education that catered to privilege).

169 Washington, *supra* note 19.

170 President Thomas Jefferson, Sixth Annual Message to Congress (Dec. 2, 1806).

171 *See id.*

172 *See, e.g.*, Ross J. Pudeloff, *Education and the Constitution: Instituting American Culture*, in *LAWS OF OUR FATHERS: POPULAR CULTURE AND THE U.S. CONSTITUTION* 23, 26–27 (Ray B. Browne & Glenn J. Browne eds., 1986) (“By a necessary definition, a republican education was a mass education . . .”).

173 *See generally* McDonald v. City of Chicago, 561 U.S. 742, 864 (2010) (Stevens, J., dissenting) (describing our Constitution's “promise” of “self-rule”); *THE FEDERALIST* NO. 52, at 323 (Alexander Hamilton or James Madison) (Clinton Rossiter ed., 1961) (“The definition of the right of suffrage is very justly regarded as a fundamental article of republican government.”).

174 DAVID BARTON, *ORIGINAL INTENT: THE COURTS, THE CONSTITUTION, & RELIGION* 334–35 (1996) (discussing Adams, etc.); SILBEY, *supra* note 39, at 141 (recounting the view that it was the “noblest political duty” to vote and it could not be withheld).

175 SILBEY, *supra* note 39, at 144–46; *National General Election VEP Turnout Rates, 1789–Present*, U.S. ELECTIONS PROJECT, <http://www.electproject.org/national-1789-present> (last visited Nov. 6, 2018).

learned and uneducated participated at reasonably similar levels to produce an almost fully mobilized electorate.”<sup>176</sup>

The third premise was that citizens would vote intelligently.<sup>177</sup> The Framers expected that “individual citizens examined the candidates and issues both thoroughly and objectively. They then reached their voting decision by the exercise of reason and made their choice on the basis of enlightened self-interest, but in such a way that the common good was served.”<sup>178</sup> This exercise of reason required education. “Puritans at Massachusetts Bay colony in the seventeenth century, visionaries like Thomas Jefferson in the late eighteenth century, [and] the creators of public schools in the early nineteenth century . . . all believed that literacy was a *sine qua non* for effective participation in public affairs.”<sup>179</sup>

These education expectations were also reflected in the official acts of both Congress and the states.<sup>180</sup> Congress transferred extensive federal land to states and territories, requiring that they use the land and proceeds from it to establish and provide for schools.<sup>181</sup> The Northwest Ordinance of 1785 required that each new town set aside “the lot No. 16 . . . for the maintenance of public schools within the said township.”<sup>182</sup> Some states acted through their constitutions. Among the original thirteen states, five adopted constitutions between 1776 and 1787 that referenced support for or commitment to education.<sup>183</sup> The 1780 Massachusetts Constitution, for instance, emphasized the importance of education, stating that the state should “cherish” and “encourage” education.<sup>184</sup> Its rationale was plain: the “diffus[ion] of educa-

176 PAUL KLEPPNER, WHO VOTED? THE DYNAMICS OF ELECTORAL TURNOUT, 1870–1980, at 143 (Gerald M. Pomper ed., 1982).

177 HORACE MANN, LECTURES ON EDUCATION 55–56 (Boston, Ide & Dutton 1855) (1840) (“The theory of our government is,—not that all men, however unfit, shall be voters,—but that every man, by the power of reason and the sense of duty, shall become fit to be a voter. Education must bring the practice as nearly as possible to the theory.”); O’Brien, *supra* note 63, at 141 (“Jefferson thought that citizens must be educated in order to vote . . .”); *see also* Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) (“Thomas Jefferson pointed out . . . that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.”).

178 DeFleur, *supra* note 64, at 74.

179 Bennett et al., *supra* note 28, at 167 (citations omitted).

180 The Constitution itself also included indirect support for education. Although often overlooked, the Copyright Clause was connected to the furtherance of education. Ned Snow, *The Meaning of Science in the Copyright Clause*, 2013 BYU L. REV. 259, 287–88 (explaining that the meaning of “science” comes from Charles Pinckney, who intended an “educational or scholastic denotation”).

181 *See* Papasan v. Allain, 478 U.S. 265, 268 (1986) (discussing Congress’s policy of reserving land in every township for public schools).

182 *Id.* (quoting 1 LAWS OF THE UNITED STATES OF AMERICA 565 (Philadelphia, John Bioren, & W. John Duane 1815)).

183 John C. Eastman, *When Did Education Become a Civil Right? An Assessment of State Constitutional Provisions for Education: 1776–1900*, 42 AM. J. LEGAL HIST. 1, 3 (1998).

184 MASS. CONST. pt. II, ch. V, § 2 (ratified 1780).

tion] generally among the body of the people . . . [is] necessary for the preservation of their rights and liberties.”<sup>185</sup> Four years later, New Hampshire concurred in this same general maxim in its constitution,<sup>186</sup> with a number of other state constitutions doing the same in the early 1800s.<sup>187</sup>

The net result of these efforts was the rapid expansion of education. While public education remained rudimentary in many locations during the pre-Civil War era, the United States’ progress stood out in the world. By the mid-1800s, the only country with a higher primary school enrollment than the United States was Prussia.<sup>188</sup> Outside observers saw the nation’s expanding literacy and education as a testament to America’s unique commitment to self-government. Alexis de Tocqueville wrote: “I think there is no other county in the world where, proportionately to the population, there are so few ignorant and so few learned individuals . . . .”<sup>189</sup>

A modern study of the late 1700s to 1850 goes even further to confirm an empirical link between our form of government, voting, and access to education. It found that the expansion of education (and lack thereof) in particular geographic locations in the United States correlated with the expansion of democratic participation (and lack thereof) in the United States.<sup>190</sup> “[O]rdinary white Americans had an advantage over common men in their European countries of origin: They had more political voice relative to local elites, and increasingly so over the first half-century of independence.”<sup>191</sup> They leveraged that voice to enact policies to expand education. “The earlier suffrage of middling American white citizens seems to have accelerated the rise of public primary schooling . . . .”<sup>192</sup> The study found the same phenomena occurring within the United States: those areas affording the common man the most participation in government then devoted the most resources to education.<sup>193</sup>

In sum, pre-Fourteenth Amendment history reveals a strong ideological foundation and rationale for education as a fundamental right. Public education began as a nascent idea closely tied to the nation’s form of government. As Michael Rebell writes, public education was “rooted in republican values . . . [and] a uniquely American innovation.”<sup>194</sup> In this respect, regard-

185 *Id.*

186 N.H. CONST. pt. II, art. LXXXIII (ratified 1784) (“Knowledge and learning, generally diffused through a community . . . [is] essential to the preservation of a free government . . .”).

187 *See Eastman, supra* note 183, at 10.

188 *Go & Lindert, supra* note 20, at 3.

189 1 TOCQUEVILLE, *supra* note 66, at 55.

190 *See Go & Lindert, supra* note 20, at 14.

191 *Id.* at 13.

192 *Id.* at 13–14.

193 *Id.* at 19–20; *see also* SILBEX, *supra* note 39, at 146 (indicating voting turnout rates were lowest in slave states); Elisa Mariscal & Kenneth L. Sokoloff, *Schooling, Suffrage, and the Persistence of Inequality in the Americas, 1800–1945*, in *POLITICAL INSTITUTIONS AND ECONOMIC GROWTH IN LATIN AMERICA* 159, 159–217 (Stephen Haber ed., 2000).

194 REBELL, *supra* note 70, at 196 n.20.

less of how well Congress and the states expanded access to education, education was embedded in the very concept of who we are as states and a nation. In this respect, the Founders believed education was a necessary aspect of liberty and ordered society. Unsurprisingly, where implementation of that idea was lacking, so too was a republican form of government. It was this failure that would later drive more aggressive and conclusive steps to ensure education following the Civil War.

### C. *Transitioning from Theory to Reality: The Fourteenth Amendment Era*

The national and state-level commitment to education became far more concrete between the end of the Civil War and the final ratification of the Fourteenth Amendment. As *McDonald* reveals, the most crucial inquiries are in regard to the events surrounding the Fourteenth Amendment, particularly evidence of deprivations of education, congressional efforts to address those deprivations, the extent to which those prior efforts were incorporated into the Fourteenth Amendment, Fourteenth Amendment debates themselves, and state actions and responses. Each of these inquiries offers ample evidence that education is a fundamental right.

#### 1. Recognition of Education Deprivations Prior to the Fourteenth Amendment

Prior to the ratification of the Fourteenth Amendment, congressional and state leaders began to take special note of the deprivation of education in various locations, particularly the South.<sup>195</sup> They saw this deprivation as a grievous wrong to both individuals and the nation as a whole.<sup>196</sup> In the South, African Americans had been completely denied formal learning and even basic literacy was criminalized.<sup>197</sup> Poor whites' access to education was more theoretical than real,<sup>198</sup> demonstrated by the fact that white illiteracy rates were more than four times higher in the South than the North.<sup>199</sup> Congressional and state leaders went so far as to argue that these education deprivations worked an even larger harm—they allowed southern elites to

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195 See, e.g., CONG. GLOBE, 40th Cong., 1st Sess. 167 (1867) (statement of Sen. Sumner) (assigning blame for the war on the lack of education and discussing high illiteracy rates); 2 CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA, *supra* note 54, at 688–89 (same); *id.* at 694–95 (same); see also CREMIN, *supra* note 41, at 149 (describing the southern education system as “a patchwork”).

196 See, e.g., CONG. GLOBE, 41st Cong., 2d Sess. 1333 (1870) (statement of Sen. Edmunds) (stating the aristocratic tendencies of the South and lack of general education led to the war); CONG. GLOBE, 40th Cong., 1st Sess. 168 (1867) (statement of Sen. Morton) (asserting that without mass education, “the political power will remain almost entirely in the hands of the present rebel-educated classes”).

197 See Wahl, *supra* note 38, at 17 n.51.

198 See CREMIN, *supra* note 41, at 149.

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

dominate government and ultimately start a war that was adverse the interests of the masses.<sup>200</sup>

## 2. Legislation to Address Education Deprivations Prior to the Fourteenth Amendment

Congress began addressing these education deprivations in the years immediately preceding the Fourteenth Amendment. Congress funded a massive expansion of educational opportunity in the South through the Freedmen's Bureau. In fact, education became one of the primary functions of the Bureau during Reconstruction.<sup>201</sup> More importantly, through the Reconstruction Act, Congress forced states to adopt their own constitutional education clauses to ensure that access to education would further expand, not recede.

In 1867, ten Confederate states had yet to rejoin the Union.<sup>202</sup> The Reconstruction Acts of 1867 and 1868 stated the terms upon which Congress would readmit Confederate states to the Union. Those terms explicitly required that Southern states, among other things, adopt new state constitutions that conformed to a republican form of government and the U.S. Constitution.<sup>203</sup> States were then to submit those constitutions to Congress, which would determine whether they conformed.<sup>204</sup>

Congress would also express the view that public education is a central component of a republican form of government. Senator Charles Sumner offered an amendment to the Reconstruction Act to make the provision of education an explicit condition of readmission. The amendment required

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200 See *id.* (“[H]ad these States been more enlightened they would never have rebelled. . . . A population that could not read and write naturally failed to comprehend and appreciate a republican government.”); *id.* at 168 (statement of Sen. Morton) (arguing that education of the masses was necessary to change the political balance in the South); Susan P. Leviton & Matthew H. Joseph, *An Adequate Education for All Maryland's Children: Morally Right, Economically Necessary, and Constitutionally Required*, 52 MD. L. REV. 1137, 1155 (1993); see also CONG. GLOBE, 41st Cong., 2d Sess. 1333 (1870) (statement of Sen. Edmunds) (arguing that the lack of education had played a role in the War); 2 CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA, *supra* note 54, at 688–89, 694–95 (delegates arguing the same); WYTHE HOLT, VIRGINIA'S CONSTITUTIONAL CONVENTION OF 1901–1902, at 254 (1990) (describing the Virginia elite's perception of the state's Reconstruction-era constitution as threatening and dangerous).

201 CREMIN, *supra* note 41, at 517–18 (Reconstruction policy was educational policy and “the very act of emancipation had carried ‘the sacred promise to educate.’” (emphasis omitted) (quoting NAT'L TEACHERS' ASS'N, PROCEEDINGS AND LECTURES OF THE SIXTH ANNUAL MEETING 242 (Hartford, Office of the Am. Journal of Educ. 1865))); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 144 (1988) (“Education probably represented the [Freedmen's Bureau's] greatest success in the postwar South.”).

202 See Harrison, *supra* note 51, at 412.

203 Reconstruction Act of 1867, ch. 153, § 5, 14 Stat. 428, 429. The Act also required states to ratify the Fourteenth Amendment and extend voting rights to African Americans. *Id.*

204 *Id.*

states “to establish and sustain a system of public schools open to all, without distinction of race or color.”<sup>205</sup> Sumner’s education amendment garnered significant support and senators emphasized that education was necessary to ensure African Americans became full citizens in the new South.<sup>206</sup>

Sumner’s amendment ultimately failed by the narrowest margin, by a vote of 20–20.<sup>207</sup> But the reference to race, rather than the general education mandate, better explains this narrow defeat. Sumner’s amendment would have mandated an integrated or nondiscriminatory system of education. At least one of the no votes was based on an objection to integration, not education in general.<sup>208</sup> And others objected to the idea of placing explicit advance conditions on readmission, regardless of what those conditions might be.<sup>209</sup> The notion that education was necessary to a republican form of government drew no challenge at all. In this context, the tie vote over Sumner’s amendment is an enormous testament to just how strong the commitment to requiring education was. A full half of the Senate was willing not only to mandate education, but to have former slaves and slave owners sit down in those schools on equal footing.

The overall Reconstruction Act did pass and retained the provision requiring states to submit their constitutions for congressional approval.<sup>210</sup> Education remained one of Congress’s expectations regarding a republican form of government.<sup>211</sup> Senator Hendricks, who had voted against Sumner’s amendment, later emphasized that Congress could rightfully reject state constitutions that did not provide for education because they did not conform to a republican form of government.<sup>212</sup> Sumner also reiterated that senators could and should vote against the readmission of any state that did not provide for education.<sup>213</sup> While no formal vote was taken on the matter, those who had voted in favor of integrated education, combined with Senator Hendricks, comprised a majority in the Senate who understood education to be a necessary aspect of a republican form of government.

205 CONG. GLOBE, 40th Cong., 1st Sess. 581 (1867) (statement of Sen. Sumner). Sumner explained that the amendment was a simple “safeguard for the future” and a natural corollary to universal suffrage, which Congress was already requiring. *Id.* at 166–67 (statement of Sen. Sumner).

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

207 *Id.* at 170.

208 *Id.* at 169–70 (statement of Sen. Williams) (posing a rhetorical question regarding whether the amendment would require integration and then voting against it).

209 *See id.* at 148 (statement of Sen. Conkling); *id.* at 149 (statement of Sen. Sherman); *id.* at 157 (statement of Sen. Hendricks); *id.* at 168 (statement of Sen. Hendricks) (“Congress . . . has no power under the Constitution to make a constitution for a State . . .”); *see also* Harrison, *supra* note 51, at 419 n.227 (recounting senators’ concerns regarding conditioning readmission).

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

211 *See* Black, *supra* note 22, at 781–83 (summarizing Congress’s acts and intentions).

212 *See* CONG. GLOBE, 40th Cong., 1st Sess. 168 (statement of Sen. Hendricks).

213 *Id.* at 572 (statement of Sen. Sumner) (arguing that senators were “perfectly entitled to . . . refuse to vote for such a constitution” that did not guarantee education).

Further supporting this expectation is the fact that the Senate and House had just passed legislation to monitor what states were doing in terms of education. Two weeks prior to the Senate debate over the Reconstruction Act, Congress created a federal Department of Education.<sup>214</sup> Its explicit purpose was to “collect[ ] such statistics and facts as shall show the condition and progress of education in the several States and Territories” and to use that information to aid in the “establishment and maintenance of efficient school systems, and otherwise promote the cause of education throughout the country.”<sup>215</sup> In other words, before Congress even took up the explicit terms of readmission, Congress had already laid the groundwork to assess whether states were providing education to their citizens. Congress, moreover, took extensive affirmative steps to set up education systems itself in the South, giving states a running start in carrying out Congress’s expectations.<sup>216</sup>

Most conclusive, however, was Congress’s action immediately following the final ratification of the Fourteenth Amendment in 1868. With the Amendment formally in place, Congress explicitly conditioned the remaining Confederate states’ readmission on the provision of public education. In the year before final ratification, nine Southern states drafted, debated, and approved specific state constitutional language that mandated the provision of public education. Those states were readmitted in 1868. Congress did not, however, readmit the remaining states to the Union until 1870 and did so under harsher terms: “[T]he constitution[s] of [Texas, Mississippi, and Virginia] shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the constitution[s] of said State[s].”<sup>217</sup>

### 3. The Fourteenth Amendment

Congress’s legislative acts prior to the Civil War were directly linked to the final ratification of the Fourteenth Amendment itself. When Congress passed the Reconstruction Act, the Fourteenth Amendment was still eleven votes short of the number necessary for ratification.<sup>218</sup> Without the affirmative votes of Southern states, the Fourteenth Amendment would not have

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214 An Act to Establish a Department of Education, ch. 158, § 1, 14 Stat. 434, 434 (1867).

215 *Id.*

216 See, e.g., *Papasan v. Allain*, 478 U.S. 265, 268 (1986) (discussing Congress’s land grant education policy); CREMIN, *supra* note 41, at 516 (explaining the Freedmen’s Bureau’s role in creating and funding new schools); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 780–81 (1985) (finding two-thirds of Freedmen’s Bureau’s budget went to education).

217 See An Act to Admit the State of Texas to Representation in the Congress of the United States, ch. 39, 16 Stat. 80, 81 (1870); An Act to Admit the State of Mississippi to Representation in the Congress of the United States, ch. 19, 16 Stat. 67, 68 (1870); An Act to Admit the State of Virginia to Representation in the Congress of the United States, ch. 10, 16 Stat. 62, 63 (1870).

218 See Douglas H. Bryant, Comment, *Unorthodox and Paradox: Revisiting the Ratification of the Fourteenth Amendment*, 53 ALA. L. REV. 555, 563–64 (2002).

become part of the U.S. Constitution in 1868.<sup>219</sup> And per the Reconstruction Act, Congress would not readmit states to the Union until they ratified the Amendment.<sup>220</sup>

Added to this was the condition that Southern states adopt new state constitutions that conformed to a republican form of government,<sup>221</sup> which included establishing systems of public education. When the requisite number of states complied by enacting education clauses and ratifying the Fourteenth Amendment, the Amendment became a formal addition to the Constitution.<sup>222</sup> Thus, at that very moment in time when the Amendment was finally ratified, education had become a right of state citizenship in the constitution of every readmitted state.<sup>223</sup> This fact intersects with the Fourteenth Amendment, which by its text, explicitly grants citizenship and prevents the infringement of the rights of citizens.<sup>224</sup> In short, without even debating the question of whether education was a fundamental right or privilege and immunity of citizenship, Congress took steps to ensure that the Fourteenth Amendment's newly recognized citizens would immediately have access to their constitutional right to education.

Congress's rationale for its action was clear: an educated citizenry is necessary for a republican form of government.<sup>225</sup> This rationale also directly relates to the Court's more amorphous substantive due process question of whether a right is "implicit in the concept of ordered liberty."<sup>226</sup> Our Constitution conceptualizes ordered liberty in terms of a republican form of government.<sup>227</sup> Congress has, through its power to enforce a republican form of government, practically defined ordered liberty as requiring states to provide public education.<sup>228</sup> Without education, citizens cannot fully partici-

219 *See id.* at 565.

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

221 *Id.*

222 Proclamation No. 13, 15 Stat. 708, 710–11 (1868) (Secretary of State William Seward).

223 ALA. CONST. of 1868, art. XI, § 6; ARK. CONST. of 1868, art. IX, § 1; FLA. CONST. of 1868, art. VIII, § 1; GA. CONST. of 1868, art. VI, § 1; LA. CONST. of 1868, tit. VII, art. CXXXV; N.C. CONST. of 1868, art. IX, § 2; S.C. CONST. of 1868, art. X, § 3.

224 U.S. CONST. amend. XIV, § 1.

225 *See, e.g.*, CONG. GLOBE, 40th Cong., 1st Sess. 167, 572 (1867) (statement Sen. Sumner); *id.* at 168, 572 (statement of Sen. Morton); *id.* at 168 (statement of Sen. Hendricks).

226 *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937).

227 *See* U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . ."); *see also* Daniel Walker Howe, *Anti-Federalist/Federalist Dialogue and Its Implications for Constitutional Understanding*, 84 Nw. U. L. REV. 1, 2–3 (1989) (discussing the connection between republicanism and liberty in the eighteenth century).

228 *See, e.g.*, An Act to Admit the State of Mississippi to Representation in the Congress of the United States, ch. 19, 16 Stat. 67, 68 (1870) (requiring the continued provision of education as a condition of Missouri's readmission to the Union); *see also* *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 206 (Ky. 1989) ("[P]ublic schools . . . are a part and parcel of our free institutions, woven into the very web and woof of popular govern-

pate in self-government.<sup>229</sup> And without guaranteeing education, a state government could not be fully republican in form and, thus, fit to be included in the Union. This view of government, or ordered liberty, became so entrenched that following the enactment of the Fourteenth Amendment, no other state would ever enter the Union without an education clause.<sup>230</sup>

#### 4. State Practices and Ratifications of the Fourteenth Amendment

Those who ratified the Fourteenth Amendment were equally, if not more, committed to constitutionalizing education. In the span of just two years, the Southern states that provided the final votes to ratify the Fourteenth Amendment transformed themselves from a region in which education was not guaranteed anywhere to one in which it was guaranteed everywhere. The state constitutional conventions began meeting immediately after Congress passed the Reconstruction Act,<sup>231</sup> and demonstrated the same clarity of vision regarding the importance of education. Delegates to the constitutional conventions consistently acknowledged that their task was to create a republican form of government<sup>232</sup> and that education was a necessary component of that government.

Most state conventions established a committee to focus exclusively on the creation of an education system. The very act of devoting a committee exclusively to this task reveals the primary importance of education in these new constitutional schemes. A typical state convention established several committees, most of which focused on general issues of government bureaucracy and separation of powers.<sup>233</sup> Voting and education tended to be the only substantive subject matter specific committees in some states.<sup>234</sup>

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ment . . .” (quoting 3 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES IN THE KENTUCKY CONSTITUTIONAL CONVENTION 4463 (Frankfort, E. Polk Johnson 1890)).

229 See *supra* notes 195–228.

230 ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; COLO. CONST. art. IX, § 2; HAW. CONST. of 1959, art. IX, § 1; IDAHO CONST. art. IX, § 1 (mandating “a general, uniform and thorough system of public, free common schools” to further “[t]he stability of a republican form of government”); MONT. CONST. of 1889, art. XI, §§ 1, 7; NEB. CONST. art. VII, § 1; NEV. CONST. art. XI, §§ 1, 2; N.M. CONST. art. XII, § 1; N.D. CONST. art. VIII, § 147; OKLA. CONST. art. XIII, § 1; S.D. CONST. art. VIII, § 1 (mandating an education system as a necessity of a republican form of government); UTAH CONST. art. X, § 1; WASH. CONST. art. IX, §§ 1, 2; WYO. CONST. art. VII, § 1.

231 See, e.g., CYNTHIA E. BROWNE, STATE CONSTITUTIONAL CONVENTIONS: FROM INDEPENDENCE TO THE COMPLETION OF THE PRESENT UNION, 1776–1959: A BIBLIOGRAPHY 5, 39, 46, 80, 112, 167, 234 (1973).

232 1 CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA, *supra* note 54, at 10 (noting that purpose of convention is “to frame a new Constitution” so as “to secure a Republican form of Government”); *id.* at 628–807 (citing the second volume and referencing a republican form of government more than fifty times over seven days: February 29, March 2, March 3, March 4, March 5, March 6, and March 7).

233 See, e.g., 1 *id.* at 40.

234 Some states also had individual rights committees, but those focused on a litany of narrow rights. See, e.g., *id.*

Voting and education held this unique position because of their centrality to a republican form of government itself. In proposing a robust mandatory system of public education, the South Carolina convention's committee on education, for instance, explained that education "is the surest guarantee of the . . . preservation of the great principles of republican liberty."<sup>235</sup> This sentiment was so widely shared across the state conventions that the decision to constitutionally commit states to the creation of education systems generated almost no debate at all. When the question of the mandate arose, delegates simply affirmed that education was necessary for a republican form of government,<sup>236</sup> and uneducated citizens could not carry out their basic duties to the state.<sup>237</sup>

To the extent objections arose, they involved more nuanced issues regarding whether, on the heels of war and economic implosion, states had the capacity to finance education.<sup>238</sup> Others raised concerns about the prospect of racial equality in the schools.<sup>239</sup> Concerns of this sort, however, did not represent direct challenges to the creation of public education. They were concerns about how progressive and burdensome state policy on education would be.

235 See *id.* at 264.

236 See, e.g., *id.* at 688 (citing the second volume and stating that compulsory education was necessary for republican progress); *id.* at 691 ("[C]heap education is the best defence of the State."); see also DEBATES AND PROCEEDINGS OF THE CONVENTION TO FORM A CONSTITUTION FOR THE STATE OF ARKANSAS 500 (Little Rock, J.G. Price 1868) [hereinafter ARKANSAS CONVENTION OF 1868] (arguing that access to education would give blacks the means to "work their way up" in the world" and "take their place . . . among the leaders of their people"); *id.* at 683 (supporting the constitution because of its education mandate); OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE CONVENTION, FOR FRAMING A CONSTITUTION FOR THE STATE OF LOUISIANA 200–01, 289 (New Orleans, J.B. Roudanez & Co. 1867–1868) [hereinafter LOUISIANA CONVENTION OF 1868] (noting education was necessary because it had been denied to African Americans for two centuries); JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NORTH CAROLINA, *supra* note 54, at 486 (providing for county government to carry out the "Republican principle of local self-government" and education).

237 2 CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA, *supra* note 54, at 695 ("If a man is so ignorant as to know nothing of political economy of his State or country, he can never be a good citizen."); *id.* at 697 (noting that African American suffrage created "the pressing necessity of their being educated to comprehend their new position, exercise their new rights, and obey their new laws").

238 See *id.* at 172–73 (citing the first volume); see also LOUISIANA CONVENTION OF 1868, *supra* note 236, at 277 (expressing concerns over costs).

239 See, e.g., ARKANSAS CONVENTION OF 1868, *supra* note 236, at 498–500, 626–27; LOUISIANA CONVENTION OF 1868, *supra* note 236, at 292; 2 CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA, *supra* note 54, at 692, 893–94 (supporting nondiscrimination); *id.* at 692, 701–02, 894 (questioning integration and compulsory education); ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 91 (2009) (indicating that "[t]here was disagreement, however, about integrated schools"); Michael Robert Mounter, *Richard Theodore Greener and the African American Individual in a Black and White World*, in AT FREEDOM'S DOOR: AFRICAN AMERICAN FOUNDING FATHERS AND LAWYERS IN RECONSTRUCTION SOUTH CAROLINA 130, 145 (James Lowell Underwood & W. Lewis Burke Jr. eds., 2000).

The key insight from the education debates was not that some concerns arose, but that issues as weighty as race and meager state finances were not enough to dissuade states from enacting education clauses.<sup>240</sup> If anything, state conventions further strengthened their education clauses rather than concede to these concerns.<sup>241</sup> For instance, several state constitutions included funding provisions that required certain resources to be devoted exclusively to the support of education.<sup>242</sup> Other states were even willing to impose poll taxes, not to exclude voters, but to raise additional funds for education.<sup>243</sup> Several state constitutions even went so far as to mandate that public schools be open to all<sup>244</sup>—a direct repudiation of the idea that schools would be segregated.

The effort to rebuild republican forms of government through public education was so overwhelming that it inverted the educational status quo. Before the Civil War, affirmative education obligations were entirely missing from Southern state constitutions.<sup>245</sup> Three years after the Civil War, nine

240 See, e.g., 2 CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA, *supra* note 54, at 692, 696 (discussing the challenges of supporting education, but emphasizing its necessity in a republican form of government); WILLIAMS, *supra* note 239, at 91 (indicating that “these conventions produced ‘progressive documents’” that “established free public schools (attendance was compulsory in some states)” (quoting ERIC FONER, *FOREVER FREE: THE STORY OF EMANCIPATION AND RECONSTRUCTION* 143–44 (2005))).

241 JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE PEOPLE OF GEORGIA 482–83 (Augusta, E.H. Pughe 1868) (offering an amendment to strengthen rather than weaken education clause by ensuring one or more schools in every district as soon as possible); LOUISIANA CONVENTION OF 1868, *supra* note 236, at 60–61, 200–01 (including majority and minority reports, both of which agreed on the same core aspects of delivering education to all the youth).

242 See, e.g., ALA. CONST. of 1868, art. XI, § 10 (providing that proceeds from all new and old state lands “shall be inviolably appropriated to educational purposes”); *id.* art. XI, § 11 (requiring that one-fifth of general annual state revenues “be devoted exclusively to the maintenance of public schools”); FLA. CONST. of 1868, art. VIII, §§ 4, 7 (devoting resources to an education fund and requiring per-capita distribution among counties); see also JOHN MATHIASON MATZEN, *STATE CONSTITUTIONAL PROVISIONS FOR EDUCATION* 129–39 (1931) (tracking the new common school funds in state constitutions).

243 GA. CONST. of 1868, art. VI., § 3; James Lowell Underwood, *African American Founding Fathers: The Making of the South Carolina Constitution of 1868*, in *AT FREEDOM’S DOOR: AFRICAN AMERICAN FOUNDING FATHERS AND LAWYERS IN RECONSTRUCTION SOUTH CAROLINA*, *supra* note 239, at 1, 9–10.

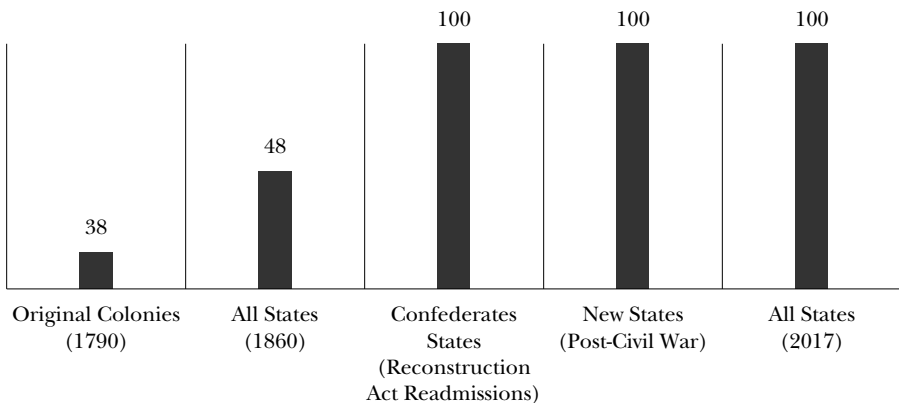
244 ALA. CONST. of 1868, art. XI, § 6 (establishing education for “all the children of the State”); ARK. CONST. of 1868, art. IX, § 1 (same); FLA. CONST. of 1868, art. VIII, § 1 (same); GA. CONST. of 1868, art. VI, § 1 (same); LA. CONST. of 1868, tit. VII, art. CXXXV (“All children of this State [of suitable age] shall be admitted to the public schools . . . without distinction of race . . . .”); N.C. CONST. of 1868, art. IX, § 2 (mandating an education system for “all the children of the State”); S.C. CONST. of 1868, art. X, § 4 (same).

245 The most extensive support prior to the Civil War was found in Kentucky’s and Tennessee’s constitutions, but they encouraged education rather than affirmatively mandating it. KY. CONST. of 1850, art. XI, § 1; TENN. CONST. of 1834, art. XI, § 10 (indicating that the state shall “cherish literature and science” and “encourage[ ]” schools). One could read this as a weak constitutional mandate. See Calabresi & Perl, *supra* note 57, at 455–56.

out of the ten Confederate states had enacted an affirmative education clause in their constitution.<sup>246</sup> Two years later, every Confederate state had enacted an affirmative clause. Moreover, the text of those education clauses included the same concept found in Sumner’s proposed amendment to the Reconstruction Act: the clauses mandated a system of public schools open to “all” children.<sup>247</sup>

The same pattern occurred in newly formed states during this era. Between 1864 and 1876, Nevada, Nebraska, and Colorado would enter the Union as new states, all with education clauses.<sup>248</sup> In the century following the enactment of the Fourteenth Amendment, thirteen new states sought admission to the Union.<sup>249</sup> Every single one included an education mandate in their constitutions.<sup>250</sup> Congress initially rejected the single petition for statehood (from New Mexico) that did not include an education clause and required the territory to revise its constitution to include one.<sup>251</sup> In short, once the Fourteenth Amendment became law, Congress never admitted another state to the Union without an education clause.

FIGURE 1: PERCENTAGE OF STATES WITH EDUCATION CLAUSES



246 See ALA. CONST. of 1868, art. XI, § 6; ARK. CONST. of 1868, art. IX, § 1; FLA. CONST. of 1868, art. VIII, § 1; GA. CONST. of 1868, art. VI, § 1; LA. CONST. of 1868, tit. VII, art. CXXXV; MISS. CONST. of 1868, art. VIII, § 1; N.C. CONST. of 1868, art. IX, § 2; S.C. CONST. of 1868, art. X, § 3; TEX. CONST. of 1869, art. IX, § 1.

247 See *supra* note 246.

248 COLO. CONST. art. IX, § 2 (ratified 1876); NEB. CONST. art. VII, § 1 (ratified 1875); NEV. CONST. art. XI, §§ 1, 2 (ratified 1864).

249 See Martin Kelly, *States and Their Admission to the Union*, THOUGHTCO., <https://www.thoughtco.com/states-admission-to-the-union-104903> (last updated Feb. 8, 2018).

250 See INST. FOR EDUC. EQUITY & OPPORTUNITY, *EDUCATION IN THE 50 STATES: A DESKBOOK FOR THE HISTORY OF STATE CONSTITUTIONS AND LAWS ABOUT EDUCATION* 161–96 (2008), [https://www.pubintlaw.org/wp-content/uploads/2012/04/EDU\\_50State.pdf](https://www.pubintlaw.org/wp-content/uploads/2012/04/EDU_50State.pdf) (summarizing the education clauses and their histories in each state).

251 *Id.* at 29.

As the chart above reveals, the education clause pattern is even more striking in comparison with the original states and colonies. At the nation's founding, only five of thirteen state constitutions provided for education.<sup>252</sup> On the eve of the Civil War, more than half of the nation's states still failed to affirmatively guarantee education.<sup>253</sup> The complete reversal in Southern constitutions during Reconstruction was enough by itself to create a new supermajority of states with an education clause. By 1868, 81% of all state constitutions included an education clause.<sup>254</sup> The admission of additional new states, combined with revisions to constitutions in existing states, steadily pushed that number higher. By 1875, every state except Connecticut had an education clause (although Connecticut did have an education system and a constitutional provision that reserved certain funds to support it).<sup>255</sup> Connecticut finally cured that technical defect in 1965.<sup>256</sup>

Data from the post-Civil War period also reveals how impactful these clauses were in practical terms. Public school enrollment increased dramatically. According to the National Center for Education Statistics, enrollment increased by 44% during the 1870s.<sup>257</sup> Enrollment continued to steadily rise over the next few decades.<sup>258</sup> Whereas the enrollment of school-aged children hovered around 50% at the time of the Civil War, it reached 81% by 1910.<sup>259</sup> The amount of time students spent in school also increased, with the length of the school year and attendance rates growing substantially.<sup>260</sup>

In sum, education as a fundamental right has deep historic roots. The nation's very concept of government was premised on an educated citizenry. As a result, the United States, from its infancy, distinguished itself internationally with its expansion of education opportunity. In those instances in which the country failed to live up to its ideals, Congress eventually took action to cure the problem. By the end of the Civil War, the inherent tension between the national commitment to a republican form of government and the reality of education opportunity in many states came to a head. What followed was a series of concerted congressional and state efforts to constitutionalize education. In just a few short years surrounding the Fourteenth Amendment, the provision of public education became a *de facto* right in over three-quarters of the states and a uniform expectation for all moving forward. This history ranks education as fundamental at the time of the

252 See Eastman, *supra* note 183, at 3.

253 See Black, *supra* note 22, at 791.

254 Calabresi & Perl, *supra* note 57, at 460.

255 *Id.* at 458 n.132 (explaining that in 1875, New Jersey adopted its education clause, leaving Connecticut as the only state without one).

256 Sheff v. O'Neill, 678 A.2d 1267, 1280 (Conn. 1996) (explaining the 1965 amendment to the state constitution to address school segregation).

257 William C. Sonnenberg, *Elementary and Secondary Education*, in NAT'L CTR. FOR EDUC. STAT., U.S. DEP'T OF EDUC., 120 YEARS OF AMERICAN EDUCATION: A STATISTICAL PORTRAIT 25, 25-26 (Thomas D. Snyder ed., 1993).

258 *Id.*

259 *Id.* at 26.

260 *Id.* at 27-28.

Fourteenth Amendment. Arguments to the contrary simply overlook this crucial period, incorrectly looking to post-Reconstruction, Jim Crow, and later eras for evidence of support of education. Those periods do not establish the absence of a right, only that the previously established right was being violated—most often for racist reasons.<sup>261</sup>

### III. QUALITATIVE DEMAND

The recognition of a fundamental right involves two distinct inquiries: (a) whether a right exists, and (b) the scope of the right. Part II demonstrated that education is a fundamental right, but the question remains as to its scope. The right to bear arms, again, provides a straightforward roadmap for this second question. The Supreme Court in *McDonald* held that a right existed and was enforceable against states.<sup>262</sup> In *District of Columbia v. Heller*, the Court examined the precise meaning and scope of a right to “keep and bear arms.”<sup>263</sup> The right could have been as narrow as a right of militiamen to keep the specific types of weapons that they would use in battle or as broad as any individual’s right to keep weapons of their choice for self-defense.<sup>264</sup> The answer to the scope question is the key to drawing lines regarding whether state laws invade a fundamental right.

Questions of scope are a particularly significant barrier for the right to education. A court could easily accept the general idea that students have a constitutional right to education, but the scope of the right to education inherently involves complex and substantive judgments. These uncertainties can dissuade a court from recognizing the right at all, even if evidence exists to support the right.<sup>265</sup> As state court decisions reveal, legislative history at best provides only vague outlines of the scope of the right.<sup>266</sup> This means that a court that recognizes a right to education will be called on to draw inferences regarding scope that will have enormous practical consequences.<sup>267</sup> A broad education right will draw courts into wholesale evaluations of educational quality on a statewide level,<sup>268</sup> whereas a limited right

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261 See generally RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* (2004).

262 *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

263 *District of Columbia v. Heller*, 554 U.S. 570, 576–600 (2008).

264 Compare *id.* at 582, with *id.* at 609.

265 See, e.g., *Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 408 (Fla. 1996) (per curiam) (finding no “judicially discoverable [or] manageable standards”); *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1191 (Ill. 1996) (same).

266 See, e.g., *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 205–06 (Ky. 1989) (examining constitutional debates).

267 See, e.g., *id.* at 212–13 (defining the scope of the right to education after examining several sources on the meaning of uniform an efficient education); *Leandro v. State*, 488 S.E.2d 249, 255 (N.C. 1997) (defining the scope of a sound basic education).

268 See, e.g., *Rose*, 790 S.W.2d at 214 (declaring the entire school system unconstitutional).

can preclude the vast majority of education challenges plaintiffs might raise.<sup>269</sup>

More specifically, a right to education can be defined as requiring absolute equity, a high-quality level of education, a minimally adequate education, mere access to education, or only good faith efforts to support education. Each of these permutations raises additional questions. What are the aspects of education to which these concepts apply? Do these concepts apply only to major categories like school funding and teacher competency, or do they apply to more granular aspects like class size, technology, and school district boundaries?

The Court in *San Antonio Independent School District v. Rodriguez* indicated that the lack of guideposts was a significant reason for why it would not intervene.<sup>270</sup> In the four decades since *Rodriguez*, state supreme courts have made enormous strides in fleshing out the scope of education rights and duties under their state constitutions.<sup>271</sup> Some scholars argue that these state court decisions offer guideposts for a floor of educational opportunity that a federal right could demand.<sup>272</sup> Scholars also point to the vast expansion of federal education statutes, centralized curricula, and the expectations embodied in standardized tests as providing additional manageable standards.<sup>273</sup>

Whatever the intrinsic merits of these sources, it would be a mistake to rely primarily on them. First, they put the Court in the position of making an open-ended policy-based inquiry from which the current Court is likely to recoil. The Court would, in effect, be forced to draw inferences based on an evolving modern common law. The identification of a historical fundamental right to education cannot simply become the predicate for the Court to take over, modernize, and federalize education.

Second, the history surrounding the Fourteenth Amendment provides its own guideposts for the scope of the right. Supreme Court precedent, moreover, indicates that this history is the first point of departure in identifying a right's scope.<sup>274</sup> Where a precise constitutional term is available (such as the right to bear arms), the Court has recently looked for the original plain meaning of the constitutional text, relying on congressional purpose,

269 See, e.g., *Jones v. State Bd. of Elementary & Secondary Educ.*, 927 So. 2d 426, 431 (La. Ct. App. 2005) (rejecting claim because the state constitution only requires the state to adopt a funding formula and does not require it to develop a formula that addresses costs or particular items).

270 See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 89 (1973) (Marshall, J., dissenting).

271 See Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMP. L. REV. 1325, 1325–26 (1992) (applauding state court developments in defining adequacy).

272 See, e.g., Ratner, *supra* note 12, at 814–22; Kristen Safier, Comment, *The Question of a Fundamental Right to a Minimally Adequate Education*, 69 U. CIN. L. REV. 993, 1018–20 (2001).

273 See, e.g., Black, *supra* note 77, at 1393–95; Ratner, *supra* note 12; Michael A. Rebell, *The Right to Comprehensive Educational Opportunity*, 47 HARV. C.R.-C.L. L. REV. 47, 54 (2012).

274 See *District of Columbia v. Heller*, 554 U.S. 570, 576–600 (2008) (examining the historical meaning of the right to bear arms).

dictionaries, and common usage of the time.<sup>275</sup> In the absence of constitutional language (as with the right to marry or procreate), the Court relies more heavily on historical practices and traditions.<sup>276</sup> The Court also tests the logic of competing meanings and practices against the purpose and function of the right.<sup>277</sup>

Even if the word education were in the Constitution, definitions alone would do little to resolve the scope of the right. Webster's 1828 *American Dictionary* defines education in terms of "instruction and discipline which is intended to enlighten the understanding, correct the temper, and form the manners and habits of youth, and fit them for usefulness in their future stations."<sup>278</sup> This definition simply begs the question of what "stations" students were to prepare for, as each calls for a different level of understanding. Yet, this definition does reinforce how important the Framers' and Ratifiers' purpose for education is in discerning the scope of a right to education. Without a purpose or goal, the scope of a right to education may be practically impossible to identify. Consistent with this logic, the Court's analysis in cases like *Heller* is dominated by inquiries into purpose.<sup>279</sup>

As Section III.A details, the historical record provides relatively clear answers to the Framers' and Ratifiers' purpose in guaranteeing education. They were confronting a specific set of problems—the entrenched effects of slavery, illiteracy, and disenfranchisement—with a specific goal in mind: preparing the population at large for citizenship in a republican form of government. Historical practices and traditions then provide the depth regarding the type of education citizens needed in a republican form of government. As Section III.B details, the United States' republican form of government required that citizens possess a set of skills and competencies, largely grounded in literacy and critical thinking, that would allow them to engage in self-rule through the ballot. More specifically, citizens required the ability to comprehend, evaluate, and act thoughtfully on the functions and policies of government.

#### A. *The Framers' and Ratifiers' Intent*

##### 1. Preparing Individuals for Citizenship in a Republican Form of Government

The most basic goal was to prepare individuals to take their place as citizens. The Fourteenth Amendment had just declared all persons born and naturalized in the United States to be citizens. This meant that nearly four million African Americans, whom the Supreme Court had previously

275 *See id.*

276 *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2595–97 (2015).

277 *See Heller*, 554 U.S. at 577 ("Logic demands that there be a link between the stated purpose and the command.").

278 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New York, S. Converse 1828) (defining "education").

279 *See Heller*, 554 U.S. at 577–92.

excluded from citizenship, would be immediately ushered into the body politic.<sup>280</sup> In six southern states, African Americans were more than forty percent of the population, reaching as high as fifty-seven percent in South Carolina.<sup>281</sup> In another five southern states, African Americans were twenty-four to thirty-three percent of the population.<sup>282</sup> Substantial numbers of illiterate whites were also expected to begin participating in government, as the South transitioned from elitist to egalitarian.

The education clauses that states enacted clearly articulated citizenship as the motivating purpose. In a comprehensive treatment of the subject, Michael Rebell writes: “[T]he text and the legislative history of these clauses reflect the strong commitment of the nation’s founders and of the architects of the common schools to the need to ensure that all students be prepared to function as capable citizens in a democratic society.”<sup>283</sup> Drawing on this history, state supreme courts have likewise recognized this citizenship goal. Thirty-two have explicitly found that “preparation for capable citizenship is the prime purpose or a primary purpose of the education clause of their state constitutions.”<sup>284</sup>

By citizenship, Congress and the states meant citizenship in our republican government. The Founders believed our republican form of government required more than just nominal voters.<sup>285</sup> Citizens needed to discern their own interests and those of the common good.<sup>286</sup> They would then select leaders who could carry out that vision.<sup>287</sup> Consistent with the theme of the common good, the Founders believed citizens had a duty to vote.<sup>288</sup> The relationship between the government and its citizens was reciprocal. Government owes certain responsibilities to its citizens, but citizens owed responsibility to their government as well.<sup>289</sup> Those duties included voting, serving on juries, and participating in self-government.<sup>290</sup>

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280 See U.S. CENSUS BUREAU, U.S. DEP’T OF INTERIOR, MAP SHOWING THE DISTRIBUTION OF THE SLAVE POPULATION OF THE SOUTHERN STATES OF THE UNITED STATES (1861), [https://www.census.gov/history/pdf/1860\\_slave\\_distribution.pdf](https://www.census.gov/history/pdf/1860_slave_distribution.pdf).

281 *Id.*

282 *Id.*

283 REBELL, *supra* note 70, at 4–5.

284 *Id.* at 5–6, 55–56 (citing numerous state supreme court cases).

285 See, e.g., Botstein, *supra* note 67, at 60; DeFleur, *supra* note 64, at 74.

286 See DeFleur, *supra* note 64, at 74; James A. Gardner, *Madison’s Hope: Virtue, Self-Interest, and the Design of Electoral Systems*, 86 IOWA L. REV. 87, 116–20 (2000) (detailing the Madisonian theory that voters would pursue the common good).

287 See Gardner, *supra* note 286, at 116–20.

288 See BARTON, *supra* note 174, at 334–35.

289 See generally EDWARD KEYNES, LIBERTY, PROPERTY, AND PRIVACY: TOWARD A JURISPRUDENCE OF SUBSTANTIVE DUE PROCESS 50 (1996); OUR AGELESS CONSTITUTION 172–75 (W. David Stedman & LaVaughn G. Lewis eds., 1987) (describing the responsibility of citizens and discussing the decline of the “consciousness of responsibility” since the founding).

290 References to jury service pale in comparison to the duty to vote, but logic and evidence indicate that citizens needed some level of education to fulfill their duty as jurors. That serving on a jury is a duty of citizenship is beyond question. Rebell makes a compel-

The Founders were convinced that this form of government required an intelligent and educated electorate.<sup>291</sup> Uninformed and uncomprehending masses would, at best, fail to carry out their nominal duties and remain incapable of discerning the public good. At worst, they would pursue their own narrow interests or fall prey to manipulations. This misguided power could be used, for instance, to infringe the property rights of the wealthy. In short, the republican form of government to which the Founders aspired would rise or fall on its ability to expand the intelligence of its citizenry.<sup>292</sup>

## 2. The Reciprocal Relationship Between the “Qualified Voter” and His Right to Education

The clearest evidence of the expectation for intelligent voting is in the concept of the “qualified voter.” While voter qualifications have certainly been misused in this country,<sup>293</sup> their underlying merit is premised on the notion that voters must exercise the ballot intelligently. And ironically, the validity of the government efforts to enforce this expectation rests on the government’s willingness to educate its citizens. Logic dictates that a government cannot fairly call itself republican if it indefinitely excludes large numbers of citizens from voting who have never had the opportunity to receive education.<sup>294</sup> Thus, a republican form of government must take affirmative steps to educate its citizens.

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ling argument that jury duty, likewise, requires intelligent citizens. See REBELL, *supra* note 70, at 52.

291 See *supra* notes 168–87 and accompanying text.

292 See, e.g., ARK. CONST. art. XIV, § 1 (ratified 1874) (mandating education because “[i]ntelligence and virtue being the safeguards of liberty and the bulwark of a free and good government”); IND. CONST. of 1816, art. IX, § 1 (“Knowledge and learning, generally diffused through a community . . . [are] essential to the preservation of a free government . . .”); MINN. CONST. art. VIII, § 1 (ratified 1857) (“The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the Legislature to establish a general and uniform system of public schools.”); N.H. CONST. pt. II, art. LXXXIII (ratified 1784) (“Knowledge and learning . . . [are] essential to the preservation of a free government . . .”); N.D. CONST. art. VIII, § 1 (ratified 1889) (mandating education because “[a] high degree of intelligence, patriotism, integrity and morality on the part of every voter in a government by the people being necessary in order to insure the continuance of that government”); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 205–06 (Ky. 1989) (positing that Kentucky’s constitutional convention of 1890 justified the education clause as essential to freedom, developing patriotism, and understanding government); REBELL, *supra* note 70, at 5 (“[A]n educated populace was viewed as a means of survival for the democratic principles of the state.” (quoting the Wyoming Supreme Court)).

293 Dayna L. Cunningham, *Who Are to Be the Electors? A Reflection on the History of Voter Registration in the United States*, 9 YALE L. & POL’Y REV. 370, 370–72 (1991).

294 *Black’s Law Dictionary* defines republican government as one “chosen by the people.” *Republican Government*, BLACK’S LAW DICTIONARY (10th ed. 2014). The extent to which the government is actually chosen by the people depends on the extent to which the people are able to vote. John Hart Ely explains that equal protection’s prohibition on voting discrimination is linked to principles regarding a republican form of government.

Literacy tests have historically served as a rough proxy for voters' ability to cast their ballot intelligently. As Arthur Bromage would remark of the post-Civil War period that expanded the right to vote: "The literacy test may not be a panacea, but at least it is practical. A test of civic competence before admitting an individual to the electorate, even if desirable, is not feasible."<sup>295</sup> These tests, of course, have also intertwined with racist motivations to exclude minorities,<sup>296</sup> but the tests are not limited to those motivations. The first push for literacy tests came well before the mass enfranchisement of blacks.

For instance, New York's constitutional convention of 1846 debated a reading and writing requirement for voters.<sup>297</sup> While that measure failed, a similar one passed nine years later in Connecticut.<sup>298</sup> It was not until post-Reconstruction that literacy tests would be so clearly aimed at African American voters. Prior to then, some Southern literacy tests were aimed at removing illiterate whites and blacks from the electorate.<sup>299</sup> The proponents feared unlearned and reactive white voters, as well as former slaves.<sup>300</sup> Problems later became widespread because Southern officials administered the tests in discriminatory manner, not because the tests were inherently invalid.<sup>301</sup>

Outside the South, literacy tests would emerge as a means to "reduce [ ] the political influence of immigrants, poor, and the 'uninformed.'"<sup>302</sup> Ethnic bias would play a role in the North as well,<sup>303</sup> but so too would the notion that some baseline of knowledge and education were appropriate qualifications to vote. New York, in fact, structurally links literacy, education, and voting. For a period of years, the education system controlled the literacy and knowledge requirement.<sup>304</sup> Voters demonstrated their qualifications by either completing a course of study in the school system or passing an exam administered by the school system.<sup>305</sup>

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See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 121–23 (1980).

295 Arthur W. Bromage, *Literacy and the Electorate*, 24 AM. POL. SCI. REV. 946, 949 (1930).

296 Cunningham, *supra* note 293, at 370–72.

297 See Bromage, *supra* note 295, at 950.

298 *Id.*

299 See Cunningham, *supra* note 293, at 373–74.

300 See *id.*

301 *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 50 (1959) (distinguishing between racial inequality in administering a literacy test and the validity of the test itself); *Guinn v. United States*, 238 U.S. 347, 366 (1915) (positing that literacy tests are "the exercise by the State of a lawful power vested in it not subject to our supervision, and indeed, its validity is admitted").

302 John E. Filer et al., *Voting Laws, Educational Policies, and Minority Turnout*, 34 J.L. & ECON. 371, 374 (1991).

303 See ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 145–46 (2000); Bromage, *supra* note 295, at 952.

304 See Bromage, *supra* note 295, at 957–61.

305 See *id.*

In the absence of racial or ethnic bias, the Supreme Court has held that literacy tests are generally constitutional. Its rationale mirrors that of the Founders. Just five years after deciding *Brown v. Board of Education*, the Court in *Lassiter v. Northampton County Board of Elections*<sup>306</sup> wrote:

The ability to read and write . . . has some relation to standards designed to promote intelligent use of the ballot. . . . Literacy and intelligence are obviously not synonymous. Illiterate people may be intelligent voters. Yet in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise. It was said last century in Massachusetts that a literacy test was designed to insure an “independent and intelligent” exercise of the right of suffrage.<sup>307</sup>

The Court validated the general constitutional legitimacy of restricting the ballot to intelligent voters and relying on literacy to do so.

The general legitimacy of such a restriction, however, rests not simply on nondiscrimination, but on education as a fundamental right. While the Court did not address the issue, government and citizens have reciprocal duties. The legitimacy of literacy and knowledge requirements in a republican form of government rests on the government taking on the duty to educate its citizens to the extent necessary for them to cast their votes intelligently.<sup>308</sup> Otherwise, the exclusion of voters becomes an illegitimate exercise of power by the government (or its literate citizens) over disadvantaged citizens. The exercise of power could also become countermajoritarian depending on the rigor of the qualifications.

The Supreme Court has never expressly acknowledged the logic of a reciprocal duty, but it hints at it with its descriptions of education. As the Court wrote in *Ambach v. Norwick*, “Public education, like the police function, ‘fulfills a most fundamental obligation of government to its constituency.’”<sup>309</sup> State courts are far more forceful on this point. The Vermont Supreme Court wrote: “[T]he Education Clause assumes paramount significance in the constitutional frame of government established by the framers: it expressed and incorporated ‘that part of republican theory which holds education essential to self-government and which recognizes government as the source of the perpetuation of the attributes of citizenship.’”<sup>310</sup> Although less eloquently, numerous other state supreme courts offer a similar explanation of why their states adopted education clauses and why the state must now prepare individuals for their roles as citizens, particularly in the intelli-

306 360 U.S. 45 (1959).

307 *Id.* at 51–52 (footnote omitted) (citation omitted) (quoting *Stone v. Smith*, 34 N.E. 521, 521 (Mass. 1893)).

308 See *supra* notes 172–79 and accompanying text.

309 *Ambach v. Norwick*, 441 U.S. 68, 76 (1979) (quoting *Foley v. Connelie*, 435 U.S. 291, 297 (1978)).

310 *Brigham v. State*, 692 A.2d 384, 393 (Vt. 1997) (per curiam) (quoting Allen W. Hubsch, *Education and Self-Government: The Right to Education Under State Constitutional Law*, 18 J.L. & EDUC. 93, 97–98 (1989)).

gent exercise of the vote.<sup>311</sup> In short, the foregoing logic binds together the Founders' belief that citizens have a duty to vote, the duty must be exercised intelligently, and states have a duty to provide education to their citizens. It is no surprise then that Congress acted pursuant to the republican form of government guarantee to demand that all states provide education following the Civil War.

### B. *A Common Understanding of Educated Citizenship*

If the purpose of a fundamental right to education is to prepare individuals for self-government in our republican form of government, what then are the specific skills and knowledge that citizens need? The answer to that question represents the measures for identifying the qualitative scope of a fundamental right to education. The most historically honest qualitative measures can be found in an examination of how citizens actually participated in self-government prior to and immediately following the Fourteenth Amendment. Their participation, or at least intelligent participation, required far more than just casting a vote or the basic ability to read. As a function of the times, participation required a relatively high level of literacy and engagement, as self-government involved an ongoing and active public dialogue that took place in print. Voting was simply the final culmination of that participation. Moreover, citizens often voted on matters far more important than electing their officials. They were regularly called to reform government itself, voting on new state constitutions and amendments.

#### 1. Print-Based Self-Government

Self-government, particularly at the federal level, was almost entirely print based at the time of the Fourteenth Amendment. Newspapers and pamphlets were the dominant, and often exclusive, medium through which citizens understood their government.<sup>312</sup> Print-based materials were the means through which citizens learned of, debated, and understood public policy.<sup>313</sup> As Margaret DeFleur explains, the only way citizens, particularly those living in rural settings, could learn of and stay apprised of what their representative had done or were about to do in Washington, D.C. was to read it in the newspapers.<sup>314</sup> Newspapers, as a consequence, became the de facto public forum. Insofar as one exercised the First Amendment right to receive and dispense political information and debate, it was through the newspa-

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311 See REBELL, *supra* note 70, at 56–59.

312 See DeFleur, *supra* note 64, at 70.

313 See Thomas David Bunting, *A Bible, an Ax, and a Tablet: Tocqueville's Newspapers and Everyday Political Discourse*, 46 PERSP. ON POL. SCI. 257, 258–60 (2017); DeFleur, *supra* note 64, at 70.

314 See DeFleur, *supra* note 64, at 70; *see also* Carwardine, *supra* note 65, at 4.

pers.<sup>315</sup> Thus, the ability to read, for all practical matters, was necessary to enter the body politic.

As agrarian as the American population was, it was very politically attuned. The general public had an insatiable appetite for newspapers. Between 1800 and 1860, the number of newspapers in print grew from 1200 to 3000, and the total combined circulation of these papers doubled.<sup>316</sup> The circulation set the nation apart. “Americans of the Civil War era read more and cheaper newspapers, and enjoyed a greater choice of daily and weekly titles, than the citizens of any other nation.”<sup>317</sup> To be clear, newspapers devoted much of their content to sensationalism, but much of it was political. Moreover, the level of political information and discourse in the papers reflected the United States’ status as the “world’s first mass democracy.”<sup>318</sup> Tocqueville, for instance, reasoned that the widespread consumption of newspapers in the United States leveled down political power from elites to the average citizen, which made America more egalitarian and less like aristocratic Europe.<sup>319</sup>

Newspapers were the principal means through which government spoke to its citizens. Outside the ballot box, newspapers were, in effect, the link that bound government to its citizens. Presidents used newspapers as their central mechanism to speak regularly and directly to the electorate and shape public opinion.<sup>320</sup> Since at least Andrew Jackson, individual newspapers served as the President’s official “organ” and until the Buchanan presidency received government patronage.<sup>321</sup> Presidents, of course, gave public speeches, but the most significant impact of those speeches was in their reprinting. Lincoln’s Gettysburg Address demonstrates the point best. His remarks were underwhelming and overshadowed in person, but when printed and circulated, they redefined what the Civil War meant to the nation.<sup>322</sup>

Lincoln’s learned use of the papers, moreover, revealed how central the printed word was to self-government in a time of crisis. Rather than using an

315 Tocqueville draws a tight connection between newspapers and citizens’ First Amendment freedoms. See 2 TOCQUEVILLE, *supra* note 66, at 697.

316 See FRANK LUTHER MOTT, AMERICAN JOURNALISM: A HISTORY OF NEWSPAPERS IN THE UNITED STATES THROUGH 250 YEARS, 1690 to 1940, at 216 (1941); DAN SCHILLER, OBJECTIVITY AND THE NEWS: THE PUBLIC AND THE RISE OF COMMERCIAL JOURNALISM 12 (1981).

317 Carwardine, *supra* note 65, at 3.

318 *Id.*; see also 1 TOCQUEVILLE, *supra* note 66, at 55.

319 See Bunting, *supra* note 313, at 261.

320 See Carwardine, *supra* note 65, at 9–10.

321 Erik McKinley Eriksson, The Establishment and Rise of the Washington Globe: A Phase of Jacksonian Politics 1 (June 1921) (unpublished M.A. thesis, College of the State University of Iowa), <https://ir.uiowa.edu/cgi/viewcontent.cgi?article=4208&context=etd>.

322 See GARRY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA 35, 38 (1992).

“official organ” to manipulate public opinion or distort the truth,<sup>323</sup> President Lincoln believed that direct and truthful communication through the papers would save our republic. Lincoln

belie[ved] that it was the citizen’s exercise of reason which would ensure the Union’s ultimate victory. . . . Even in the darkest days he professed his continuing faith in the people: “Let them know the truth, and the country is safe.” . . . [Even] in wartime [he] remained convinced of “the power of the right word from the right man to develop the latent fire and enthusiasm of the masses.” . . . In setting out his evolving purposes and policies Lincoln chiefly used the printed word.<sup>324</sup>

Political parties also relied heavily on newspapers to perform a variety of functions. A contemporaneous commentator explained that “[n]ewspapers are to political parties in this country what working tools are to the operative mechanic.”<sup>325</sup> Scholars further observe that “newspapers acted as ligaments, connecting scattered party loyalists, especially those living in rural isolation and small towns, and giving them a sense of participating in a wider, even national, political community.”<sup>326</sup>

Newspapers were so important to the growth and operation of our democracy that Congress itself supplemented their transmission.<sup>327</sup> The Postal Service Act of 1792 subsidized the delivery of newspapers, reducing newspaper delivery rates to just a fraction of the standard rate.<sup>328</sup> The Postal Service also allowed editors to ship their newspapers to one another free of charge.<sup>329</sup> This practice encouraged and allowed for the easy republication of news stories nationwide.<sup>330</sup> As two scholars observe, the Post Office was the first central government agency, and by “facilitat[ing] the expansion of the press,” it “shaped political developments.”<sup>331</sup>

In sum, citizens’ ability to intelligently cast their votes depended almost entirely on their ability to engage a robust set of print materials. The existence of those materials alone distinguished our nation. Political leaders at all levels of government relied on those materials and sought to ensure wide access to them. But as the next subsection of this Article demonstrates, citizenship entailed more than just the avid consumption of newspapers.

323 See, e.g., ANDREW W. ROBERTSON, *THE LANGUAGE OF DEMOCRACY: POLITICAL RHETORIC IN THE UNITED STATES AND BRITAIN, 1790–1900*, at 68–82 (1995) (detailing the various slogans and rhetoric used by the parties and Presidents to persuade the public).

324 Carwardine, *supra* note 65, at 14 (footnote omitted).

325 SILBEY, *supra* note 39, at 54 (quoting Rep. Jabez Hammond).

326 Carwardine, *supra* note 65, at 4.

327 See Richard Pérez-Peña, *A Reminder of Precedents in Subsidizing Newspapers*, N.Y. TIMES (Jan. 27, 2010), <https://www.nytimes.com/2010/01/28/business/media/28subsidy.html>.

328 *Postage Rates for Periodicals: A Narrative History*, U.S. POSTAL SERV. (June 2010), <https://about.usps.com/who-we-are/postal-history/periodicals-postage-history.htm>.

329 *Newspapers and Journals During the Civil War Era*, PEOPLE’S CONTEST, <https://peoplescontest.psu.edu/newspapers-and-journals-during-civil-war-era> (last visited Nov. 22, 2018).

330 See *id.*

331 THE DEMOCRATIC EXPERIMENT: NEW DIRECTIONS IN AMERICAN POLITICAL HISTORY 9–10 (Meg Jacobs et al. eds., 2003).

## 2. Opinion Formation and Government Accountability

Newspapers and other print medium served a function beyond just information. They were the mechanism through which citizens formed opinions about government and ultimately held it accountable. This process is, of course, difficult to precisely measure, but the prevailing practices of the time provide extensive evidence from which to draw inferences about the level of literacy skills and knowledge our republican form of government would have required. The most pertinent information indicates that citizenship required relatively high-level critical literacy, knowledge, and reflection.

As part of a “systematic and large-scale qualitative research project” on American politics, James Bryce traveled extensively throughout the United States in the post–Civil War period.<sup>332</sup> His highly regarded book, *The American Commonwealth*, examined the design and function of state, local, and federal government in the United States.<sup>333</sup> The Supreme Court, in fact, has relied on Bryce interpreting the Constitution when questions of historical practice have arisen.<sup>334</sup> In his private capacity, Chief Justice William Howard Taft further wrote of Bryce: “He knew us better than we know ourselves, and he went about and among us and gave us the boon of his illuminating wisdom derived from the lessons of the past.”<sup>335</sup>

Bryce found that the ongoing formation of public opinion, not the mere casting of a ballot, was the mechanism that held the United States government accountable on a day-to-day basis.<sup>336</sup> Unlike other countries, United States officials are always set to come before the voters after some relatively short and preordained point in time and be held accountable for their actions.<sup>337</sup> The effect was preemptive. Representatives monitored and responded to public opinion well before elections were held.<sup>338</sup> Bryce wrote: “Towering over presidents and state governors, over Congress and state legislatures, over conventions and the vast machinery of party, public opinion stands out, in the United States, as the great source of power, the master of servants who tremble before it.”<sup>339</sup>

Public opinion developed through an ongoing dialectic between citizens in the newspapers.<sup>340</sup> American voters read about events, interpreted them based on their own predispositions, formed an initial position, followed the

332 DeFleur, *supra* note 64, at 66–67.

333 *Id.*

334 *Dames & Moore v. Regan*, 453 U.S. 654, 659–60 (1981) (noting Bryce and Tocqueville are “astute foreign observers of our system . . . during the first century of the Nation’s existence”); *Robertson v. Baldwin*, 165 U.S. 275, 296 (1897) (noting that Bryce is “an English writer of high authority” who wrote the “admirable work on the American Commonwealth”).

335 1 BRYCE, *supra* note 66, at xi.

336 *See, e.g., id.* at 132–33, 344, 362; *id.* at 923 (citing the second volume).

337 *Id.* at 924–28 (citing the second volume).

338 *Id.*

339 *Id.* at 923.

340 *Id.* at 929–38.

debates in the papers, sharpened their positions, saw those positions reflected in political candidates, and then voted.<sup>341</sup> Joel Silbey similarly concludes of the pre-Civil War period: “When the people voted, they demonstrated how well they had absorbed the main elements defining the political nation and understood the significance of the parties’ distinctive rhetoric, how much they had internalized political culture, and what their best calculation was of how to attain their own particular goals.”<sup>342</sup> This accountability loop was not happenstance. It was an outgrowth of the U.S. form of government, the expansion of the right to vote, the literacy of citizens, and the proliferation of newspapers.<sup>343</sup>

Tocqueville, who is also well-regarded by the Court for his insights on nineteenth-century practices,<sup>344</sup> went a step further, describing citizens’ interaction with newspapers as necessary to preserve basic freedom and liberty.<sup>345</sup> Papers allowed citizens to come together in common causes both for and against government.<sup>346</sup> Without the public forum that papers offered, individuals were largely powerless and subject to the tyranny of the majority.<sup>347</sup> But through papers, “the oppressed citizen [can exercise his] one means of defense: he can appeal to the nation as a whole, and if it is deaf, to humanity at large.”<sup>348</sup> Tocqueville found this dynamic to be especially important in the United States, where even the lowliest members of society were literate and engaged in the formation of public opinion.<sup>349</sup> The net effect was an egalitarian exercise of power consistent with our form of government.<sup>350</sup> In short, these studies and reflections on American political culture demonstrate not only a highly literate and engaged electorate, they demonstrate that literacy and the ongoing written dialogue between citizens

341 See DeFleur, *supra* note 64, at 75–76. Final votes cast at the ballot box are “a result of a long process of awareness, discussion, debate, controversy, and final opinion structuring.” *Id.* at 77.

342 SILBEY, *supra* note 39, at 142.

343 2 BRYCE, *supra* note 66, at 923 (writing that America has marched “unconsciously as well as consciously” toward the goal of “the extension of the suffrage, the more rapid diffusion of news, and the practice of self-government itself” and as a result “[n]o other people . . . stands so near” self-government).

344 See *Dames & Moore v. Regan*, 453 U.S. 654, 659–60 (1981).

345 2 TOCQUEVILLE, *supra* note 66, at 697–98 (describing the press as “the democratic weapon of freedom” and a singular “means of defense”).

346 *Id.* at 517–18; see also *id.* at 519 (“Newspapers do not multiply simply because they are cheap, but according to the more or less frequent need felt by a great number of people to communicate with one another and act together.”).

347 See Bunting, *supra* note 313, at 257–62.

348 2 TOCQUEVILLE, *supra* note 66, at 697.

349 See Bunting, *supra* note 313, at 257, 261 (summarizing Tocqueville’s findings of the high levels of literacy in the United States among all citizens and the levelling down effect it had on political power).

350 *Id.* at 258–59, 261 (“The free press was not just for elites; it was a weapon for everyone in a democratic society. Anyone could make grievances publicly . . .”). Tocqueville was surprised to find that newspapers reached from remote frontier farmers to common laborers in the cities. 1 TOCQUEVILLE, *supra* note 66, at 305.

and leaders lay at the very heart of the government we had formed. Absent the capacity to engage in that dialogue, the nation may very well have resembled something far different.

### 3. A Constitution-Making Era

Finally, the pre- and post-Civil War period was an incredible time of constitution making at both the federal and state level. That all-important task of self-government presupposed and required a high level of literacy and governmental understanding.<sup>351</sup> This fact is easily overlooked, as scholars and courts canvas the Framers' thoughts and writings. The Framers, however, sought the assent of the states and the people within them. The Framers' writings are important not only in what they said, but also in what they tell us about the audience to whom they were directed.

The *Federalist Papers* are telling on this score. Alexander Hamilton, James Madison, and John Jay wrote eighty-five essays arguing the merits of our Constitution.<sup>352</sup> Their stated audience was "the People of the State of New York."<sup>353</sup> The content of those essays presumed that critical reading and literacy was "the proper standard of literacy for democratic participation."<sup>354</sup> And newspaper editors believed that such an audience existed. New York City's newspapers published nearly all of the essays within the span of a year, and a number of essays were also republished in Virginia, Pennsylvania, Rhode Island, Massachusetts, and New Hampshire.<sup>355</sup>

Citizens' interaction with the Federal Constitution, however, pales in comparison to the demands of state constitutions. State constitutional conventions, in many instances, called for the direct approval by citizens. This was arguably the highest act of citizenship and, by its nature, required that citizens make a substantive judgment about the form and function of government. They could not simply cast their ballot in favor of a politician to carry out their general wishes. Citizens would typically vote to call a constitutional convention, elect delegates to those conventions to propose a draft constitution, and then vote on the final draft. And, of course, debates over the merits of these constitutions would be fought out in newspapers.

These state constitutional conventions, moreover, occurred on a frequent basis, particularly in the period surrounding the Fourteenth Amendment. All the Southern states would adopt entirely new constitutions during Reconstruction. And as the country expanded westward, new territories would also hold constitutional conventions as part of the process of becoming a state. And to be clear, a convention could occur several times during a citizen's lifetime. Many Southern states called three to four conventions dur-

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351 See, e.g., Botstein, *supra* note 67, at 60–61.

352 Victoria Nourse, *Toward a "Due Foundation" for the Separation of Powers: The Federalist Papers as Political Narrative*, 74 TEX. L. REV. 447, 453 n.22 (1996).

353 THE FEDERALIST NO. 1 (Alexander Hamilton).

354 Botstein, *supra* note 67, at 60.

355 Elaine F. Crane, *Publius in the Provinces: Where Was The Federalist Reprinted Outside New York City?*, 21 WM. & MARY Q. 589, 589–590 (1964).

ing the second half of the nineteenth century.<sup>356</sup> Other state constitutions included provisions for automatically recurring conventions every decade or two.<sup>357</sup> Western states typically took a different approach, allowing citizens to amend the constitution through a referendum rather than a convention.<sup>358</sup> In short, constitutional conventions and amendments were part of the regular life of a citizen during the second half of the 1800s.

The constitutions and other documents that citizens considered and voted on were, of course, complex. The U.S. Constitution was, for instance, written at what would be college reading level today.<sup>359</sup> State constitutions were typically longer and at least equally complex.<sup>360</sup> The complexity of texts, moreover, was not unique in comparison to other political texts. Presidential speeches of the time (which were also reprinted) were written at just as high a level.<sup>361</sup> Lincoln even wrote the Gettysburg Address at an eleventh-grade reading level.<sup>362</sup>

#### 4. A Substantive Standard for a Citizen's Education

The Framers' purpose in guaranteeing education combined with the actual demands, expectations, and prevailing practices of citizenship at the time provide a basis upon which to meaningfully define the scope of a right to education. As the forgoing Sections demonstrate, the Framers sought to enshrine a right to education with a specific end in mind: the preparation of individuals for citizenship in a republican form of government. They did so for three reasons. First, they believed it was the duty of citizens to vote.<sup>363</sup> Second, effective self-government required educated voters.<sup>364</sup> Third, government could only demand educated voting if government carried out its

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356 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 5 (William F. Swindler ed., 1979) (listing constitutional conventions in Virginia in 1864, 1870); *id.* at 417 (1973) (citing the second volume and listing Georgia conventions in 1861, 1865, 1868, 1877); 8 *id.* at 447 (1979) (listing South Carolina conventions in 1865, 1868, 1895).

357 See also N.H. CONST. art. XCIX, § C (repealed 1980) (vote on the necessity of a new convention every seven years); N.Y. CONST. of 1846, art. XIII, § 2 (constitutional convention possible every twenty years).

358 THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 51 (1989).

359 Jason Kottke, *The Reading Level of Presidential Speeches*, KOTTKE.ORG (Oct. 10, 2014), <https://kottke.org/14/10/the-reading-level-of-presidential-speeches>; Derek Thompson, *Presidential Speeches Were Once College-Level Rhetoric—Now They're for Sixth-Graders*, ATLANTIC (Oct. 14, 2014), <https://www.theatlantic.com/politics/archive/2014/10/have-presidential-speeches-gotten-less-sophisticated-over-time/381410/>.

360 See, e.g., VA. CONST. of 1870, in 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS, *supra* note 34, at 3871–904 (containing twelve articles and exceeding thirty pages).

361 See Kottke, *supra* note 359; Thompson, *supra* note 359.

362 Lee Drutman, *Is Congress Getting Dumber, or Just More Plainspoken?*, SUNLIGHT FOUND. (May 21, 2012), <https://sunlightfoundation.com/2012/05/21/grade-level-congress/>.

363 See *supra* notes 174–76 and accompanying text.

364 See *supra* notes 177–79 and accompanying text.

duty to ensure citizens' access to education.<sup>365</sup> Thus, the extension of a right to education was an act of self-preservation by the government and its people.

The intelligent exercise of the ballot involved far more than casting a ballot. It required a high level of literacy and political engagement. The relationship between government, representatives, and the people was almost entirely print based.<sup>366</sup> The written word was citizens' primary, if not only, means of understanding their government, consistently holding it accountable, resisting its overreach, and compelling it toward representative policies.<sup>367</sup> Citizens engaged this print dialectic rapaciously.<sup>368</sup> These literate aspects of our nation were manifestations of our form of government itself and set the nation apart from others.<sup>369</sup> It allowed our citizens to not only participate in an ongoing political dialogue,<sup>370</sup> it allowed them to actually form and reform their government through constitutions on a regular basis.<sup>371</sup>

If the Framers sought to guarantee education for citizenship in a republican form of government, these are the skills and expectations they would have had for that education. Thus, a substantive standard for a fundamental right to education emerges from history itself. That standard can be reduced to a single sentence: a fundamental right to education requires the state to provide individuals with the skills to comprehend the political discourse of the day, evaluate its merits, and then act thoughtfully through the ballot and other means of accountability.<sup>372</sup>

Breaking that standard into its component parts, historical practices demonstrate, first, that requisite comprehension entails a high level of reading comprehension, something akin to the ability to read on a modern-day twelfth-grade level. While determining the appropriate reading level is far from an exact science, a twelfth-grade reading comprehension level, or higher, is a conservative estimate. The most relevant political texts and dialogue of the era would have demanded no less. Most presidential speeches were delivered at a college reading level.<sup>373</sup> Even the Gettysburg Address—one of the simplest of the era—measures at an eleventh-grade level.<sup>374</sup> The Declaration of Independence is at college level.<sup>375</sup> As the chart below demonstrates, analysis of the typical state constitution—the most important mea-

365 See *supra* notes 167–94 and accompanying text.

366 See subsection III.B.1.

367 See subsection III.B.2.

368 See Carwardine, *supra* note 65, at 1–2.

369 See Bunting, *supra* note 313, at 261.

370 See 2 BRYCE, *supra* note 66, at 929–38.

371 See, e.g., N.Y. CONST. of 1846, art. XIII, § 2.

372 Although reaching her conclusions based on political theory and modern necessities rather than constitutional originalism, Suzanna Sherry interestingly forwards a similar theory of education. Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 157 (1995).

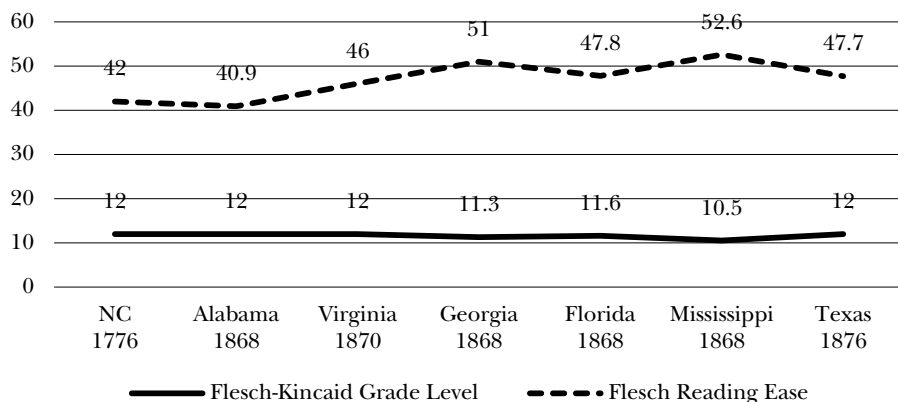
373 Thompson, *supra* note 359.

374 Drutman, *supra* note 362.

375 *Id.*

sure on which citizens would cast votes—reveals that the constitutions regularly measure at the maximum grade-level score—which is twelfth grade—and most often hit a college level in terms of reading ease.<sup>376</sup>

FIGURE 2: READABILITY OF STATE CONSTITUTIONS



Second, evaluation of texts, regardless of the complexity of the text, requires the ability to situate what has been read in a larger context of knowledge and judge it. This, at the least, entails a working understanding of government structure, function, and policy, as well as individual rights.<sup>377</sup> Third, thoughtful action entails everything from active engagement in the debate itself—through print or otherwise—to the cast of a ballot that furthers one’s own interests as well as the republican form of government itself.<sup>378</sup> This last skill is largely the natural outgrowth of the first two, but could involve two important additional components.

The first is the ability not just to evaluate written text, but to also engage in advocacy through the written text. If the written word was the first forum of defense for oppressed citizens,<sup>379</sup> those citizens must actually have the

376 This analysis is based on a sample of state constitutions. The sample only includes those constitutions for which an html or Word document version was available. Others were only available in picture format and excluded due to the labor required to input them manually.

377 A republican form of government was among the purposes of the Kentucky education clause and, in defining the scope of the fundamental right to an adequate education, the Kentucky Supreme Court held that the right to education required “sufficient knowledge of economic, social, and political systems to enable the student to make informed choices” and “sufficient understanding of governmental processes to enable the student to understand the issues that affect” the nation. *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989). Several other states have adopted the same exact requirements as Kentucky. *See, e.g., Gannon v. State*, 319 P.3d 1196, 1233–35 (Kan. 2014); *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1359–60 (N.H. 1997).

378 *See generally Claremont*, 703 A.2d at 1359 (requiring the ability to make informed decisions about policy).

379 *See, e.g., 2 TOCQUEVILLE, supra note 66, at 697.*

ability to cogently make their case in the written public form. The second ability might involve a deeper understanding of government. If citizens are to act in the interests of the greater good, they must understand and appreciate that greater good, which is not an automatic outgrowth of education.

While amorphous, this greater good is one that the Supreme Court has frequently referenced in regard to education. The Court in *Brown v. Board of Education* famously emphasized that education “is the very foundation of good citizenship” and the means by which government “awaken[s] the child to cultural values.”<sup>380</sup> In other cases, the Court has similarly remarked that schools, through the “preparation of individuals for participation as citizens, . . . preserv[e] . . . the values on which our society rests.”<sup>381</sup>

Some, looking for solutions to modern problems, might smirk at the notion of a constitutional right to an education largely grounded in concepts of literacy and civics curriculum. What of computers, coding, calculus, and foreign language they might ask? First, the task of this Article was not to find evidence for a right to education that meets all the needs of modern students. The task was to assess whether any federal right to education might exist and, if so, whether history provides any markers for its substantive meaning. That meaning is most clearly evidenced in the demands of citizenship. With that said, the evidence also reveals a strong commitment to creating economically self-sufficient citizens.<sup>382</sup> Citizens should tend to society’s need in the public forum and tend to their own through economic freedom and productivity.<sup>383</sup> This history may warrant further exploration, but it involves an additional logical step that is not as closely tied to this Article’s thesis regarding self-governance.

Second, this fundamental right would be too permissive if it underestimates both what literacy in a republican form of government entails and the level of literacy deficiency among modern students. The literacy of the Fourteenth Amendment era is best described as critical literacy, meaning that it entailed both high-level reading and critical thinking. While a larger percentage of today’s population may be able to read children’s stories than it could 150 years ago, a large percentage of today’s students appear to read at a lower functional level, have fewer critical thinking skills, and a far narrower understanding of government than those who could read and engage in the political process in the post-Civil War period.<sup>384</sup> Today’s students certainly read less often and far less challenging texts, know far less about their basic

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380 *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

381 *Ambach v. Norwick*, 441 U.S. 68, 76 (1979).

382 See, e.g., FONER, *supra* note 201, at 244 (discussing the Civil Rights Act as offering the first definition of citizenship, which included economic freedom). The bulk of the Civil Rights Act of 1866’s prohibitions were aimed at contract and property rights. The Supreme Court in 1968 and 1976 would confirm the centrality of the rights of contracting and property rights to the Civil War-era amendments. *Runyon v. McCrary*, 427 U.S. 160 (1976); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

383 See, e.g., FONER, *supra* note 201, at 244.

384 See REBELL, *supra* note 70, at 2–3, 17–18; Botstein, *supra* note 67, at 57–60; Sherry, *supra* note 372.

rights, and vote at far lower rates than their predecessors.<sup>385</sup> It is the bottom end of our education system for which the right to education means so much. For them, literacy on par with the expectations and needs of the post-Civil War era would be a major improvement.<sup>386</sup>

Finally, to say that the Federal Constitution only guarantees one set of skills does not mean schools will no longer be expected to provide other skills. Many state constitutions do, in fact, require those other skills, as do state and federal statutes.<sup>387</sup> The point of a federal fundamental right to education is simply to recognize that our Constitution demands a uniform baseline regarding the skills that our political form of government rests upon.

#### CONCLUSION

The fundamental right to education holds a unique allure for the Supreme Court. The Court's initial draft of its opinion in *Brown v. Board of Education* declared school segregation unconstitutional because it violated a fundamental right, not equal protection.<sup>388</sup> Yet, with the stroke of a pen, the Court deleted a couple of words and changed the course of the next half century of education rights.<sup>389</sup> Since *Brown*, the Court has refused to recognize a right to education while carefully remaining open to the possibility of a different result if the right facts and theory arose. The precedential value of the Court's prior statements on education, however, is minimal. The Court may describe education in terms normally reserved for fundamental rights, but its descriptions remain little more than rhetorical flourishes.

The Court has not taken the next step because it lacks compelling explanation for why our Constitution protects education as a fundamental right. Most litigants and scholars have premised their arguments on the importance of education as general principle. None have specifically anchored the right in the original intent of the constitutional Framers. Given the Court's increasingly restrictive approach to fundamental rights, an originalist explanation may be the only one the Court would accept. Originalism protects the Court from the potential error of its own judgment, as well as the inevitable critique that the Court is inventing rights. More important, an originalist argument could, in effect, compel the Court to recognize a right to education, not simply because it wants to, but because the Framers would have expected it.

This Article finally fills that originalist gap, demonstrating that public education was a central premise of the very form of government the Constitu-

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385 See, e.g., REBELL, *supra* note 70, at 17–21; Bennett et al., *supra* note 28.

386 More than one in four twelfth graders do not even read at a basic level. NAT'L ASSESSMENT OF EDUC. PROGRAMS, THE CONDITION OF EDUCATION: READING PERFORMANCE 3 (2018).

387 See, e.g., *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989); *Leandro v. State*, 488 S.E.2d 249, 255–56 (N.C. 1997).

388 Hacker & Blake, *supra* note 7, at 46–50.

389 *Id.*

tion enshrined in 1787. Honoring the national commitment to education, however, has never been easy. Were it so, advocates would not be calling for the right to education more than two centuries after the Constitution's framing. Yet, at the end of the Civil War, Congress saw the problem that failing to fully and formally declare a right to education had caused. To cure it, Congress forced Southern states—in conjunction with ratifying the Fourteenth Amendment itself—to amend their state constitutions to guarantee public education. After the Fourteenth Amendment, no state would ever again enter the Union without an education clause in their state constitution. This overlooked history provides the exact evidence the Court has required to recognize a fundamental right. If the Court ever recognizes a fundamental right to education, the specific facts detailed in this Article will be the basis.

