EDUCATION, EQUALITY, AND NATIONAL CITIZENSHIP

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INTRODUCTION

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

The momentum behind these efforts is a welcome development that shows little sign of abating. But its potential to advance a national goal of equal educational opportunity is limited by a sobering and largely unnoticed fact: The most significant component of educational inequality across the nation is not inequality within states but inequality between states. As economists Sheila Evans, William Murray, and Robert Schwab observe, “differences in spending between . . . New Jersey, California, and Texas are much more important than differences in spending between Trenton, Sacramento, and Austin and their suburbs.” Based

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2 See, e.g., Montoy v. Kansas, 102 P.3d 1158 (Kan. 2005); Hoke County Bd. of Educ. v. North Carolina, 599 S.E.2d 365 (N.C. 2004); Campaign for Fiscal Equity v. New York, 801 N.E.2d 326 (N.Y. 2003); see also Michael A. Rebell, Adequacy Litigations: A New Path to Equity, in BRINGING EQUITY BACK: RESEARCH FOR A NEW ERA IN AMERICAN EDUCATIONAL POLICY 291, 297 (Janice Petrovich & Amy Stuart Wells eds., 2005) (“16 of the 18 plaintiff victories in the past 14 years have involved substantial or partial adequacy considerations”). For up-to-date information on school finance litigation in all 50 states, see www.schoolfunding.info.


4 Murray, Evans, & Schwab, supra note __, at 798. In 2000-01, for example, half of all school districts in New Jersey spent at least $10,317 per pupil, whereas 90% of districts in Texas spent $9,695 or less. See Frank Johnson, NAT’L CTR. FOR EDUC. STATISTICS, REVENUES AND EXPENDITURES BY PUBLIC SCHOOL DISTRICTS: SCHOOL YEAR 2000-2001, at 11 tbl.4 (2004). Ninety
on school finance data from 1972 to 1992, they find that “roughly two-thirds of nationwide inequality in [district] spending is between states and only one-third is within states.” In other words, even if we were to eliminate disparities between school districts within each state, large disparities across states would remain. Moreover, the burden of such disparities tends to fall most heavily on disadvantaged children with the greatest educational needs.

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

The lack of policy attention to this problem mirrors the absence of legal theory that treats the national distribution of educational opportunity as a matter of constitutional concern. Given the history of practices relegating minority children to inferior schools, it is unsurprising that lawyers and scholars have often turned to the injunction against officially sanctioned discrimination in the Equal Protection Clause. But equal protection has been less potent in addressing disadvantage that cannot readily be traced to official design or that affects a somewhat smaller percent of districts in California spent $9,077 per pupil or less, whereas 90% of districts in New Jersey spent $8,650 per pupil or more. See id.

Murray, Evans, & Schwab, supra note __ at 808. State-court school finance litigation “is able to attack only a small part of [educational] inequality,” and “it seems unlikely that further litigation will yield large reductions in national inequality in the future.” Id.


See infra notes __ and accompanying text.

Wayne Riddle & Liane White, Cong. Res. Serv., Libr. of Cong., Public School Expenditure Disparities: Size, Sources, and Debates Over Their Significance 19 (1995); see Richard Rothstein, Equalizing Education Resources on Behalf of Disadvantaged Children, in A Notion at Risk: Preserving Public Education as an Engine for Social Mobility 31, 62 (Richard D. Kahlenberg ed., 2000) (“Because the financing of public education has always been primarily a state and local, not a federal, matter, very little policy attention has been devoted to [interstate] inequality. Yet this might be the most serious financing problem in American education.”).
diffuse or amorphous class. In such circumstances, the “substantive” dimension of disadvantage—the practical importance of an absolute or relative deprivation, apart from its causal origin—has failed to find a foothold in equal protection doctrine. Although this result is not inevitable, it is no accident either. As a textual matter, the Equal Protection Clause is easily read to suggest mere evenhandedness as its core principle. Brown itself said that educational “opportunity, where the state has undertaken to provide it, must be made available to all on equal terms”—as if each state were free to decide what level of opportunity if any to provide. Equal protection, in other words, has no bottom.

This Article argues that the Fourteenth Amendment authorizes and obligates Congress to ensure a meaningful floor of educational opportunity throughout the nation. But instead of parsing the Equal Protection Clause, the perspective I aim to develop focuses on the Fourteenth Amendment’s opening words, the Citizenship Clause. Before the Fourteenth Amendment mandates equal protection of the laws, it guarantees national citizenship. This guarantee is affirmatively declared; it is not merely protected against state abridgment. Moreover, the guarantee does more than designate a legal status. Together with Section 5, it obligates the national government to secure the full membership, effective participation, and equal dignity of all citizens in the national community. This obligation, I argue, encompasses a legislative duty to ensure that all children have adequate educational opportunity for equal citizenship.

For familiar reasons, the constitutional guarantee of national citizenship has never realized its potential to be a generative source of substantive rights. It was rendered stillborn by a reactionary Supreme Court that perverted the essential

9 See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33 (1973) ("It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws."); Shapiro v. Thompson, 394 U.S. 618, 662 (1969) (Harlan, J., dissenting) ("I know of nothing which entitles this Court to pick out particular human activities, characterize them as 'fundamental,' and give them added protection under an unusually stringent equal protection test.").

10 See ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT 39 (1994) (construing Equal Protection Clause as a “charter of positive liberty”); Frank I. Michelman, Foreword: On Protecting the Poor Through the Fourteenth Amendment, 83 HARV. L. REV. 7, 17 (1969) (the “injunction against ‘denying’ the ‘equal protection of the laws’ is not so clearly void of a requirement that the quiescent state must ‘act’ (i.e., cease denying protection) in certain circumstances”); see also JACOBUS TENBROEK, THE ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 205-06 (1951).

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

12 See U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States 

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

14 See U.S. CONST. amend. XIV, § 5 (“Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).
meaning of the Civil War Amendments and helped undermine Reconstruction. 15 Nevertheless, contemporaneous interpreters beyond the five-Justice majority in Slaughterhouse recognized national citizenship as a font of substantive guarantees that Congress had the power and duty to enforce. Justice John Marshall Harlan elaborated this view in his lone dissent in the Civil Rights Cases, describing the fundamental transformation of nationhood wrought by the Citizenship Clause. 16 Moreover, this understanding of national citizenship undergirded a series of proposals in Congress between 1870 and 1890 seeking to establish a strong federal role in public education that would, among other things, narrow educational disparities among the reunified states. These early proposals, which Congress vigorously debated and nearly passed, illuminate what many leaders of the framing generation believed to be the scope of federal authority and responsibility to secure full and equal national citizenship. Their perspective bears directly on the maldistribution of educational opportunity across the nation today.

By recovering this strand of constitutional thought, this Article aims to instantiate what William Forbath has called the “social citizenship tradition” in our constitutional heritage. 17 At its core, the tradition holds that there is a “basic human equality associated with the concept of full membership of a community” and that it is the duty of government to ensure the civil and political as well as social and economic prerequisites for the realization of this equality. 18 In pursuit of these commitments, the tradition challenges two aspects of how we typically understand constitutional law.

First, contrary to the conventional wisdom that “the Constitution is a charter of negative rather than positive liberties,” 19 the social citizenship tradition assigns equal constitutional status to negative rights against government oppression and positive rights to certain forms of government assistance on the ground that both are essential to liberty. The concept of positive rights, while disfavored in Supreme Court doctrine, 20 has never been far from the core ideals of the nation’s

15 See The Slaughterhouse Cases, 83 U.S. 36 (1873).
transformative moments. It was part of the ideology of emancipation and Reconstruction. It animated the New Deal constitutional vision and President Franklin Roosevelt’s call for a “Second Bill of Rights.” And it found brief expression in the fundamental rights strand of equal protection doctrine during the Great Society. Moreover, as Cass Sunstein and David Currie have observed, positive rights to government help inhere in a variety of traditionally “negative” constitutional protections, although this reality is obscured by baseline “assumptions about . . . the natural or desirable functions of government.” Neither the text nor history of the Constitution forecloses a reading of its broad guarantees to encompass positive rights, and the experiences of other nations suggest that the existence of such rights is fully compatible with constitutionalism. Indeed, the late Charles Black argued, it is “to secure these rights” that “Governments are instituted among men.”


22 See Sunstein, supra note __; Forbath, supra note __, at 68-75.


24 Cass R. Sunstein, Lochner’s Legacy, 87 Colum. L. Rev. 873, 889 (1987); see David P. Currie, Positive and Negative Constitutional Rights, 53 U. Chi. L. Rev. 864 (1986). The right to property, for example, cannot be reduced to a set of limitations on government regulation or interference. The right is meaningful because government has affirmatively created an elaborate system of laws, agencies, police, and courts on which property owners rely to enforce claims against private and public actors. See, e.g., Truax v. Corrigan, 257 U.S. 312, 328 (1921) (state law barring injunctions against striking workers deprives an employer of property without due process). The same is true of contract: like property, it “entails a right against third parties that is worthless without government help.” Currie, supra, at 876; see Sunstein, supra, at 889 (“The contracts clause amounts to a right to state enforcement of contractual agreements; if the state fails to protect by refusing to enforce a contract, it is violating the clause.”). Even the right of free speech, a quintessential negative right, often requires positive action by government. See, e.g., Schneider v. State, 308 U.S. 147, 162 (1939) (city officials must keep streets open for leafleting despite the burden of “cleaning and caring for the streets”); Glasson v. City of Louisville, 518 F.2d 899, 906 (6th Cir. 1975) (police “must take reasonable action to protect from violence persons exercising their constitutional rights” to speech and assembly).

25 See, e.g., Determining Income Constituting the Basis for the Right to Family Allowance, 115/10/A/2005 (Constitutional Tribunal of Poland) (applying constitutional right to family allowance to invalidate statutory formula governing income eligibility); Republic of South Africa v. Grootboom, 2001 (1) SA 46 (CC) (requiring reasonable government action to ensure the constitutional right of access to adequate housing); BVerfG 33, 303, 330-31 (1972) (interpreting constitutional right to freely choose one’s place of training to imply positive rights to education).

26 Charles L. Black, Jr., A New Birth of Freedom: Human Rights, Named and Unnamed 6 (1997) (quoting Declaration of Independence); see id. at 133 (reading the Constitution in light of
The near absence of social and economic rights in our constitutional law implicates a second assumption about constitutional meaning that the social citizenship tradition rejects. The general assumption of lawyers and laymen alike is that the meaning of the Constitution is fixed by the courts. Our legal culture treats constitutional questions as questions of ordinary law, and as such, constitutional questions are quintessentially adjudicative questions, i.e., questions that are emphatically the province and duty of courts to decide. Because the Supreme Court has refused to recognize fundamental rights to education, welfare, and other government aid in adjudicated cases, we are taught to believe that no substantive obligations exist in these areas.

However, as a growing body of scholarship suggests, it is a mistake to equate the adjudicated Constitution with the full meaning of the Constitution itself. Whatever answer a court might give to whether the Constitution guarantees minimum entitlements to social and economic welfare, it will be encumbered by considerations of judicial restraint arising from the countermajoritarian difficulty and limitations on institutional competence. The Rodriguez decision, for example, exhibited many of these prudential concerns. Moreover, as Robin West has explained, constitutional adjudication is jurisprudentially constrained by the conservative methodology inherent to the task of dispensing “legal justice” in narrowly framed disputes. For these reasons, the adjudicated Constitution often falls short of exhausting the substantive meaning of the Constitution’s open-textured guarantees. Lawrence Sager captured the point when he wrote that judicial doctrine in many areas, including the Fourteenth Amendment, “mark[s] only

the Declaration to infer an “affirmative constitutional duty of Congress diligently to devise and prudently to apply the means necessary to ensure, humanly speaking, a decent livelihood for all”).


29 See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 41 (1973) (“the Justices of this Court lack both the expertise and the familiarity with local problems [involving] the raising and disposition of public revenues”); id. at 42 (noting “this Court’s lack of specialized knowledge and experience” on “difficult questions of educational policy”); id. at 56 (questioning “the desirability of completely uprooting the existing system”).

30 West, supra note __, at 311-14. Legal justice seeks “to guarantee some continuity between the past and the present”—“to treat like cases alike”—by conserving legal traditions through application of precedent and analogical reasoning. Id. at 311-12; see also Post & Siegel, supra note __, at 1966-71 (describing the different institutional perspectives of Congress and the Court in constitutional interpretation).
the boundaries of the federal courts’ role of enforcement,” leaving the full scope of constitutional norms “underenforced.”

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

From this perspective, the language of rights, with its deep undertone of judicial enforceability, seems inapt to probe the full scope of a legislator’s constitutional obligations. As Professor Sager observes, “the notion that to be legally obligated means to be vulnerable to external enforcement can have only a superficial appeal.” It is more illuminating simply to ask what positive duties, apart from corresponding rights, the Fourteenth Amendment entails for legislators charged with enforcing its substantive guarantees.

Framed this way, the question facilitates recognition of the fact that Congress, unlike a court, is neither tasked with doing legal justice in individual cases nor constrained by institutional concerns about political accountability. Instead,

Congress can draw on its distinctive capacity democratically to elicit and articulate the nation’s evolving constitutional aspirations when it

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31 Sager, supra note __, at 1213.
33 Forbath, supra note __, at 1.
35 Sager, supra note __, at 1221. Citing the example of state high court judges deciding matters of state law or Justices of the U.S. Supreme Court deciding federal law, Professor Sager notes that “[w]e are quite comfortable . . . in the belief that these judges are legally obligated to observe the norms of their legal system.” Id. at 1222. Although judges are subject to impeachment, “surely the presence of such rarely invoked enforcement devices is not essential to our perception that these judges are routinely and consistently bound to legal standards.” Id.
36 For a thoughtful discussion on the need to examine constitutional duties apart from judicially enforceable rights, see West, supra note __.
enforces the Fourteenth Amendment. Because of the institutionally specific ways that Congress can negotiate conflict and build consensus, it can enact statutes that are comprehensive and redistributive, and so vindicate constitutional values in ways that courts cannot.\(^{37}\)

Thus the legislated Constitution, in contrast to the adjudicated Constitution, is not “narrowly legal” but rather dynamic, aspirational, and infused with “national values and commitments.”\(^{38}\) As we shall see, the Reconstruction-era proposals for federal aid to public education exemplify this sort of legislative constitutionalism, featuring Congress in the role of apprehending and discharging its duty to enforce the guarantee of national citizenship.

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

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

Part III shows how this approach to the Fourteenth Amendment was implemented soon after ratification by legislators seeking to establish a robust federal role in support of public education. In a series of federal aid bills between 1870 and 1890, members of Congress invoked the grant of national citizenship as a basis of federal power and duty to ensure that children in all states, white and black, achieved basic literacy. The most well-developed proposals were national not sectional in scope, even as they were designed to disproportionately benefit poor states with high rates of illiteracy. The lengthy and learned congressional

\(^{37}\) Post & Siegel, supra note __, at 2031; cf. Laurence H. Tribe, The Puzzling Persistence of Process-Based Constitutional Theories, 89 YALE L.J. 1063, 1079 (1980) (representation-reinforcement theories of constitutional interpretation, while having some appeal to judges, have no relevance “to an elected representative—especially one who regards the Constitution as addressed to all who govern”).

\(^{38}\) Post & Siegel, supra note __, at 2022, 2027; see WEST, supra note __, at 312 (legislated Constitution embodies moral and political aspirations, including aspirations for distributive justice).
debates on these measures left a rich legacy informing both constitutional principle and education policy. That legacy identifies the guarantee of national citizenship as a source of federal responsibility to ensure a national floor of educational adequacy.

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

I. CONCEPTUAL GROUNDWORK

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

A. Citizenship and Equality

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

Professor Marshall usefully distinguished three dimensions of the equality implicit in citizenship. First, citizenship implies political equality, an equal “right to participate in the exercise of political power, as a member of a body invested with political authority or as an elector of the members of such a body.” Second, all citizens enjoy civil equality, an equality of “rights necessary for indi-

39 MARSHALL, supra note __, at 28-29.
40 Id. at 11.
idual freedom—liberty of the person, freedom of speech, thought and faith, the right to own property and to conclude valid contracts, and the right to justice.”

Third, citizenship implies a degree of social equality. Marshall understood the “social element” of citizenship to encompass “the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in the society.”

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

Equality in political, civil, and social dimensions neither coincides with nor guarantees economic equality. The account of citizenship I offer here does not squarely challenge the competitive norms of the marketplace and its resulting

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41 Id. at 10.
42 Id. at 11.
43 See U.S. Const. amend. XV § 1; infra notes ___ and accompanying text (Fourteenth Amendment citizenship guarantee incorporates at least the rights contained in the Civil Rights Act of 1866, including rights to make and enforce contracts, to sue, to be parties, to give evidence, and to inherit, purchase, lease, sell, hold, and convey property).
44 Karst, supra note __, at 5-6.
46 Karst, supra note __, at 4. Although my understanding of citizenship is informed by Professor Karst’s, an important difference between my approach and his is that he relies on the Equal Protection Clause as the constitutional foundation for substantive rights of citizenship, see id. at 42-46, whereas I rely on the Citizenship Clause of the Fourteenth Amendment. In this respect, my approach follows that of Professor Black, see Charles L. Black, Jr., Structure and Relationship in Constitutional Law 51-66 (1969), whom Professor Karst also credits as a key influence, see Kenneth L. Karst, Belonging to America: Equal Citizenship and the Constitution ix (1989).
hierarchies. However, not all degrees of economic inequality are compatible with the concept of citizenship. In our society, we need not look far to find conditions of economic deprivation or domination severe enough to frustrate the effective realization of political, civil, and social equality. Thus, although citizenship is “not a charter for sweeping economic leveling,” it includes an economic component. To be a citizen is to have a level of economic independence necessary for the meaningful exercise of civil and political freedoms and for the attainment of self-respect and the respect of others.

The economic autonomy essential to citizenship depends not only on the existence of social insurance and safety nets. More importantly, it depends on the opportunity for self-sufficiency through decent work in the occupation of one’s choice. Work confers a measure of independence necessary for participation in public affairs as well as the standing required for the enjoyment of social equality. As Professor Forbath has observed, “the most salient border between minimum respect and degradation in today’s class structure falls along the line between those who are recognized by organized society as working and providing a decent living for themselves and their families . . . and those men and women at the bottom of the class hierarchy who are not.”

Because social stigma attaches


48 Karst, supra note __, at 11.

49 See Alice Kessler-Harris, In Pursuit of Equity: Women, Men, and the Quest for Economic Citizenship in 20th-Century America 12 (2001) (defining “economic citizenship” to mean “the achievement of an independent and relatively autonomous status that marks self-respect and provides access to the full play of power and influence that defines participation in a democratic society”); Amar, supra note __, at 42 (minimum entitlement to property that provides a foundation for productive labor is essential “to create independent citizens”).

50 See Kessler-Harris, supra note __, at 10-13. Professor Kessler-Harris notes that social citizenship and economic citizenship have not always been mutually reinforcing. “For example, policies that enhance motherhood may offer social rights while closing paths to economic citizenship,” as federal welfare programs once did when they “required female parents to restrict their access to the labor market or suffer a loss of benefits.” Id. at 13. Professor Marshall similarly observed the “divorce of social rights from the status of citizenship” in poor laws that stigmatized their beneficiaries by “separat[ing] the community of citizens from the outcast company of the destitute.” Marshall, supra note __, at 24. This tension, still apparent in the distinction between the “deserving” and “undeserving” poor, underscores the importance of work, and not merely concepts of minimum welfare, in the economic component of citizenship. See Kessler-Harris, supra note __, at 13 (“In modern democratic societies prevailing beliefs in the sanctity of the market make access to it the only practical route to empowerment as citizens.”); Kenneth L. Karst, The Coming Crisis of Work in Constitutional Perspective, 82 Cornell L. Rev. 523, 532 (1997) (“Work is still seen as connected to the citizenship values of respect, independence, and participation.”).

51 Forbath, supra note __, at 16.
to joblessness and various forms of low-wage work, a vital prerequisite for equal citizenship is effective access to economic opportunity.

B. Educational Adequacy for Equal Citizenship

Education bears obvious significance to each facet of citizenship described above. When the Court in *Brown* described education as “the very foundation of good citizenship,” it seemed to contemplate the political dimension of citizenship, for the phrase comes just after the Court’s “recognition of the importance of education to our democratic society” and its assertion that education “is required in the performance of our most basic public responsibilities.” Yet the Court also alluded to social citizenship when it said that education “is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.” In subsequent cases, the Court has noted the importance of education to personal dignity and social status, observing that “education prepares individuals to be self-reliant and self-sufficient participants in society” and that “by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority.”

Contemporaneous with *Brown*, T.H. Marshall wrote that “[t]he education of children has a direct bearing on citizenship”—on the exercise of civil freedom, on the health of political democracy, and on qualification for employment. In particular, he worried that unequal educational opportunity, by virtue of “its relation with occupational structure,” would cause citizenship to operate “as an instrument of social stratification.” Yet economic inequality is not inherently at odds with equal citizenship. As Professor Marshall observed, the “basic human equality associated with the concept of full membership of a community . . . is not inconsistent with the inequalities which distinguish the various economic levels in the society.”

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52 Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954); see also Ambach v. Norwich, 441 U.S. 68, 77 (1979) (public schools “inculca[e] fundamental values necessary to the maintenance of a democratic political system”); Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) (“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”).

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

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


56 MARSHALL, supra note __, at 25; see id. at 26, 64-67.

57 Id. at 67.

58 Id. at 8.
than equality of income” underscores that citizenship is not undermined by inequality per se, but rather by inequality that deprives an individual of the minimum respect necessary for full membership in her society. 59

Although minimum respect is of course violated by invidious discrimination of the sort readily detected by equal protection radar, official evenhandedness is not alone sufficient to ensure full citizenship. As Philip Kurland put it, “equality can be secured on a low level no less than a high one,” and thus “[i]t is not equality but quality with which we are concerned.”60 Focusing on citizenship rather than equal protection directs our attention to educational disadvantage that falls below a threshold essential for minimum respect. The relevant principle of distribution sounds in adequacy rather than equality.

In its broad outlines, the content of educational adequacy follows directly from citizenship’s several facets. Citizenship requires a threshold level of knowledge and competence for public duties such as voting, serving on a jury, and participating in community affairs, and for the meaningful exercise of civil liberties like freedom of speech. Citizenship also requires sufficient education for productive work and the self-reliance, respect, and autonomy that work entails. Beyond these thresholds, the concept of citizenship admits variation and inequality in educational opportunity. Not all citizens of a society will enjoy the same advantages as the relatively well-off. As a practical reality, some will have greater influence over public decision-making than others, some will have greater access to economic opportunity than others, and the field will be tilted in favor of those with better education. But these inequalities need not threaten equal dignity and full membership so long as they occur above a sufficiently high level.

Importantly, educational adequacy, as I understand it here, is a relational concept whose content is contingent upon social norms. The essential substance of citizenship cannot be specified by a fixed or objective minimum that is independent of the range of human welfare and capabilities existing in a particular society. Because citizenship marks full participation and belonging “according to the standards prevailing in the society,”61 the level of educational opportunity, civic competence, and material well-being necessary for equal dignity and mutual respect depends on what other members of the society have. Children in Mississippi, for example, have far better educational opportunities than children in Mozambique.62 But the social meaning of a particular level of education—

59 Id. at 56; cf. Karst, supra note __, at 40 (“when it comes to protecting the poor, equal citizenship and ‘minimum protection’ amount to much the same thing”).
61 Marshall, supra note __, at 11.
what it means to an individual’s ability to enjoy full membership in her society—
must take into account the society’s circumstances and norms. Thus, adequacy is
not distinct from, but rather informed by, the conditions of inequality in a given
social context. 63 This relationship between adequacy and equality is what I have
in mind when I say that the Fourteenth Amendment guarantees “educational ade-
quacy for equal citizenship.”

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

If equal citizenship is the object, then several implications follow. First, the
floor of educational opportunity must be sufficiently high to ensure not bare sub-
sistence, but the achievement of the full range of human capabilities that com-
prise the societal norm. Second, the notion of educational adequacy must be dy-
namic, evolving as societal norms evolve. And third, adequacy must entail a

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

64 William S. Koski & Rob Reich, When “Adequate” Isn’t: The Retreat from Equity in Educa-
tional Law and Policy and Why It Matters 39 (Dec. 21, 2005) (manuscript on file with author); see
Paul A. Minorini & Stephen D. Sugarman, Educational Adequacy and the Courts: The Promise
and Problems of Moving to a New Paradigm, in EQUITY AND ADEQUACY IN EDUCATION FINANCE:
ISSUES AND PERSPECTIVES 175, 188 (Helen F. Ladd & Janet S. Hansen eds., 1999) (“adequacy is not
a matter of comparing spending on the complaining group with spending on others”); Peter Enrich,
Leaving Equality Behind: New Directions in School Finance Reform, 48 VAND. L. REV. 101, 168
(1995) (adequacy “is not comparative”).

65 Koski & Reich, supra note ___, at 62.

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

Saharan Africa can expect to attend an average of five to six fewer years of primary and secondary
schooling than a child in Western Europe or the Americas.”).
limit to inequality, a point at which the maldistribution of educational opportunity puts too much distance between the bottom and the rest of society. Adequacy is thus a function of the range and contours of the overall distribution. It is a principle of bounded inequality.

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

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

II. THE GUARANTEE OF NATIONAL CITIZENSHIP

[Part II provides historical background on the Citizenship Clause and argues that the national citizenship guarantee, read together with Section 5 of the Fourteenth Amendment, entails substantive rights that Congress is both authorized and duty-bound to enforce, regardless of state action.]

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67 Of course, even a high threshold of adequacy will not fully level the playing field for competitions that reward educational advantage. This point is central to Professors Koski and Reich’s thoughtful argument that equality, not adequacy, is the fairer distributive principle given education’s status as a “positional good.” Koski & Reich, supra note __, at 46. However, this argument has its bite primarily at the upper end of the educational distribution, where the positional features of education are most apparent. For example, they emphasize the importance of fairness in competition for college admission, see id. at 48-49, 54-55, even though admission to the vast majority of colleges is not competitive, see Andrea Venezia, Michael W. Kirst, & Anthony L. Antonio, Betraying the College Dream: How Disconnected K-12 and Postsecondary Education Systems Undermine Student Aspirations 14 (2003) (urging greater policy attention to student readiness for “ ‘broad access institutions’ . . . that admit almost every student who applies,” which “comprise about 85 percent of all postsecondary schools and educate the majority of the nation’s college students”). The logic of equality leads Koski and Reich to conclude that students at the prestigious Palo Alto High School have a “ground to complain” that their peers at the even more prestigious Choate Rosemary Hall enjoy better and “unfair” chances at getting into top colleges. See Koski & Reich, supra note __, at 54. The example reveals a central difficulty with the equality principle, namely, its inability to distinguish which inequalities along a spectrum deserve the greatest remedial priority. See Michelman, supra note __, at 37-38. Although adequacy may not fully level the playing field for elite college admission, it targets inequality at an especially salient and injurious line of social division—the “border between minimum respect and degradation.” Forbath, supra note __, at 16. In the end, Koski and Reich propose an equity policy that they admit resembles “a high adequacy standard.” Koski & Reich, supra note __, at 62 & n.187.
III. EDUCATION AND NATIONAL CITIZENSHIP

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

The second interpretive strategy, associated with Alexander Bickel, acknowledges that the specific rights contemplated by the framers were limited. However, this approach distinguishes between “congressional understanding of the immediate effect of the enactment on conditions then present” and “what if

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69 See FLACK, supra note __, at 94, 96; CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (1866) (Sen. Howard). *But see* RAOUl BERGER, *GOVERNMENT BY JUDICIARY* 20-36 (1977) (arguing that privileges and immunities of citizenship include only the rights specified in the 1866 Act).

70 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823); see CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (Sen. Howard) (quoting *Corfield*); id. at 1757 (Sen. Trumbull) (“To be a citizen of the United States carries with it some rights; and what are they? They are those inherent, fundamental rights which belong to free citizens or free men in all countries . . . .”); see also Barnett, supra note __, at 458-62 (arguing that the framers understood the Privileges or Immunities Clause to protect inalienable natural rights inherent to citizenship).

71 CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (Sen. Howard). Justice Washington’s opinion in *Corfield* suggested the open-ended nature of citizenship rights by listing a few examples and then stating that “[t]hese, and many others which might be mentioned, are, strictly speaking, privileges and immunities” of citizenship. 6 F. Cas. at 551-52 (emphasis added).

72 See Ward v. Flood, 48 Cal. 36, 49 (1874) (education “is not a privilege or immunity appertaining to a citizen of the United States as such”); Marshall v. Donovan, 73 Ky. 681, 688 (1874) (same); see also McConnell, supra note __, at 1036-43; Kaczorowski, supra note __, at 926-28.

any thought was given to the long-range effect, under future circumstances, of provisions necessarily intended for permanence.” Although “no specific purpose going beyond the coverage of the Civil Rights Act is suggested” by the legislative history of the Fourteenth Amendment, according to Bickel, there was “rather an awareness on the part of these framers that it was a constitution they were writing, which led to a choice of language capable of growth.” The framers neither indulged radical theories of rights and equality that would have roused opposition, nor did they limit themselves to a mere enumeration of the specific guarantees of the Civil Rights Act of 1866. Instead, they chose generic language “sufficiently elastic to permit reasonable future advances” through legislation and judicial interpretation. As Charles Fairman has explained, invoking Justice Bradley’s dissent in *Slaughterhouse*:

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

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

In this Part, I examine some of the first steps that the Reconstruction Congress took along the interpretive path described by Professor Bickel. Between 1870 and 1890, Congress repeatedly sought to effectuate the guarantee of na-

74 *Id.* at 59.
75 *Id.* at 61.  
76 *Id.* at 61; *see* John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 28 (1980) (“[T]he most plausible interpretation of the Privileges or Immunities Clause is, as it must be, the one suggested by its language—that it was a delegation to future constitutional decision-makers to protect certain rights that the document neither lists, at least not exhaustively, nor even in any specific way gives directions for finding.”).  
78 Karst, supra note __, at 54; *see* Kaczorowski, *supra* note __, at 926 (“The Republicans’ understanding of the fourteenth amendment and the Civil Rights Act thus encompassed a developmental conception of these civil rights provisions. The conception permitted the future inclusion of rights within [its] protective guarantees that the framers might not have intended to protect in 1866.”).
tional citizenship through ambitious efforts to provide funding, leadership, and support for public education. A broad coalition of legislators carefully studied and nearly enacted a series of proposals designed to benefit whites and blacks in the North and South, promising federal aid or intervention where state efforts were inadequate. These were the earliest proposals for the kind of federal role in public education we have today.79

The proposals were not free of controversy; indeed, they ultimately did not pass. In discussing them, my point is not to reveal a singular “original understanding” of the Citizenship Clause (there likely was none), but rather to highlight a sustained and coherent constitutional perspective urged by legislators as an alternative to the judicially elaborated constitutional order of *Slaughterhouse* and the *Civil Rights Cases*.80 The education proposals, crafted during an era of constitutional transition and possibility, illuminate understandings of federal responsibility now lost among the “forgotten alternatives” of Reconstruction.81 At that time, the grant of national citizenship, like other clauses of the Fourteenth Amendment, was an open-ended mandate, couched in generic terms with no specific entailments. The education bills show how Congress sought to particularize and enforce its substantive guarantees. By studying these early interpretations, we recover a piece of the social citizenship tradition and enlarge our vision of what the Fourteenth Amendment might mean today.

I begin with a brief discussion of the Freedmen’s Bureau and the creation of a federal Department of Education. I then focus on three education aid bills—the first sponsored by Representative George Frisbie Hoar of Massachusetts in 1870, the second by Representative Legrand Perce of Mississippi in 1872, and the third by Senator Henry William Blair of New Hampshire in the mid-1880s. I conclude

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

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

this Part by discussing the relevance of these proposals to the contemporary imperative of educational adequacy for equal citizenship.

A. 1866-70: The Freedmen’s Bureau and the Department of Education

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

Yet the Bureau’s activities were driven less by a general theory of welfare provision for effective citizenship than by a specific interest in providing just compensation for slavery. While proposing to enable “all loyal refugees and freedmen . . . to become self-supporting citizens of the United States,” the Freedmen’s Bureau Act of 1866 limited educational programs to newly freed blacks, and the Bureau in fact served very few white children. During debate over the Act, opponents criticized its racial exclusivity, invoking the plight of poor and equally needy whites. In response, its supporters “stressed the special needs of blacks,” making clear that “[f]rom the beginning to the present time [blacks] have been robbed of their wages, to say nothing of the scourgings they


83 See Schnapper, supra note __, at 780-81 & n.146 (citing annual reports of the commissioner of the Freedmen’s Bureau for the years 1866 to 1870). The Bureau began under the authority of an 1865 act signed by President Lincoln. See Act of Mar. 3, 1865, ch. 90, 13 Stat. 507. The 1866 Freedmen’s Bureau bill, which Congress passed over President Johnson’s veto, extended the Bureau’s operations until July of 1868. See Act of July 16, 1866, ch. 200, 14 Stat. 173. In July of 1868, Congress again extended the Bureau’s activities but terminated its authority to collect funds from rental of abandoned lands, which had been its primary source of income. See Act of July 6, 1868, ch. 135, 15 Stat. 83; Act of July 25, 1868, ch. 245 15 Stat. 193. The Bureau became insolvent in 1870 and finally closed in 1872.

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


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

87 See Schnapper, supra note __, at 781 & n.147 (observing that white children comprised less than one percent of enrollment in Bureau-operated schools, according to Bureau reports).

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

89 Id. at 767.
have received" and that “[w]e owe something to these freedmen.” Propo-
nents saw the bill as a necessary remedy authorized by Section 2 of the Thir-
teenth Amendment, lest the freedmen “be taken and reduced into slavery
again.”

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

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

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91 Id. at 2779 (Rep. Eliot); see id. at 365 (Sen. Fessenden) (“[T]he Constitution has now been
changed so that slavery no longer exists in this country. A large body of men, women, and chil-
dren, millions in number, who had received no education, who had been laboring from generation
to generation for their white owners and masters, able to won nothing, to accomplish nothing, are
thrown, without protection, without aid, upon the charities of the world . . . .”); id. at 939 (Sen.
Trumbull) (“[N]ever before in the history of this Government have nearly four million people been
emancipated from the most abject and degradin g slavery ever imposed upon human beings; never
before has the occasion arisen when it was necessary to provide for such large numbers of people
thrown upon the bounty of the Government, unprotected and unprovided for.”).
92 Id. (Sen. Trumbull); see id. at 366 (Sen. Fessenden) (invoking Thirteenth Amendment); id. at
631 (Rep. Moulton) (same).
to Obtain Federal Aid for the Common Schools, 1870-1890, at 21 (1949).
94 Id.
95 Id.; see Act of Mar. 2, 1867, ch. 158, 14 Stat. 434.
plaints about federal overreaching. Nevertheless, its proponents stressed the national interest in “universal education” for whites and blacks and the need for “a controlling head by which the various conflicting systems in the different States can be harmonized, by which there can be uniformity.”

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

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

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

In its early years, the Department had limited capacity and was soon demoted to an “Office of Education” or “Bureau of Education” within the Department of

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97 See id. at 2968 (Rep. Rogers) (urging that “towns, cities, and States” be allowed to “carry out and regulate the system of education without interference, directly or indirectly, ... [by] the Federal Government”); id. at 3047 (Rep. Pike) (“[H]ere we have ... a scheme of governmental control of all the common schools.”); Cong. Globe, 39th Cong., 2d Sess. 1843 (1867) (Sen. Davis) (educational matters “belong peculiarly to the States, and were intended to be left exclusively to State management”); id. at 1893 (Sen. Hendricks) (same). However, the idea of creating the Department was not “thrust upon this House without anybody asking for its passage,” but instead arose from the recommendation of “men who inaugurated the existing systems of their own States, and are at the head of those systems at the present time.” Cong. Globe, 39th Cong., 1st Sess. 3044 (1866) (Rep. Moulton) (observing that education chiefs of Illinois, Ohio, and Vermont among others supported the Department).

98 Id. (Rep. Moulton); see id. at 2967 (Rep. Donnelly); id. at 3049 (Rep. Garfield).

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


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

B. 1870-71: The Hoar Bill to Establish a National System of Education

One month earlier, Congressman George Hoar of Massachusetts had introduced the first major proposal for federal supervision of public education, and he reported it out of the House Committee on Education and Labor on the same day as President Grant’s proclamation. A graduate of Harvard Law School and a staunch opponent of slavery, Hoar cut his political teeth in the Free Soil movement and was elected to Congress in 1868 as a “self-acknowledged disciple of [Charles] Sumner.” In his autobiography, he wrote that the debate over the

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102 See CONG. GLOBE, 40th Cong., 2d Sess. app. 521 (1868).
103 See LEE, supra note __, at 37-38 (discussing Eaton); MCAFEE, supra note __, at 105-06. According to Professor Lee, by 1870 support for “more nation-wide uniformity and standardization of educational activity” as well as “equalizing the educational funds of the states” had come from the National Association of School Superintendents, the incipient National Education Association, and the American Educational Monthly, which was “the official organ of certain state teachers’ associations and the most widely circulated periodical of its class at the time.” LEE, supra note __, at 24, 36-37, 41.
104 “All Men Free and Equal,” The XVth Amendment Proclaimed, Message to Congress—Proclamation of the President (Mar. 30, 1870), available at http://memory.loc.gov/rbc/rbpe/rbpe00/00902000/001dr.jpg. President Grant quoted the famous words of President Washington’s Farewell Address: “Promote, then, as a matter of primary importance, institutions for the general diffusion of knowledge. In proportion as the structure of the Government gives force to public opinion, it is essential that public opinion should be enlightened.” Id.
105 Id.
106 See H.R. 1326, 41st Cong. (1870).
107 See CONG. GLOBE, 41st Cong., 2d Sess. 2294 (1870). The thrust and language of President Grant’s proclamation appear to have been influenced by a letter that Hoar sent to Grant on March 29, 1870. See RICHARD E. WELCH, JR., GEORGE FRISBIE HOAR AND THE HALF-BREED REPUBLICANS 23 (1971) (quoting Hoar’s letter).
108 Id. at 21.
Department of Education in his first term “led [him] to give special study to the matter of National education” and shaped his belief that “[a] complete system of education at the National charge was an essential element of . . . reconstruction policy.”

Titling his 1870 proposal “A bill to establish a national system of education,” Hoar observed that the legislation “for the first time sought to compel by national authority the establishment of a thorough and efficient system of public instruction throughout the whole country.”

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

The bill’s heavy-handed approach prompted an array of objections. Critics seized on the absence of standards by which the President would adjudge a state school system to be satisfactory. The cadre of federal school officials contemplated by the bill was assailed as a “system of functionaryism” involving “reckless expenditure” and “patronage.” Opponents also criticized the

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109 1 George F. Hoar, Autobiography of Seventy Years 256, 265 (1903).
110 Cong. Globe, 41st Cong., 2d Sess. app. 478 (1870); see H.R. 1326, 41st Cong. (1870).
111 H.R. 1326, 41st Cong. § 19 (1871).
112 Id.
113 Id. §§ 1-3.
114 Id. §§ 4-5.
115 Id. §§ 6, 13.
116 Id. § 15 (as amended by Rep. Hoar).
118 See id. app. at 78 (Rep. Bird) (“Beware of politics in your schools.”); id. app. at 97 (Rep. McNeely) (noting lack of clarity on whether the President would evaluate state school systems based on state laws or on the actual condition of schools).
119 Id. app. at 78 (Rep. Bird).
120 Id. at 1372 (Rep. Kerr).
eminent domain provision as an invitation to abuse and the federal authority to select schoolbooks as a means by which “[t]he very foundations of knowledge might be poisoned.” Moreover, a recurring theme of the bill’s detractors was “the utter want of power in Congress to enforce the provisions of this bill.” Nothing in the Constitution, they argued, authorized the “Federal interference in the educational affairs of the States” envisioned by the bill.

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

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

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

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121 Id. app. at 94 (Rep. McNeely); see id. app. at 240 (Rep. Dockery).
122 See id. app. at 79 (Rep. Bird); id. at 1372 (Rep. Kerr); id. at 1374 (Rep. Rogers).
123 Id. at 1372 (Rep. Kerr); see id. at 1374 (Rep. Rogers). Opponents of the bill also condemned the tax to finance the schools as “oppressive in the extreme.” Id. app. at 241 (Rep. Dockery); see id. at 1372 (Rep. Kerr).
124 Id. app. at 80 (Rep. Bird).
125 Id. app. at 94 (Rep. McNeely).
126 LEE, supra note __, at 53 (quoting George F. Hoar, Education in Congress, OLD & NEW, May 1872, at 600).
127 The key speeches in support of the bill, other than Hoar’s, appear at CONG. GLOBE, 41st Cong., 3d Sess. app. 100 (1871) (Rep. Arnell); id. at 1072 (Rep. Clark); id. at 1243 (Rep. Lawrence); id. at 1375 (Rep. Townsend); id. app. at 189 (Rep. Prosser).
128 See CONG. GLOBE, 41st Cong., 2d Sess. app. 478 (1870).
in Iowa, or the factory in Maine as much as does the vote of its owner.\textsuperscript{129}

With this backdrop, Hoar asserted his central claim: “Now, if to every man in every State is secured by national authority his equal share in the Government surely there is implied the corresponding power and duty of securing the capacity for the exercise of that share in the Government.”\textsuperscript{130} The following year, Hoar reiterated that “[t]he Constitution not only establishes a national Government, but since the [fourteenth and fifteenth] amendments have been added to that instrument it establishes a Government which it declares shall be administered by the intelligent voice of every citizen within its borders.”\textsuperscript{131} The “clear and direct” implication, according to Hoar, is that “if the Government cannot be administered in a constitutional way, to wit, by the intelligent voice of the people, unless that people is educated,” then “of direct logical necessity it becomes the constitutional duty of Congress to secure [public education].”\textsuperscript{132}

Importantly, the bill’s supporters made clear that the scope of constitutional concern went beyond the new freedmen. Among the 3.5 million people who could not read or write, blacks and whites comprised almost equal shares,\textsuperscript{133} and among school-aged children who did not attend school in 1860, there were more than twice as many whites as blacks.\textsuperscript{134} Unlike the racially targeted approach of the Freedmen’s Bureau, Hoar’s proposal sought to provide education universally to whites and blacks. For either race, the principle was the same. Just as educational deprivation threatened to defeat the newly won citizenship of freedmen, “there is a terrible amount of illiteracy among the whites, especially in the southern States, whereby such are rendered unfit for the proper discharge of their po-

\textsuperscript{129} Id. app. at 479. The Fifteenth Amendment, to which this passage refers, is an elaboration of national citizenship rights. See U.S. Const. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”).

\textsuperscript{130} Cong. Globe, 41st Cong., 2d Sess. app. 479 (1870).


\textsuperscript{132} Id.; see also id. at 1041. With similar arguments, supporters of the bill also invoked the Guarantee Clause of Article IV, Section 4—“The United States shall guarantee to every State in this Union a Republican Form of Government,” U.S. Const. art. IV, § 4—as a source of congressional duty to secure public education. See Cong. Globe, 41st Cong., 3d Sess. 808-09 (1871) (Rep. Lawrence); id. at 1243-44 (Rep. Lawrence); id. at 1377 (Rep. Townsend).

\textsuperscript{133} See Cong. Globe, 41st Cong., 2d Sess. app. 479 (1870) (Rep. Hoar) (estimating that 1,777,779 whites and 1,734,551 blacks were illiterate in 1870 based on Bureau of Education data).

\textsuperscript{134} See Cong. Globe, 41st Cong., 3d Sess. 1377 (1871) (Rep. Townsend) (citing Bureau of Education statistics showing that 3,821,972 white children and 1,707,800 black children were not attending school in 1860 and that the total (5,529,772) was roughly equal to the number of children who did attend school (5,680,356)).
litical duties and are ignorant of their political rights.”\textsuperscript{135} Noting the “three great amendments” recently adopted, Hoar concluded his June 1870 speech by urging: “let us, in extending the charter of freedom over a new race, reaffirm that declaration with wider and more beneficent scope” by extending education “to every citizen in every State and in every locality.”\textsuperscript{136}

Like the Freedmen’s Bureau, however, Hoar’s proposal in practice would have targeted the South, where none of the states had a well-developed school system in 1870.\textsuperscript{137} In this respect, the Hoar bill was an essential step toward completing the work of Reconstruction but not an example of a genuinely national federal role in public education. Nevertheless, states’ rights objections to the bill pushed its proponents to articulate a notion of federal responsibility that could be applied more broadly than the bill envisioned. Hoar’s basic belief was that illiteracy in the South was not merely a Southern problem but a national problem. His argument for federal responsibility called on Americans not to “slink back into their state boundaries and define themselves again as citizens of Massachusetts, Ohio, or Illinois,” but to “claim their common nationality and fully and finally become Americans, one people, indivisible.”\textsuperscript{138}

In response to a legislator opposed to federal interference “with educational matters belonging properly to the jurisdiction of the States,” a supporter of the bill explained that “[m]y colleague, in his zeal for State rights, forgets that the citizens of a State are citizens of the nation as well [and] that the nation’s claims upon them are paramount to those of a State.”\textsuperscript{139} If the nation “can call on [its citizens] to sit on its juries, to exercise offices of trust and profit, to become law-makers, and assist in

\textsuperscript{135} Id. (Rep. Townsend).
\textsuperscript{136} CONG. GLOBE, 41st Cong., 2d Sess. app. 486 (1870) (Rep. Hoar).
\textsuperscript{137} See CONG. GLOBE, 41st Cong., 3d Sess. 1039-40 (1871) (Rep. Hoar); id. app. at 101 (Rep. Arnell) (the Hoar bill “might well be entitled ‘A bill for the better reconstruction of the South’ “). This sectional focus prompted cries of hypocrisy from Southern legislators who pointed to the North’s own educational failures. See id. app. at 96-97 (Rep. McNeely) (observing that use of child labor in Massachusetts impeded many school-aged children from obtaining an education). Some legislators also complained that Hoar gave Southern states too little credit for the educational efforts they were making. Representative Rogers of Tennessee reported that his state, though poor, “felt the need of education” and hence levied a fifty-cent “tax on dogs, exempting one for each family, to carry forward their school system.” Id. at 1375 (Rep. Rogers); see id. at 1379 (Rep. Booker) (reporting Virginia’s educational progress and declaring “our people are alive to the importance of education”). Hoar’s bill was supported by some Southern legislators, including Representative Clark of Texas and Representatives Arnell and Prosser of Tennessee. See supra note __.
\textsuperscript{139} CONG. GLOBE, 41st Cong., 3d Sess. 1377 (1871) (Rep. McNeely).
\textsuperscript{140} Id. at 1377-78 (Rep. Townsend).
discharging all governmental duties,” then “does it not impose on itself the obligation to qualify them for the work they may have to do?”

In the end, Hoar put the point this way:

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

Hoar summed up the federal role in a simple formula: “What, then, is the function of the national Legislature? It is twofold. It is to compel to be done what the States will not do, and to do for them what they cannot do.” The duty of Congress was to secure adequate educational opportunity when states fail to do so “either through indifference, hostility to education, or pecuniary inability.”

As discussed below, this concept of national responsibility animated subsequent efforts to extend the federal role in education not only to the South but throughout the country.

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

The Hoar bill died in 1871 without reaching a vote in the House. In addition to complaints of patronage, bureaucracy, and interference with states’ rights, an additional factor leading to its demise was the Senate’s contemporaneous consideration of a proposal by Senator Sumner to compel racial integration in the public schools of the District of Columbia.

Members of both parties opposed the idea, and resistance was not confined to the South. Although the Hoar bill did not address mixed schooling, the fear that “[r]ules adopted for Washington, D.C.,

141 Id. at 1377.
142 COG. GLOBE, 42d Cong., 1st Sess. 335 (1871). This remark came during consideration of the Ku Klux Klan Act of 1871 authorizing military force to protect blacks in their civil rights. While believing the Act to be a “necessary measure of relief,” Hoar took the occasion to emphasize that the only “permanent remedy for the evils of the South” is “general education.” Id.
145 See id. at 1055 (Sen. Sumner).
146 See McAfee, supra note __, at 111 (“Mixed schools were the logical extension both of the common school idea and the Republican civil rights movement. But the overwhelming majority of whites at that time refused to consider sending their children to schools with significant numbers of black children.”).
could later be grafted onto a national school system” could not have been far from legislators’ minds.\footnote{Id. at 110.}

Despite its failure to advance in Congress, the Hoar bill’s underlying notion of federal responsibility quickly took other forms. On January 15, 1872, Congressman Legrand Perce, a Mississippi Republican who was then chairman of the House Education and Labor Committee, introduced a new proposal for federal education aid, this time avoiding any suggestion of national schools run by federal authorities.\footnote{See H.R. 1043, 42d Cong. (1872); CONG. GLOBE, 42d Cong., 2d Sess. 862-63 (1872) (Rep. Perce) (“T[he] question of the establishment of a national system is not in issue. We propose to aid and assist the educational systems adopted by the several States.”).}

The bill sought to apply the proceeds of public lands to education by dedicating half the annual revenue from land sales to a perpetual “national educational fund” and by allocating the other half, plus interest from the fund, on the basis of population to each state that provided free education to all children between the ages of six and sixteen.\footnote{H.R. 1043, 42d Cong. §§ 3-5 (1872).}

The bill allowed states to spend ten percent of the funds on teacher education and required the rest to be spent on teacher salaries.\footnote{See id. § 6.}

Moreover, in response to continuing opposition to racially mixed schools,\footnote{See CONG. GLOBE, 42d Cong., 2d Sess. 569 (1872) (Rep. Storm) (warning that “this bill is a Trojan horse. In its interior are concealed the lurking foe—mixed schools.”); id. at 791 (Rep. Kerr) (worrying that Congress would require states, as a funding condition, to establish “mongrel schools, forced association, and resulting demoralization to my own race”).}

the bill was amended to make clear that no state would lose funding “for the reason that the laws thereof provide for separate schools for white children and black children, or refuse to organize a system of mixed schools.”\footnote{See id. at 882.}

The Perce bill was an early version of federal aid through conditional grants. Although it was a clear improvement from the Hoar bill, its detractors characterized it as a “craftily and cunningly-devised” copy of the Hoar bill—“the old cat disguised in the meal-bag”—that threatened “to take charge of the public-school system of the country.”\footnote{Id. at 569 (Rep. Storm).}

Opponents renewed the claim that “there is no authority in the Constitution to establish a general national system of education”\footnote{Id. app. at 19 (Rep. Herndon).}

and accused the bill of trying “to do indirectly what we are not allowed to do directly.”\footnote{Id. at 569 (Rep. Storm); see id. at 788 (Rep. McHenry) (“This bill gives the proceeds of the sale of the lands to the States for school purposes, but reserves to the General Government a super-

\footnote{Id. at 569 (Rep. Storm).}
In response, proponents of the bill invoked Article IV’s grant of congressional power “to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.” Perce himself looked to the general welfare clause of Article I as well as the Guarantee Clause of Article IV, offering arguments similar to Hoar’s thesis on federal responsibility for securing national citizenship. But to the extent that the Guarantee Clause implied the necessity of education for state not national citizenship, it did not fully capture the constitutional import of Perce’s own proposal. Unlike the Hoar bill, the Perce bill had genuinely national scope. In addition to addressing the needs of whites and blacks, the bill extended the federal role to the North as well as the South on the ground that insufficient education was “a national calamity, and not necessarily sectional.” Moreover, Perce’s proposal sought to apply a common educational standard throughout the Union. Although the original bill allocated funds based on population, the final version proposed distributing funds on the basis of illiteracy, thereby directing more aid to states with greater need and less fiscal capacity.

Thus the Perce bill in its final version reflected an underlying policy goal of ensuring that “the children of [each] State, who will be called on to discharge the duties of citizens of the United States, shall be educated” to a national standard of literacy, whatever the fiscal capacity of each state. Urging Congress to “step in and lend us a helping hand,” Perce’s fellow Mississippian, Representative George McKee, reminded his colleagues that “[t]he children of the South, white and colored, are not the children of the South alone; they are the children of the intendment, through its officials, over the expenditure of the money. . . . Congress cannot thus go into the States and control their internal affairs.”; id. at 791 (Rep. Kerr) (“the logical effect of [the bill] will unquestionably be to transfer the ultimate control of education in the country to Federal tribunals”); id. at 793 (Rep. Parker) (“The bill permits Congress to take possession of the State governments.”).

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

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

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

159 Id. app. at 16 (Rep. Rainey). Congressman Joseph H. Rainey was the first black elected to the House of Representatives. See MCAFEE, supra note __, at 116-17 (discussing Rainey’s speech in support of the Perce bill); see also CONG. GLOBE, 42d Cong., 2d Sess. 862 (1872) (Rep. Perce) (observing that the North had 1,356,302 illiterates while the South had 4,189,972).

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

161 Id. at 794 (Rep. Townsend).
Similarly, echoing President Grant’s proclamation two years earlier, Congressman Henry Dawes of Massachusetts described the bill as a means of securing rights of national citizenship guaranteed by the Fifteenth Amendment. As Dawes put it, the bill sought to discharge “the obligation we took upon ourselves” to ensure that “those we clothed with the ballot should have the means of casting that ballot intelligently”—an obligation now with special importance because “a ballot cast in Massachusetts or Arkansas, or upon the Pacific slope or in Pennsylvania, not only affected the locality where it was dropped, but the whole nation alike.” Dawes saw federal aid to public education as consonant with emerging advances in commerce, transportation, and communications: “we are becoming by means of these forces one people and one nation.”

The Perce bill passed the House on February 8, 1872, by a vote of 117 to 98, with twelve Democrats voting for and twenty Republicans voting against the measure. In December 1872, as the bill went to the Senate, President Grant hailed it as “a measure of such great importance to our real progress and is so unanimously approved by the leading friends of education that I commend it to the favorable attention of Congress.” However, the bill never reached a vote in the Senate “mainly because Senator Morrill . . . insisted that the money should go to the agricultural colleges, in which he took great interest, and not to common schools.” When the bill came up for consideration on February 11, 1873, Senator Morrill moved that it be “passed over,” and it did not surface again.

The Perce bill was significant to the evolving conception of the federal role in several ways. First, it packaged federal aid in the form of conditional grants to the states. Second, its scope was truly national; it was intended to benefit blacks and whites in the North and South. Third, it sought to allocate funds based on a uniform standard of educational need. By targeting illiteracy, the bill served “the purpose of stimulating education to such portions of the country as most greatly need it.” Its funding formula was designed to narrow inequality across states.

162 Id. at 795 (Rep. McKee).
163 Id. at 861 (Rep. Dawes).
164 Id.
165 See id. at 903; see also LEE, supra note __, at 83-84 (analyzing the vote by party and region).
167 1 HOAR, supra note __, at 265; see MCAFEE, supra note __, at 120 (“As the Republican father of federal aid to agricultural and industrial colleges, Morrill did not like the bill’s diversion of federal land proceeds to primary and elementary education.”).
168 CONG. GLOBE, 42d Cong., 3d Sess. 1250 (1873) (Sen. Morrill); see MCAFEE, supra note __, at 121.
Finally, the constitutional debate on federal aid to public education included a restatement of Congress’s power and duty to secure rights of national citizenship.

D. 1882-90: The Blair Bills to Aid Public Schools Through Direct Appropriations from the National Treasury

The Perce bill turned out to be the most vigorous effort in the 1870s to extend federal aid to public education. In 1873, Congressman Hoar introduced legislation that attempted to revive the Perce bill and throughout the decade, Presidents Grant and Hayes supported measures to ensure universal education. In 1875, Grant proposed a constitutional amendment whereby “the States shall be required to afford the opportunity of a good common-school education to every child within their limits.” After the Perce bill, however, these initiatives failed to gain momentum for several reasons. First, the depression of 1873 ushered in a period of retrenchment, focusing the attention of legislators on “simple economic survival” and “away from patriotic consideration of national long-term needs.” In this environment, new expenditures by the federal government, and especially redistributive measures, were politically untenable. Second, the subject of mixed schools was brought to the fore by Senator Sumner’s uncompromising advocacy for the inclusion of a ban on segregated schooling in the Civil Rights Act of 1875. Although the Senate voted for the ban in 1874, the move was highly toxic and corroded consideration of the federal role in public education. Third, the Slaughterhouse decision in 1873 bolstered opponents of an enlarged federal role in securing rights of national citizenship.

170 See H.R. 477, 43d Cong. (1873); 2 CONG. REC. 149-50 (1873) (Rep. Hoar).
171 See Lee, supra note __, at 72-74.
172 President Ulysses S. Grant, Seventh Annual Message to Congress (Dec. 7, 1875), available at Woolley & Peters, supra note __.
173 McAfee, supra note __, at 121.
174 See id. at 125-49; McConnell, supra note __, at 984-1092.
175 The Senate’s vote to ban segregated schools was a key factor, along with the depression and political corruption in the Grant administration, in the dramatic losses suffered by Republicans in the 1874 mid-term election. See McAfee, supra note __, at 166-67; William Gillette, Retreat from Reconstruction, 1869-1879, at 211-58 (1979). The ban was stripped out of the civil rights bill before it was passed in 1875. See McConnell, supra note __, at 1080-86. Sumner’s strident advocacy on mixed schools could not have helped Hoar’s 1873 effort to revive the Perce bill, especially since Sumner and Hoar both hailed from Massachusetts and were close friends. See McAfee, supra note __, at 123.
176 See id. at 146 (“That spring [1874], Democrats enjoyed reminding Republicans that a Republican Court had ruled in the Slaughterhouse Cases of the year before that the privileges and immunities of United States citizens did not include public education.”).
Yet the issue did not disappear and made a strong comeback in the following decade. In 1880, the Senate passed a bill sponsored by Senator Ambrose Burnside of Rhode Island that, like the Perce bill, proposed establishing a national education fund from the proceeds of public lands.177 Similar constitutional issues were raised during the three-day debate on the bill, including appeals to national duty arising from the citizenship guarantees of the Civil War amendments.178 Unlike the Perce bill in the House, the Burnside bill cleared the Senate with a wide bipartisan margin: twenty-two Republicans and nineteen Democrats voted in favor of the bill, while only six Democrats opposed it.179 As Professor Lee has noted, the lopsided majority was significant because the South by that time had reverted to Democratic control: “Southern Democrats had joined Northern Republicans in leading the campaign for federal aid to common schools.”180 But the Burnside bill met “a ceaseless campaign of obstruction in the House” and never reached a vote.181

The Hoar, Perce, and Burnside bills, along with the early work of the federal Bureau of Education, set the stage for the most significant education aid proposal of the postbellum period. Sponsored by Senator Henry Blair of New Hampshire, chairman of the Committee on Education and Labor,182 the proposal intensely engaged the Senate throughout much of the 1880s and won passage in that chamber in 1884, 1886, and 1888 before failing in 1890.183 For several reasons,

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

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

179 See id. at 229.

180 LEE, supra note __, at 85.

181 Id. at 86.

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

183 Senator Blair first introduced the bill in 1882, see 13 CONG. REC. 4820 (1882), but it did not receive thorough consideration until the next session in 1884, see 15 CONG. REC. 1999 (1884). In describing the bill, I will refer to the version passed by the Senate on April 7, 1884 (S. 398), and reintroduced by Blair in 1885 (S. 194) and in 1887 (S. 371). See S. 398, 48th Cong. (1884), re-
the Blair bill was the high-water mark in the early conceptualization of the federal role in public education.

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

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

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184 See S. 194, 49th Cong. § 1 (1886). Senator Blair characterized his bill as a “temporary aid” measure intended to coexist with the perpetual education fund from public land sales proposed by the Burnside bill, whose passage Blair also urged in 1884. See S. REP. NO. 48-101, pt. 2, at 28-29 (1884), reprinted in 17 CONG. REC. 1248-49 (1886).

185 See id. § 2.

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

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

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

189 Id. § 10. As historian Daniel Crofts has shown, the Blair bill garnered significant support from blacks. See Crofts, supra note __, at 46. “Implicit in their support for this legislation was the assumption—or at least the hope—that Redeemer governments could be trusted to treat black schools fairly and to supply them with an equitable share of any federal aid. Such an expectation may not have been completely farfetched when the Blair bill was drafted in the early 1880s.” Id.
from its own funds as it received from the federal government, introducing a simple model of cooperative federalism. The bill also prohibited the use of federal funds for school construction or parochial schools, and it required instruction in federally funded schools to include “reading, writing, and speaking the English language, arithmetic, geography, [and] history of the United States.”

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

This unprecedented compilation of data revealed large interstate variations in terms of educational needs, school expenditures, and revenue-raising capacity. The per capita value of real and personal property in New England, where enrollment rates were high and illiteracy rates low, was 40 percent greater than in the mid-Atlantic states, two times greater than in the Midwest and West, and four times greater than in the South. The South received less than half of what any other region was receiving, and this was true for both the amount of federal funds per pupil and the amount per state (despite the number of school-age children). This is the greatest case of federal inequity that the nation had ever seen, since it distributed funds on the basis of the education statistics the federal government had compiled, and these had been specifically compiled to show that the South did not need the same level of funds as the North.

times greater than in the South, where enrollment rates were low and illiteracy rates high.  Disparities in education spending reflected these disparities in revenue-raising capacity, as New England states spent three or four times more per pupil than Southern states. With these data, owing largely to the creation of a federal education agency, Blair established a strong predicate for the necessity of federal aid.

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

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

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

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197 See id. at 2014-15 tbl.3; id. at 2016-18 tbls.5-7; id. at 2022-23 tbl.15; see also S. Rep. No. 48-101, pt. 2, at 22 (1884) (showing that, among the states, educational “necessity is most pressing where the ability to meet its requirements is least, making assistance from a central power indispensable”), reprinted in 17 Cong. Rec. 1246 (1886).

198 See 15 Cong. Rec. 2014-15 tbl.3 (1884) (showing “Expenditure in the year—per capita of pupils enrolled in public schools”).

199 Opponents of the bill argued that Congress has no power “to tax the people of the United States in order to raise revenue to be expended on a subject, unless the Government of the United States has jurisdiction over that subject.” Id. at 2373 (Sen. Coke). Because the Constitution does not give Congress authority over education—“the common schools of this country pertain only to the jurisdiction of the States,” id. at 2460 (Sen. Coke)—it “is not a proper object for the appropriation of money out of the Federal Treasury.” Id. at 2066 (Sen. Saulsbury); cf. id. at 2213 (Sen. Vest) (contending that Congress may aid the states in public education but may not “prescribe the details of the system of education in the State”). In response, the bill’s supporters argued that the Spending Clause authorizes taxation and appropriation for “any purpose of a national and general character” as determined by Congress, id. at 2506 (Sen. George), citing the Morrill Act and other examples as precedent, see id. at 2205 (Sen. Garland); id. at 2373-75 (Sen. George). These debates were later resolved in favor of federal power. See South Dakota v. Dole, 483 U.S. 203 (1987); United States v. Butler, 297 U.S. 1 (1937).

I say public life with no reference to the incumbency of political office. By the public life of an American citizen I refer to his life as a sovereign; to his constant participation in the active government of his country; to the continual study and decision of political issues which devolve upon him whatever may be his occupation; and to his responsibility for the conduct of national and State affairs as the primary law-making, law-construing, and law-executing power, no matter whether or not he is personally engaged in the public service as policeman or President, as any State official whatever, member of Congress, Chief-Justice of the United States, or a humble justice of the peace. In republics official stations are servitudes. The citizen is king.\textsuperscript{201}

Thus, Blair argued, the nation must secure to each person a degree of education “commensurate with the character and dignity of the station which he occupies by the theory of the government of which he is a part.”\textsuperscript{202} “We think it is clear,” he concluded, “that the nation has the power, which implies the duty of its exercise when necessary, to educate the children who are to become its citizens.”\textsuperscript{203}

Echoing this theme, Democratic Senator Joseph Emerson Brown of Georgia, a graduate of Yale Law School and former chief justice of the Georgia Supreme Court, described the Blair bill as an expression of Congress’s power and duty to secure the constitutional guarantee of national citizenship. Quoting the Citizenship Clause, Brown drew an analogy between the Blair bill and the voting rights enforcement acts recently passed by Congress and partially sustained by the Supreme Court.\textsuperscript{204} “If Congress has power to protect the voter in the free exercise of the use of the ballot,” he argued, “it must have power to aid in preparing him for its intelligent use. And without educating the voter, . . . without, in other words, preparing him for the duty of citizenship, he can not be a citizen, at least not a useful citizen.”\textsuperscript{205}

\textsuperscript{201} 15 CONG. REC. 2000 (1884) (Sen. Blair).
\textsuperscript{202} Id.
\textsuperscript{203} S. REP. NO. 48-101, pt. 2, at 28 (1884), \textit{reprinted in} 17 CONG. REC. 1248 (1886). Like Congressman Perce before him, Senator Blair also invoked the Guarantee Clause as a ground of federal duty to aid the states in public education, although this argument, which spoke to state citizenship, was in Blair’s view secondary to the necessity of education for national citizenship. \textit{See} S. REP. NO. 48-101, pt. 2, at 4 (1884), \textit{reprinted in} 17 CONG. REC. 1240 (1886); 15 CONG. REC. 1999-2000 (1884) (Sen. Blair).
\textsuperscript{204} \textit{See} Ex parte Yarborough, 110 U.S. 651 (1884) (sustaining conviction of private individual under Ku Klux Klan Act of 1871 for assaulting black voters to deter their participation in a congressional election); Ex parte Siebold, 100 U.S. 371 (1879) (sustaining application of Enforcement Act of 1870 to convict local election officials of stuffing the ballot box in federal election).
\textsuperscript{205} 15 CONG. REC. 2251 (1884) (Sen. Brown).
Similarly, Senator Charles William Jones of Florida, also a Democrat and a lawyer, saw no need to anchor the bill in the general-welfare clause, instead emphasizing the “revolution” and “great fundamental change” effected by the Civil War amendments and especially by the Citizenship Clause. 206 “The Constitution of the United States having made citizens and voters out of 5,000,000 of slaves and cast upon the people of the States the duty of educating them for the exercise of political power, surely there can be nothing very unreasonable in the Government of the United States aiding the States in educating these people.” 207 The Blair bill sought to discharge “the obligation that rests upon the Union to prepare those people who were made citizens for the preservation of the Union for the exercise of intelligent citizenship in the Union.” 208

Although the citizenship argument called attention to the plight of the new freedmen, Blair conscientiously articulated the federal duty to secure education in more universal terms, thereby garnering support from both Northern Republicans and Southern Democrats. 209 As the Perce bill had shown, the use of illiteracy as the basis for distributing aid ensured that the scope of educational need, though most acute among Southern blacks, would radiate outward to the rest of the nation. Blair’s statistics made it difficult for legislators to ignore white illiteracy in the South or black illiteracy in the North. 210 Eager to avoid the sectionalism of the Hoar bill and the racial identifiability of the Freedmen’s Bureau, Blair explained that his “bill endeavors carefully to avoid all recognition of distinctions of race or color. There is no appeal to Northern or Southern prejudice in the bill. Illiteracy is taken as the basis of distribution, because illiteracy is the only mathematical, available, pertinent measure of the necessity of the case.

206 Id. at 2151-52 (Sen. Jones).
207 Id. at 2151 (Sen. Jones). Although Slaughterhouse misconstrued the significance of the Citizenship Clause, Senator Jones put his best gloss on the case, reading the Court’s recognition that “a person could be a citizen of the United States without being a citizen of a State” to imply the primacy of national citizenship. Id. at 2151. Senator Blair simply ignored Slaughterhouse in suggesting that education is a privilege of both state and national citizenship and is thus subject to state and federal authority concurrently. His bill did not threaten states’ rights, he argued, because “[t]he fact that the same individual child is to become a citizen of both governments does not deprive the National Government of its power to qualify that child to be its own citizen, to vote and act intelligently so far as the creation or the maintenance of the national powers are [sic] concerned.” Id. at 2063 (Sen. Blair).
208 Id. at 2251 (Sen. Brown).
209 See Crofts, supra note ___, at 43-44.
210 According to the 1880 census, the rate of illiteracy among Southern whites age 10 or older, though lower than among Southern blacks, was still 20 percent or higher in Alabama, Arkansas, Florida, Georgia, Kentucky, North Carolina, South Carolina, and Tennessee. The illiteracy rate among Northern blacks, though lower than among Southern blacks, was at least 20 percent in almost all Northern states and, in some cases, higher than 30 percent. See 15 CONG. REC. 2017 tbl.6 (1884) (Sen. Blair).
“Of course,” he acknowledged, “the necessity is less in the New England States . . . . Yet if the census is at all reliable it is a fact that there is a great deal of illiteracy prevailing even in New England . . . .” Moreover, he declared, “I am not willing to stand here and say that the son of a confederate officer or soldier shall not be educated as well as the child of his former slave. Give them both equal privileges in the direction of education, give them both the same chance to prepare for the future of American citizenship.”

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

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211 Id. at 2069.
212 Id. at 2070; see also S. REP. NO. 48-101, pt. 2, at 21-23 (1884) (showing that, in many Northern cities, over half the school-age population was not enrolled in school and concluding that “there is as great danger to the future of the country from the Northern cities as from the Southern States”), reprinted in 17 CONG. REC. 1246 (1886).
213 17 CONG. REC. 1726 (1886) (Sen. Blair). Blair’s concern for educating whites stemmed not only from considerations of equity but also from his belief in the ability of education to temper white racism. Citing KKK-led violence perpetrated by “the ignorant and degraded white man,” Blair said “[w]e but half perceive our duty when we say we discharge it by educating the colored man” and declared it essential that his “white brothers be educated, be refined by a higher form of civilization, be taught to respect his rights.” Id. at 1730.
214 15 CONG. REC. 2589 (1884) (Sen. Gibson).
215 Id. at 2467 (Sen. Saulsbury).
216 See id. at 2103 (Sen. Plumb) (“the beneficence of the General Government . . . will shrivel up all [the] aspirations of the people themselves, will induce them . . . to put out their children to nurse to the General Government, take away the interest of the people in regard to this great subject, and substitute for it the idea of depending upon the General Government for everything” concerning education); id. at 2246 (Sen. Maxey) (same).
217 See id. at 2292 (Sen. Butler) (“My prediction is that if this money is appropriated under this bill . . . ten years will not roll around before the National Government will have control of every common school in the United States.”); id. at 2102 (Sen. Plumb) (same).
218 See id. at 2062, 2252-54 (Sen. Sherman) (arguing that the bill lacked sufficient controls to ensure that states do not discriminate on the basis of race in the use of federal funds); id. at 2100 (Sen. Wan Vyck) (same).
The Blair bill won impressive backing in the Senate from a bipartisan, geographically diverse coalition. In presenting his bill, Blair had amassed dozens of letters, testimony, and memorials from school superintendents, education experts, and influential leaders in the North and South urging the establishment of national aid to education.\textsuperscript{219} The Senate votes on the bill reflected this wide-ranging support.\textsuperscript{220} In 1884, the bill passed the Senate by a margin of thirty-three to eleven, with nineteen Northern and Western Republicans together with fourteen Southern Democrats voting in favor. Similarly, in 1886, the bill passed by a vote of thirty-six to eleven, with the majority comprised of eighteen Republicans and eighteen Democrats. In 1888, the bill passed by a narrower margin, thirty-nine to twenty-nine, but still managed to attract bipartisan support spanning all regions of the country. The political viability of the Blair bill is underscored by the virtual certainty that, had the House passed it in 1884, President Arthur would have signed it into law.\textsuperscript{221} The bill’s fate would have been less certain in 1886 or 1888 had it reached the desk of President Cleveland, a states’ rights Democrat,\textsuperscript{222} yet the Senate votes showed that many Democrats were willing to support it. In any event, the Blair bill never came to a vote in the House despite broad bipartisan support there. A determined minority led by House Speaker and Rules Committee Chairman John Carlisle, a Kentucky Democrat, repeatedly referred the bill to unfriendly committees that refused to report it for consideration or reported on it adversely,\textsuperscript{223} even though as many as two-thirds of the House favored the measure.\textsuperscript{224} By 1890, the bill faced growing resistance to federal inter-

\textsuperscript{219} See id. at 2002-09; see also LEE, supra note __, at 94-139 (discussing attitudes toward the Blair bill among labor unions, the business community, the education profession, the media, churches, and other interest groups); Crofts, supra note __ (discussing support for the bill among blacks).

\textsuperscript{220} The votes described in the next three sentences are helpfully summarized in LEE, supra note __, at 157. The recorded votes on the Blair bill appear at 15 CONG. REC. 2724 (1884), 17 CONG. REC. 2105 (1886); 19 CONG. REC. 1223 (1888), and 21 CONG. REC. 2639 (1890).

\textsuperscript{221} See LEE, supra note __, at 141-42 (crediting President Arthur with “the most decisive and direct challenges to Congress on behalf of federal aid of any nineteenth century president” based on his annual messages to Congress).

\textsuperscript{222} See id. at 144-45.

\textsuperscript{223} See ELLWOOD P. CUBBERLEY, READINGS IN PUBLIC EDUCATION IN THE UNITED STATES: A COLLECTION OF SOURCES AND READINGS TO ILLUSTRATE THE HISTORY OF EDUCATIONAL PRACTICE AND PROGRESS IN THE UNITED STATES 369, 370-71 (1934); see also LEE, supra note __, at 158 (describing Speaker Carlisle’s “parliamentary obstructionism” in packing the House Committee on Education with opponents of federal aid); Crofts, supra note __, at 44 (Blair bill “never reached the floor of the House, thanks to the parliamentary intrigues of northern and border state Democrats, who dominated the House leadership”).

\textsuperscript{224} See CUBBERLEY, supra note __, at 371 (reprinting 1887 speech by Senator Blair to the National Education Association reporting that “a test vote” in the House showed “a majority of 160 in its favor to 76 against it”).
vention and racial equalization among Southern Democrats, compounded by signs of economic recovery in the South that undermined the argument for federal aid. When Blair brought his bill to a vote in the Senate for the fourth time, it failed by a margin of thirty-seven to thirty-one, as Democrats for the first time mustered a majority in opposition to the measure.\footnote{225} The demise of the Blair bill was part of developments indicating that “the federal government had washed its hands of the South,”\footnote{226} and it effectively silenced consideration of federal aid to education for the next thirty years.

In sum, the Hoar, Perce, and Blair bills sought to strengthen the ideal of nationhood arising from the creation of a new polity comprised of “citizens of the United States.” In seeking to extend educational opportunity to all children, leading proponents of federal aid understood the measures as an exercise of Congress’s power and duty to enforce and give substance to the guarantee of American citizenship. From the Freedmen’s Bureau to the Blair bill, the series of proposals steadily expanded the scope of federal responsibility for aiding public education. What began as a racially and sectionally exclusive concern evolved into a broad national priority. Amid persistent worries about federal overreaching and resistance to mixed schools, federal aid took the form of conditional grants that sought to accommodate state prerogatives while mandating racially equal if separate education. Guided by a national standard of literacy for effective citizenship, the proposals envisioned a distribution of aid that would lessen educational inequality across states. This constitutionally informed conception of the federal role garnered sustained bipartisan and regionally diverse support. But for parliamentary maneuvers in the House, the Blair bill in all likelihood would have become law.

E. \textit{Educational Adequacy: Then and Now}

Given the magnitude of interstate disparities at the time, Senator Blair had no illusion that the federal government could produce absolute equality of educational opportunity. His bill taxed wealthier states for the benefit of poorer states, and for this he offered no apology: “You may call it a leveling theory, but it is

\footnote{225} See 21 CONG. REC. 2639 (1890).
\footnote{226} Crofts, \textit{supra} note \_\_, at 44 (noting that the same Congress also defeated legislation to strengthen federal supervision over Southern elections). The potent opposition of a few Southern Democrats to the Blair bill was echoed half a century later when a similar bloc of Southern Democrats, in the name of states’ rights and racial ideology, warped and truncated the majoritarian New Deal constitutional vision of social and economic rights for all citizens of the United States. \textit{See} Forbath, \textit{supra} note \_\_, at 76-85 (discussing Dixiecrat success in excluding black Americans from New Deal social insurance programs).
the theory upon which this bill and republican creeds are built.” But Blair understood that the extent of leveling would be modest. Even with the proposed federal aid, he acknowledged, “the Southern colored child as well as the Southern white child is still left greatly to the disadvantage as compared with the Northern child.” Instead of absolute equality, the Blair bill sought to guarantee “[t]he indispensable standard of education for the people of a republic”—what I have called educational adequacy for equal citizenship.

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

227 17 CONG. REC. 1726 (1886) (Sen. Blair). Blair’s proposed “leveling” had a precedent in “the system provided by the Morrill Act whereby lands were taken from those states which possessed them and were made available to those states which had none.” LEE, supra note __, at 17.

228 15 CONG. REC. 2070 (1884) (Sen. Blair). Under the Blair bill, the average yearly appropriation would have increased the 1880 level of school expenditures across the South by 60 percent and would have more than doubled expenditures in Alabama, Florida, Georgia, Louisiana, North Carolina, South Carolina, and Tennessee. See id. at 2027 tbl.22. Even so, per-pupil spending in the South would have continued to lag behind the rest of the country.

229 Id. at 2000 (Sen. Blair).

230 Id.; see S. REP. No. 48-101, pt. 2, at 12 (1884) (“It by no means follows that the person who can read and write is therefore qualified to discharge his duty as a sovereign.”), reprinted in 17 CONG. REC. 1242 (1886).


234 Id.

235 Id.

A key difference between Blair’s era and our own is the importance of education to economic opportunity and a decent livelihood. Hoar, Blair, and their contemporaries articulated the imperative of education mainly in civic republican not economic terms. This emphasis was largely a function of the constitutional moment in which they lived, as black enfranchisement drew attention to the widespread lack of civic preparedness among all citizens, black and white. Yet it also reflected the fact that literacy and economic self-sufficiency were not yet closely linked in the agrarian and emerging industrial society of the time. At the middle of the twentieth century, still two-thirds of adult Americans—a substantial portion of whom were presumably middle-class—had not graduated from high school. Today, of course, productive employment in the technological and information-based economy requires a much higher level of education. A high school diploma is no longer enough to ensure a foothold in the middle class, and the wage premium for more and better education has increased significantly. Both economic participation and civic virtue now properly inform the notion of educational adequacy for equal citizenship.

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

It would be convenient to think that interstate educational disparities now occur above a sufficiently high threshold that they do not threaten the ideal of equal

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237 The educational demands of the industrializing economy did not become a matter of serious policy concern until the early years of the twentieth century, when numerous vocational education programs were launched at the state and federal levels. See Gordon I. Swanson, *The World of Work, in Education in the States: Nationwide Development Since 1900*, at 287, 295-96 (Edgar Fuller & Jim B. Pearson eds., 1969); Butts & Cremin, supra note __, at 388-89.

238 In 1950, 66% of people in the United States aged 25 or older were not high school graduates, and 20% were high school graduates with no college education. In 1960, 60% were not high school graduates, and 25% were high school graduates with no college. See U.S. Census Bureau, Educational Attainment: Historical Tables tbl.A-1 (“Years of School Completed by People 25 Years and Over, by Age and Sex: Selected Years 1940 to 2004”), available at http://www.census.gov/population/socdemo/education/tabA-1.pdf (last visited Jan. 26, 2006).


240 See supra notes __ and accompanying text.
citizenship. But it is doubtful that low-spending states such as Alabama, California, Mississippi, and New Mexico, where the nation’s minority and poor children are concentrated, could be said to offer adequate preparation for citizenship on par with the opportunities afforded by high-spending states such as New York, Wyoming, and Massachusetts. Thoughtful court decisions in recent years have found the educational floor in many high-spending states to be inadequate, despite equaling or exceeding the educational average in many low-spending states. In New York, for example, where black and Hispanic student achievement is comparable to average student achievement in Alabama and New Mexico, the state high court held in 2003 that the public school system was failing to provide New York City’s predominantly minority schoolchildren with the education necessary “to [ensure] meaningful civic participation in contemporary society” and “to compete for jobs that enable them to support themselves.” In Wyoming, where low-income students outperform the average student in California and Mississippi, the state supreme court in 1995 held that students in poor districts lacked adequate “opportunity to become equipped for their future roles as citizens, participants in the political system, and competitors both economically and intellectually.”

Similarly, the Supreme Judicial Court of Mass-
sachusetts in 1993 declared that the state was not providing adequate education to children in low-wealth districts, where per-pupil spending exceeds the median in many low-spending states.

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

IV. POLICY IMPLICATIONS

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

A. Education and the Federal Role

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

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247 See JOHNSON, supra note __, at 11 tbl.4.

248 See Murray, Evans, & Schwab, supra note __, at 799 tbl.2.


250 See Rothstein, supra note __, at 43-44, 49-50.
Blair and his colleagues, pursue a general step-wise inquiry. First, what does equal citizenship mean in contemporary American society? What are its political, civil, social, and economic attributes? Second, what are the educational prerequisites for achieving those attributes? What constitutes an adequate education for equal citizenship in the national community? Third, to what extent are states presently willing and able to provide an adequate education? Where and how do they fall short? Finally, what federal measures are needed to ensure that all children have adequate educational opportunity for equal citizenship? What policies best accord equal respect to every child, consistent with the guarantee of full and equal national citizenship?

Although Congress is unlikely to achieve consensus on these complex issues, its duty to enact “appropriate legislation” under Section 5 is best understood as a duty of legislative rationality in construing the Fourteenth Amendment’s substantive guarantees and in choosing the means to effectuate those guarantees. By legislative rationality, I mean something more than what is required under the judicial doctrine of rational basis review, whose undemanding standard serves not as a genuine test of rationality but as a “paradigm of judicial restraint.”

In addressing the questions above, Congress must pursue a deliberate inquiry (through the usual devices of hearings, reports, and public debate) into the meaning of national citizenship and its educational prerequisites, and must take steps reasonably calculated to ameliorate conditions that deny children adequate opportunity to achieve those prerequisites.

Importantly, a legislative commitment to educational adequacy would give priority to the most glaring educational needs over the workaday politics of budget wrangling and special interest accommodation. If educational adequacy for equal citizenship has constitutional stature, then legislative enactment of its essential substance must reflect something more than pedestrian political bargaining. This idea is analogous to notions of legislative duty that state courts have inferred from state constitutions in educational adequacy cases. Where school systems have been judged inadequate, courts have faulted state legislatures for fashioning educational policy based on political or budgetary compromises rather than educationally relevant factors.

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

252 See Montoy v. Kansas, 120 P.3d 306, 310 (Kan. 2005) (“the financing formula was not based upon actual costs to educate children but was instead based on former spending levels and political
remedies, the cases have held that state legislatures are constitutionally obligated to develop policy based on rational, empirically supported judgments of what constitutes an adequate education and what reforms are necessary to provide it. 253 The Fourteenth Amendment demands no less of Congress.

The real bite of the legislative duty I posit here is perhaps best revealed by the shortcomings of current federal education policy. For all that the No Child Left Behind Act has done to enlarge the federal role, nothing in the Act establishes a common set of educational expectations for meaningful national citizenship. NCLB purports to “ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education.” 254 But the operative provisions of the statute—in particular, its testing and accountability requirements—address student “proficiency on challenging State academic achievement standards and state academic assessments.” 255 Although schools must make annual progress toward bringing all students to a “proficient level of academic achievement,” 256 each state has virtually unfettered discretion to define and revise the standards for measuring proficiency. 257 At most, NCLB requires schools
to teach math, science, and language arts, but it sets no content or performance
standards in these subjects. The result has been a patchwork of state standards
and assessments that vary considerably in content, ambition, and rigor.²⁵⁸ In
some states, schools and students are held to the highest competitive standards; in
others, they are consigned to mediocrity or worse.

Similarly, the federal role in education funding is unguided by any determina-
tion of what resources are needed to ensure educational adequacy for equal
citizenship. The single largest program of federal education aid—Title I of the
Elementary and Secondary Education Act of 1965—awards funding to each state
in proportion to its share of poor children and to its existing level of per-pupil
spending.²⁵⁹ Thus, wealthy, high-spending states receive more Title I aid per
eligible child than poor, low-spending states. In 2001, for example, Massachu-
setts had 33% fewer poor children than Alabama but received 36% more Title I
aid; New Jersey had 17% fewer poor children than Arizona but received 52%
more aid.²⁶⁰ The net effect of Title I is to reinforce, not reduce, the wide dispari-
ties in educational resources that exist across states, with no formal or informal
determination by Congress that the lowest-spending states provide a floor of ade-
quacy. In sum, our current policies treat the nation’s schoolchildren not as “citi-
zens of the United States” but foremost as “citizens of the state wherein they re-
side”—an improper inversion of the Fourteenth Amendment guarantee.

In securing national citizenship, the federal government must serve not
merely as a facilitator of educational choices that reflect each state’s ambition
and capacity, but as the ultimate guarantor of opportunity for every child to
achieve equal standing and full participation in the national community. In the
abstract, this duty could be satisfied by an array of policy alternatives. At one
end of the spectrum are highly centralized approaches, such as the nationalized
school systems in France and Japan, but no proposal of this sort has been seri-
sously entertained in the United States since the Hoar bill died in 1871. At the

²⁵⁸ See David Klein, Thomas B. Fordham Foundation, The State of State Math Stan-
dards 2005 (2005); Sandra Stotsky, Thomas B. Fordham Foundation, The State of State
English Standards 2005 (2005); G. Gage Kingsbury et al., Northwest Eval. Ass’n, The
State of State Standards: Research Investigating Proficiency Levels in Fourteen States
(2003); Diane Ravitch, National Standards: ’50 Standards for 50 States’ Is a Formula for Inco-
erherence and Obfuscation, EDUC. WEEK, Jan. 5, 2006, at 54; Do We Need to Repair the Monument?
Debating the Future of No Child Left Behind, EDUC. NEXT, Spr. 2005, at 8, 15.

²⁵⁹ See 20 U.S.C. § 6333(a), (b).

www.ed.gov/about/overview/budget/statetables/06stbyprogram.pdf (2001 Title I allocations by
state); American Community Survey, U.S. Census Bureau, Percent of Related Children Under 18
other end of the spectrum are highly decentralized approaches, such as the national voucher systems in Chile, Columbia, and Sweden. 261 A national voucher plan providing genuinely equal access to schools that are held accountable for meeting common educational standards could be a powerful way of treating all children with equal regard, 262 although the prospect of bringing a well-regulated voucher system to national scale in the United States seems remote. 263

The basic point is that Congress retains wide policymaking discretion within the bounds of the duty I have described. In a separate article fleshing out how Congress should exercise this discretion, I argue that federal education policy can best give expression to the citizenship guarantee by enlisting non-governmental organizations to develop national education standards and by incentivizing states to adopt them voluntarily. 264 Further, Congress should reform and expand the federal role in school finance to narrow interstate disparities and to establish a national floor of educational opportunity below which no state or district may fall. 265 These policies, I contend, are logical and attainable outgrowths of the standards-based reforms embodied in NCLB.

Whatever option Congress pursues, an approach that gives meaningful content to the national citizenship guarantee will entail a stronger role for the federal government. Given the enlargement of federal power and corresponding duty


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

263 According to some observers, Congress recently took a step toward a national voucher plan when it enacted the Hurricane Education Recovery Act, which provides Alabama, Louisiana, Mississippi, and Texas students displaced by Hurricanes Katrina and Rita with $6,000 vouchers ($7,500 for children with disabilities) redeemable at public and private schools in other states. See Pub. L. No. 109-148, div. B, tit. IV, § 107, 119 Stat. 2680, 2798-2805 (2005); Meghan Clyne, Bush to Sign ‘Monumental’ School Voucher Law, N.Y. SUN, Dec. 30, 2005, at 1. The national portability and uniform amount of the vouchers are consistent with treating eligible students as “citizens of the United States.” But voucher students are still educated to standards wholly defined by the state where they reside. The plan sunsets on August 1, 2006, see § 110, 119 Stat. at 2806, and is unlikely to expand beyond its unique circumstances. On the limited scope of existing voucher programs and bipartisan resistance to significant expansion, see Goodwin Liu & William L. Taylor, School Choice to Achieve Desegregation, 74 FORDHAM L. REV. 791, 812-17 (2005), and James E. Ryan & Michael Heise, The Political Economy of School Choice, 111 YALE L.J. 2043, 2078-91 (2002).

264 See Goodwin Liu, Interstate Inequality in Educational Opportunity and the Federal Role (manuscript on file with author).

265 See id.
worked by application of Section 5 to the Citizenship Clause, my account of the Fourteenth Amendment does not assign constitutional weight to the claim that education is an area of “traditional state concern.” Not only has the factual basis for this claim been eroded by recent policy developments culminating in NCLB, but the normative element of the claim stands in tension with the constitutional investiture of authority and responsibility in Congress to secure the essential conditions of opportunity for meaningful national citizenship.

To envision Congress as the ultimate guarantor of educational adequacy, however, is not to suggest that it possesses plenary power over education or that its power is without limits. As a practical and constitutional matter, Congress’s authority to secure the citizenship guarantee is constrained by federalism-based limitations inherent to the exercise of federal power in areas where the states have concurrent jurisdiction. Although some have questioned whether “the structure of the Federal Government itself” effectively “protect[s] the States from overreaching by Congress,” there remains a strong argument that the national political process as a whole, including the informal web of federal-state relationships and obligations facilitated by political parties and advocacy groups, contains important checks on federal usurpation of state prerogatives.

In elementary and secondary education, the operation of such checks is evident in an array of codified limitations on federal power. For example, the federal government has long been prohibited from exercising any supervision or control over school personnel, curriculum, textbook selection, or the assignment or transportation of students or teachers to overcome racial imbalance. In addition, the federal government may not mandate national school building standards; it may not develop, administer, or distribute national tests in any subject

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268 See Choper, supra note __, at 180-81; Larry D. Kramer, Putting the Politics Back into the Political Safeguards of Federalism, 100 Colum. L. Rev. 215, 252-87 (2000). But cf. Prakash & Yoo, supra note __, at 1480-89.

269 See 20 U.S.C. §§ 1232a, 7906(b)(1), 7907(b), 9572(b), 9572(c).

270 See id. § 7907(d).
unless specifically authorized by statute;\(^{271}\) and it may not require a national test or otherwise take part in certifying teachers or teachers’ aides.\(^{272}\) The point is not that these specific limitations mark substantive constitutional boundaries. Rather, these limitations—plus the fact that state compliance with federal education policy is generally voluntary\(^ {273}\)—indicate that respect for state prerogatives constrains the national policymaking process and will inevitably inform any federal effort to give expression to the national citizenship guarantee.\(^ {274}\) The federal role in education, however expanded or reformed, will have to preserve a cooperative federalism that balances legitimate interests in flexibility and innovation against the benefits of policy alignment and coherence.

\textbf{B. Beyond Education}

The constitutional vision sketched here raises another question of limits generally applicable to theories of positive social and economic rights. As Justice Powell said in refusing to recognize education as a fundamental right under the Equal Protection Clause, “the logical limitations [of the] theory are difficult to perceive. How, for instance, is education to be distinguished from the significant personal interests in the basics of decent food and shelter?”\(^ {275}\) One could readily imagine that a conscientious legislator, upon a diligent inquiry into the prerequisites for equal citizenship, would feel duty-bound to address more of the nation’s opportunity structure than K-12 education.

\(^{271}\) See id. §§ 1232j(a), 7909(a).

\(^{272}\) See id. § 7910(a).

\(^{273}\) The main policy directives of NCLB, for example, are conditions attached to voluntary state receipt of federal education aid. Although I have focused on the Fourteenth Amendment in order to explain the substantive values that should guide the federal role in education, it is certainly true that conditional spending legislation provides a constitutionally flexible vehicle for Congress to enact education policy in furtherance of national citizenship. Such spending legislation may also be regarded as Section 5 legislation. Cf. Fullilove v. Klutznick, 448 U.S. 448, 476-78 (1980) (plurality opinion) (upholding application of minority set-aside in federal contracting program to state and local grantees as valid Section 5 and spending legislation); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 284-87 (1978) (opinion of Powell, J.) (describing Title VI of the Civil Rights Act of 1964, which bans racial discrimination by recipients of federal funds, as enforcing the constitutional right of equal treatment).

\(^{274}\) Thus, for example, while nothing in my account categorically precludes Congress from directly legislating national educational standards, such legislation would likely be forestalled by the operation of political safeguards that reject the idea of national standards, as the law currently stands, see supra note __, or that favor a regime of voluntary state compliance, as I propose elsewhere, see Liu, supra note __.

At one level, it may be argued that the adequacy of educational opportunity is uniquely a matter of governmental concern because government has made schooling compulsory and has long assumed primary responsibility for its finance and provision. This is a contingent fact of our present social organization—schooling was a largely private function in many parts of the country before the twentieth century—276—but the expectation and reality of government’s dominant role in providing education seem firmly entrenched. Even the most ardent critics of the government’s monopoly power over schools, such as Milton Friedman, accept that “both the imposition of a minimum required level of schooling and the financing of this schooling” by government are justified by the positive externalities arising from education’s role in “promoting a stable and democratic society.”277 For all but the small minority of children whose families can afford private tuition or home-schooling,278 participation in the public system is, by necessity and by law, compulsory. This fact alone suggests that government has a special responsibility to ensure educational adequacy apart from other facets of human welfare.

At another level, however, the duty to ensure educational adequacy rests on a normative not factual basis with broader sweep. While a decent education is essential to effective citizenship, “[e]mpirical examination might well buttress an assumption that the ill-fed, ill-clothed, and ill-housed are among the most ineffective participants in the political process” and in other domains that confer social regard.279 On my account of the Constitution’s citizenship guarantee, federal responsibility logically extends to areas beyond education. Importantly, however, the duty of government cannot be reduced to simply providing the basic necessities of life. Welfare provision in the form of cash assistance, food stamps, and public housing may prevent destitution (a worthy objective in its own right), but such provision, with its accompanying stigma of dependence and


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


279 Rodriguez, 411 U.S. at 37.

280 See Michelman, supra note __, at 13-16 (discussing John Rawls).
bureaucratic control, does not assure its beneficiaries the dignity of full membership in society. Beyond a minimal safety net, the legislative agenda of equal citizenship should extend to systems of support and opportunity that, like education, provide a foundation for political and economic autonomy and participation. The main pillars of the agenda would include basic employment supports such as expanded health insurance, child care, transportation subsidies, job training, and a robust earned income tax credit. Further, the citizenship guarantee would find expression in antidiscrimination laws that promote inclusion in social, economic, and political spheres.\(^\text{281}\)

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

> The President cannot do everything imaginable to bring it about that the laws be faithfully executed; he is limited by his own physical and mental powers, by other claims on these, and by the amplitude of the means put at his disposal by Congress. The duty has to be a duty to act prudently within these limits, without ulterior motive, sensitive to the force of the powerful conscience-stirring word “faithfully.” It cannot be any more—or, I should think, any less—than that. But is it not a duty?\(^\text{282}\)

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

\(^{281}\) Whatever the merits of characterizing statutes like the Americans with Disabilities Act or the Civil Rights Act of 1964 as commerce or equal protection legislation, they are readily understood as legislation to enforce the affirmative guarantee of equal national citizenship. See Tennessee v. Lane, 541 U.S. 509, 536 (2004) (Ginsburg, J., concurring) (“The Americans with Disabilities Act of 1990 . . . is a measure expected to advance equal-citizenship stature for persons with disabilities.”); Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 29 (2000) (“The most important objective of Title VII . . . has been to give excluded and subordinated groups greater access to good jobs and decent incomes. . . . [E]qual access to good jobs is . . . a basic element of equal citizenship.”); *see also* The Civil Rights Cases, 109 U.S. 3, 43-56 (1883) (Harlan, J., dissenting) (describing federal ban on racial discrimination in public accommodations as legislation to enforce the national citizenship guarantee).

\(^{282}\) BLACK, *supra* note __, at 133-34.
as freedom of speech and due process of law.\footnote{See supra notes \_\_ and accompanying text.} The discharge of such duties involves an essential if inexplicit balance. On one hand, enforcement of constitutional norms, like law enforcement generally, requires discretion as to what is reasonable, feasible, and likely to be effective. On the other hand, as Professor Black observed, “the decently eligible range of means and measures is one thing when you are under no duty at all to act, and quite another when you are under a serious duty to act effectively.”\footnote{BLACK, supra note \_\_, at 136.} In sum, substantial or indefinite cost is a feature common to a broad range of constitutional duties. Here, as elsewhere, such duties call on the conscientious legislator to combine seriousness of purpose with considerations of prudence, efficacy, and good faith.

\section{C. Beyond Citizenship}

Finally, I wish to flag a set of issues that require fuller treatment than I can provide here. National citizenship, as I have described it, functions as a constitutionally protected site of social regard and mutual obligation. My thesis has focused on the substantive provision that government owes to those whose formal claim to citizenship is not in doubt. What I have assumed but left unsaid is that citizenship marks a membership boundary, inevitably with insiders and outsiders. The concern, as Alexander Aleinikoff has put it, is that our national experience has sometimes shown “a darker side to the emphasis on citizenship—a circling of the wagons more than a [sic] invitation to climb on board.”\footnote{T. Alexander Aleinikoff, The Tightening Circle of Membership, 22 HASTINGS CONST. L.Q. 915, 917 (1995); see Linda Bosniak, Constitutional Citizenship Through the Prism of Alienage, 63 OHIO ST. L.J. 1285, 1316-23 (2002) (discussing “citizenship’s exclusionary face”).}]

There are at least three dimensions to the concern. First, to what extent should citizenship status be a prerequisite for citizenship rights? Does the guarantee of educational adequacy for equal citizenship extend to children who are formally non-citizens? These questions have particular salience in light of the 1996 federal welfare legislation limiting the eligibility of non-citizens, including legal permanent residents, for certain social services. Second, does national citizenship subsume a notion of national identity, and if so, does this raise the risk of illiberal educational agendas being pursued in the name of national citizenship? History provides a sober lesson in the project of “Americanization” early in the last century, in which public schools responded to increasing immigration and cultural diversity with an untidy mixture of benign tutelage, nativism, and intolerance.\footnote{See WILLIAM G. ROSS, FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION, 1917-1927 (1994); ROBERT A. CARLSON, THE QUEST FOR CONFORMITY: AMERICANIZATION} Do we invite the same difficulties today by linking education to na-
tional citizenship? Third, what are the limitations of orienting education policy toward the goals of civic nationalism and bounded social membership given the increasingly powerful forces of transnationalism and globalization? The question implicates the moral relevance of national citizenship as a site of belonging and obligation in the evolving international context.287

I take up these questions in a separate article where I argue that treating educational adequacy as an entailment of national citizenship need not marginalize non-citizen children and instead provides, even in light of cultural pluralism and globalization, the most promising framework for achieving equitable distribution of educational opportunity.288

CONCLUSION

At a policy level, many issues merit further inquiry. How much education is really adequate, and how should adequacy be measured? What level of resources can be considered adequate, and how should that level change over time? Does adequacy by today’s standards entail additional opportunity beyond elementary and secondary education in both directions, i.e., preschool and higher education?289 Must effective adequacy reforms address not only education resources but also non-resource factors such as accountability, efficiency, and choice?290 These questions call for careful analysis informed by research and best practices. Moreover, because the meaning of adequacy depends on social context, policy solutions will reflect more than technical considerations. They will reflect socially situated judgments about the prerequisites of equal citizenship in the contemporary life of the nation.

The questions are admittedly difficult and do not lend themselves to precise answers. But that is not a reason to doubt that Congress is constitutionally obli-

288 See Goodwin Liu, Education, National Citizenship, and the Membership Boundary (manuscript on file with author).
289 See Linda Jacobson, Pre-K Profile in School Finance Cases Grows, EDUC. WEEK, Oct. 5, 2005, at 18 (reporting claims by plaintiffs in six state lawsuits that educational adequacy includes preschool).
290 See David J. Hoff, Movement Afoot to Reframe Finance-Adequacy Suits, EDUC. WEEK, Oct. 26, 2005, at 25 (reporting efforts to obtain vouchers as remedies in state adequacy lawsuits).
gated to inquire and act. As Professor Black observed with characteristic insight: “When we are faced with difficulties of ‘how much,’ it is often helpful to step back and think small, and to ask not, ‘What is the whole extent of what we are bound to do?’ but rather, ‘What is the clearest thing we ought to do first?’”

Reasonable legislators may disagree on how best to define and deliver educational adequacy for equal citizenship. But such disagreement, if pursued in good faith, with a determination to act, would be a welcome step forward from the present neglect of this constitutional imperative.

291 BLACK, supra note __, at 137.