

THE YALE LAW JOURNAL

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Reconstruction State Constitutional Conventions and the Rebirth of American Schooling

ABSTRACT. A rebirth of American education occurred in the state constitutional conventions of the Reconstruction South. At a moment of national constitutional reformation, biracial coalitions of delegates constitutionalized universal public-school systems, viewing them as a core component of remaking their states in the image of the U.S. Constitution. These delegates succeeded in keeping their constitutions free from the language of segregated schooling. This ill-understood history severely troubles the Supreme Court's jurisprudence of the schoolhouse. This Note fills gaps in the ongoing conversation emanating from the Court about the relationship between our nation's history and its current educational landscape.

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NOTE CONTENTS

INTRODUCTION	282
I. THE SIGNIFICANCE OF CONVENTION DEBATES OVER EDUCATION	288
A. The Academy and the Schoolhouse	289
B. <i>Brown</i> and the Importance of Being Inconclusive	294
C. Prophetic Antebellum Failures: <i>Crandall</i> and <i>Roberts</i>	296
II. A NEW BIRTH OF FREEDOM (AND EDUCATION) IN SOUTHERN CONSTITUTIONAL CONVENTIONS	302
A. Virginia: The “Old Slavery Notion of Having Two Schoolhouses”	302
B. North Carolina: “A Right to the Privilege of Education”	308
C. South Carolina: “Without Regard to Race or Color”	315
D. Texas: “Equally Distributed Among All the Scholastic Population”	322
E. Louisiana: “There Shall Be No Separate Schools”	327
F. The Contested Rebirth of American Schooling	330
III. REVISITING THE DESCENDANTS OF <i>BROWN</i> ’S INCONCLUSIVENESS	332
A. <i>Rodriguez</i> and the Missing Reconstruction Context	332
B. <i>Plyler</i> ’s Backtracking	337
C. <i>SFFA</i> ’s Competing Historical Accounts	341
CONCLUSION	344

INTRODUCTION

“Nothing this Court holds today in any way detracts from our historic dedication to public education,” the Supreme Court announced in *San Antonio Independent School District v. Rodriguez* as it held that education was not a fundamental right protected by the Fourteenth Amendment.¹ Despite compelling historical evidence, viable jurisprudential paths, and a sizable body of scholarship, the idea of a constitutional right to education seems dead in the water.² *Rodriguez*, handed down in 1973, certainly appeared to settle the matter.³ Writing for the majority, Justice Powell stated, “Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.”⁴ While reiterating *Brown v. Board of Education*’s espousal of the importance of education to American children, the Court still refused to find education embedded in the Fourteenth Amendment, noting, “It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws.”⁵ Justice Marshall—who two decades earlier had argued *Brown* before the Court—dissented, seeing in the Fourteenth Amendment “the right of every American to an equal start in life, so far as the provision of a state service as important as education is concerned.”⁶

While existing scholarship on whether a right to education exists is compelling, it also feels unstable and unsatisfying.⁷ Whether something is a right is in some sense too big a question for any piece of scholarship to answer. Yet the question as it relates to education also appears simple. Education has held a singular place in the nation’s history, in no small part because of its singular place in the development of the human individual. Education’s fundamentality to human dignity might indeed require a heightened consideration for its potential status as a right. From the Founding to the present, access to knowledge has been seen as a core component of liberty, a requirement for the functioning of the Republic, and perhaps even a natural right of human beings. From the writings of Thomas Jefferson and John Adams, to the Northwest Ordinance, to the

1. 411 U.S. 1, 30 (1973).

2. As one scholar put it half a century later, “The decades-long fight to recognize a fundamental right to education within the U.S. Constitution appears lost.” Matthew Patrick Shaw, *The Public Right to Education*, 89 U. CHI. L. REV. 1179, 1180 (2022).

3. *Rodriguez*, 411 U.S. at 35.

4. *Id.*

5. *Id.* at 33.

6. *Id.* at 71 (Marshall, J., dissenting).

7. See *infra* Part II.

common-schools movement, to the Reconstruction rebirth of American education, to *Brown*—the through line is not hard to draw.⁸ One might even call this through line the history and tradition of American education.⁹

This Note takes another tack and offers the most comprehensive assessment to date of education's place in the constitutional conventions of the Reconstruction South.¹⁰ It seeks to join and complicate the ongoing conversation emanating from the Supreme Court on the relationship between our nation's history and its current educational landscape.¹¹ In synthesizing a history rarely told, this Note uncovers lost historical narratives and questions how state constitutional ferment during Reconstruction could and indeed must alter our current understanding of Americans' historical right—not just to education but also to unsegregated schooling at all age levels.

The vast majority of universal public-school systems in the South sprouted from the new constitutions mandated by the Reconstruction Acts of 1867.¹² The state constitutions of the Reconstruction South are peculiar historical documents that have not received extensive attention from legal scholars. Reconstruction was indeed short-lived, and these constitutions were soon amended or replaced as Southern politicians undid the progress of Reconstruction. In some sense, therefore, their legal significance lies almost entirely in their unique status as mirrors of the transforming federal constitutional order. Many of the core constitutional provisions providing for universal common schools—the centerpiece

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8. See, e.g., DAVID TYACK, THOMAS JAMES & AARON BENAVID, *LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785-1954*, at 20-31 (1987).
 9. Steven G. Calabresi and Sarah E. Agudo make a related point in their extremely illuminating study. To Calabresi and Agudo, the prevalence of universal public-school provisions in Reconstruction state constitutions potentially renders them legally significant under the “history and tradition” framework. Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 109-10 (2008).
 10. While Derek W. Black and others have used evidence from various conventions and extensively cited to convention debates, the on-the-ground arguments and strategies of the coalitions of Black and white Republican delegates who sought to keep the language of segregation out of their state constitutions is nearly nonexistent in the legal literature. See *infra* note 34 (citing Black's work).
 11. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 396 (2023) (Jackson, J., dissenting) (encouraging lawyers to assess the complex questions of race and admissions “with history in hand”). For a more recent case in which the Supreme Court assesses the schoolhouse's relation to the Constitution, see generally *Mahmoud v. Taylor*, 145 S. Ct. 2332 (2025).
 12. See EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS* 67-74 (2013) (detailing the timeline of the addition of common-school provisions into state constitutions).

of this Note—were quickly subsumed into “separate but equal” segregated schooling regimes that took generations to excise.

The short lifespans of these constitutions and the frustrating lack of enforcement of their provisions have little to do with the import of their enactment, however. These constitutions—crafted amid the throes of federal Reconstruction—shed unique light on the original meaning of the Reconstruction Amendments and the contemporary significance of education to Americans at the time. The state constitutional conventions of the Reconstruction South had one overarching task: to remake their state constitutions in the image of the U.S. Constitution that was itself undergoing reconstruction.¹³ Each of these state constitutions was to be reconstructed in parallel with the Federal Constitution, and the state and federal documents were meant to interlock and rhyme. Indeed, they were part of the same constitutional project of eradicating slavery and stitching the Union back together. The documents the states produced and subsequently ratified via popular vote thus provide us with unique insight into how the Thirteenth and Fourteenth (and potentially the Fifteenth) Amendments were originally interpreted. While the constitutions varied in many respects, the constitutional lodestars of Reconstruction—eradicate slavery, restore the Union, expand the privileges or immunities of citizenship, extend the franchise, and begin undoing the effects of slavery—were present throughout these documents. Perhaps even more than the words of the Amendments’ drafters in Congress, the actions of these state constitutional delegates demonstrate the contours of the Reconstruction Amendments as understood by the Americans who sought to give them meaning as they instituted their state analogs.

But looking at the history of education during Reconstruction and asking if it proves that there is a fundamental right to education embedded in the Fourteenth Amendment is to ask a question that is—perhaps unexpectedly—too narrow in focus. The various coalitions of reform-minded Black and white Republican delegates that attended the state constitutional conventions in the South strove for something more complex than the right to public schooling alone. They sought to harness the singular power of their constitutional moment to open the schoolhouse gates to all children, and many fought to keep the stain of segregated education out of the charters they drafted. They sought to institute new systems of opportunity that would, however slowly, reverse the detriments of the freshly destroyed system of chattel slavery.

To these Reconstruction reformers, the schoolhouse was a proxy for the wider racial order that had been radically shaken by the Civil War. Many firmly believed that segregation—an offspring of slavery—had to be kept out of the new constitutional charters. These delegates understood that the country was on the

13. See *infra* notes 40–58 and accompanying text.

precipice of a revolution in education – that school systems would soon proliferate across the country. Would Black children be permitted to play an equal part in this revolution? Would they inherit the newly granted blessings of universal schooling that other American children were to receive? To what extent would the new educational order be pre-molded by the existing racial hierarchy – could it come into being on paper free from racial distinctions? How these reformers went about answering these questions can tell us more than whether Americans have a right to the schoolhouse. This Note, therefore, seeks to detail not just the *right* to education but the *rebirth* of education in the United States.

This Note incorporates evidence and archival research from the Reconstruction constitutions and constitutional conventions across the postwar South and presents five case studies: Virginia, North Carolina, South Carolina, Texas, and Louisiana. Together, these states exhibit a suitable sampling of the demographic, economic, and political diversity of the South in the wake of the Civil War. Further, each of these states offers a unique perspective on the incorporation of a potential right to education into Southern state constitutions. Virginia, of course, contained the capital of the crushed Confederacy and had a singular historical identity as the preeminent political powerhouse of the South. North Carolina was unique in specifying education as a right in its Reconstruction constitution. South Carolina was the only state with a majority Black delegation at its constitutional convention, offering unparalleled insights into the views of Black Southerners and recently freed individuals as they exercised the levers of political power in the United States for the first time. Texas is of special importance for the role it would play in twentieth-century Supreme Court litigation over the right to education, and its convention records trouble the Court's later reasoning. Finally, Louisiana's convention was evenly split between white and Black delegates and produced a constitution that established, at least on paper, integrated public education up through the university level.

These conventions and the texts they produced provide us with a historical narrative wholly missing in Supreme Court jurisprudence and faintly acknowledged in the academy. A systematic¹⁴ look at Southern Reconstruction constitutions and constitutional conventions reveals multiple historical facts with legal import: (1) each former state of the Confederacy covered by the Reconstruction

14. While the case studies of Virginia, North Carolina, South Carolina, Texas, and Louisiana are the core of this Note's analysis, the general conclusions in this paragraph also rely on a survey of all of the Southern state constitutions remade in response to the Reconstruction Acts and their convention documents. This assessment does not include Tennessee, however, as the only ex-Confederate state not subject to military Reconstruction. For evidence supporting these points, see *infra* Part II. For the relevant state constitutional provisions not discussed elsewhere in this Note, see ALA. CONST. of 1868, art. XI, § 6; ARK. CONST. of 1868, art. IX, § 1; FLA. CONST. of 1868, art. VIII, § 1; GA. CONST. of 1868, art. VI, § 1; and MISS. CONST. of 1868, art. VIII, § 1.

Acts constitutionalized, in one form or another, a universal public-school system; (2) in the drafting conventions of almost all of those states, attempts were made to include language mandating segregated schools, and these attempts *failed*; (3) Black delegates, who could hold office for the first time, were pivotal players on the education committees of many of these conventions and were often vocal in Republican efforts to defeat segregation provisions; (4) while some Black delegates expressed concern that mixed schools would be unsafe—or not preferred by Black communities—keeping the language of *de jure* segregation out of state constitutional texts was still deemed a priority; (5) the belief of many, if not most, delegates that schools would ultimately become segregated by local means did not stop them from keeping the language of separate schools out of their constitutions; and (6) delegates frequently extolled education as a necessary component of human advancement and a tool to move the South past slavery and rebellion.

A note on method is in order. This investigation might appear to some readers to draw outside the lines of traditional constitutional interpretation—in its cast of constitutional characters, its reliance on underutilized primary sources, and the significance it places on constitutional absences and silences. To the contrary, such a study adheres to traditional methods of constitutional interpretation. It highlights the official statements and actions of elected, state-level constitutional actors at the hinge point of Reconstruction. It relies almost entirely on the texts of the state constitutions and the published journals and debates of the constitutional conventions. Where necessary, it utilizes press coverage to fill in gaps in the published records of the state conventions. These actors and texts are ripe sources of historical-legal evidence about the intentions of the Republican Party, the political and social context that birthed the Reconstruction Amendments, and the original public meaning and purpose of those Amendments.

The success of a multiracial coalition of Republican convention members in keeping the language of segregated education out of their constitutional documents was not solely a meaningful moment of resistance. It was a constitutionally significant success. This success had content that cannot be divined from the text of these state constitutions alone. In many ways, the omission of segregated education is as important as the text—it is a ratified constitutional truth that is hidden and untextualized. It is a piece of constitutional meaning that we cannot see but is vitally significant. That's why these documents are sources of constitutional meaning. The ratified texts rejected discriminatory ideals.

This discussion of the history of American schooling and the Fourteenth Amendment is timely given the Supreme Court's decision in *Students for Fair*

Admissions, Inc. v. President and Fellows of Harvard College (SFFA).¹⁵ The case's holding that Harvard and the University of North Carolina's race-based affirmative-action plans ran afoul of the Equal Protection Clause of the Fourteenth Amendment has forced a reassessment of admissions practices in higher education institutions across the country.

SFFA is also significant for another reason: its opinions and dissents contain four different retellings of the history of Reconstruction and its intersection with American schooling. Chief Justice Roberts argued for a colorblind reading of the Equal Protection Clause and began his assessment of the merits with a recounting of Reconstruction and the views of key Republican Reconstruction congressmen.¹⁶ Justice Thomas, concurring, presented his own narrative of Reconstruction "to offer an originalist defense of the colorblind Constitution."¹⁷ Justice Sotomayor's telling of Reconstruction, in dissent, foregrounded the idea that the Fourteenth Amendment was not understood historically as a "blanket ban on race-conscious policies."¹⁸ Justice Jackson's dissent encouraged us to assess admissions practices "with history in hand."¹⁹ Her interpretation hinged on the theme of "[g]ulf-sized race-based gaps" separating white and nonwhite Americans that "were created in the distant past, but have indisputably been passed down to the present day through the generations."²⁰ These gulfs were rooted in slavery, and in Justice Jackson's telling, the Second Framers sought to reconstruct the American constitutional order in such a way as to "right historical wrongs."²¹

Altogether, the opinions and dissents in *SFFA* represent a remarkable series of interpretive vignettes—variations on the themes of the legacy of slavery, the intentions of the Second Framers, and the significance of education. Each vignette probed the nature of the equality ushered in by the Fourteenth Amendment. Was it a colorblind equality (Roberts and Thomas)? Was it a race-conscious equality (Sotomayor)? Was it a reparative equality meant to rectify historical wrongs (Jackson)? Despite offering four separate historical interpretations of Reconstruction, the Court in *SFFA*—continuing the pattern of *Brown*,

15. 600 U.S. at 213.

16. *Id.* at 201–03.

17. *Id.* at 232 (Thomas, J., concurring).

18. *Id.* at 322–25 (Sotomayor, J., dissenting).

19. *Id.* at 396 (Jackson, J., dissenting).

20. *Id.* at 384.

21. *Id.* at 387.

Rodriguez, and *Plyler v. Doe*²²—passed over a distinct and legally significant set of constitutional events and actors that this Note seeks to revive.

In surfacing this history, this Note seeks to fill a gap in the Supreme Court's ongoing dialogue—exemplified by *SFFA*—on the legal significance of the United States's history of slavery, emancipation, and the schoolhouse. It seeks to demonstrate how a vital group of constitutional actors—Reconstruction delegates to Southern state constitutional conventions—understood equality as it related to education and knowledge acquisition at the precise moment the Fourteenth Amendment was undergoing ratification. These delegates were elected constitutional actors whose articulations of the meaning of equality and freedom in the throes of Reconstruction add crucial color to our understanding of Reconstruction's constitutional realities.

Accordingly, the following assessment proceeds in three parts. I begin in Part I by triangulating the constitutional and historical significance of the Southern state constitutional conventions. From one angle, I will assess the current scholarly consensus on the relationship between the Fourteenth Amendment and education, a consensus defined by intellectual consternation and pragmatic resignation. From a second angle, I move to analyze the use of history in *Brown v. Board of Education* and establish what I call *Brown's* methodological bargain. To clear the path for a straightforward textual reading of the Equal Protection Clause, the Court conceded that the history of education around the time of the Fourteenth Amendment's ratification was “inconclusive.” While of vital importance to *Brown*, this methodological move came at a cost. The final piece of Part I excavates two antebellum cases—*Crandall v. Connecticut* and *Roberts v. City of Boston*—in which legal advocates made prescient, persuasive, but unsuccessful arguments about the place of education in American constitutional law. Part II comprises the bulk of this Note's analysis, unearthing the set of short-lived Reconstruction Era constitutions crafted and ratified by biracial coalitions of delegates in the South in the aftermath of the Civil War. Finally, Part III seeks to reassess *Rodriguez* and *Plyler* in light of this historical evidence and question where this evidence fits in the historical frameworks offered by the Court in *SFFA*.

I. THE SIGNIFICANCE OF CONVENTION DEBATES OVER EDUCATION

Before taking the archival plunge into the records of the Reconstruction state constitutional conventions, we must first assess the interpretive significance of

22. 457 U.S. 202 (1982). In *Plyler*, the Court held that Texas had unconstitutionally denied undocumented children access to education, but still struggled to locate a right to education in the Constitution and the nation's history. *Id.* at 230; see *infra* Section III.B.

this history and the scholarly gaps it can help fill. This Part does so by identifying a scholarly logjam, diagnosing a jurisprudential problem, and detailing a historical failure. Each of these topics elucidates the need to incorporate the historical materials assessed in Part II into discussions of the relationship between the Fourteenth Amendment and the schoolhouse. First, scholarship on a potential right to education has suffered from a logjam, made worse by the uncertainties brought by *SFFA*, which the evidence presented in this Note could help dislodge. Second, the Supreme Court continues to struggle with the methodological bargain made in *Brown* and solidified in cases like *Rodriguez* and *Plyler*. Records of Reconstruction state constitutional conventions shed important light on the historical moment contested in each of these cases, presenting a hint of conclusiveness where the Court found none. Third, antebellum glimpses of the ideas that would later be espoused by reform-minded Republican members of the state Reconstruction constitutional conventions show that Part II of this Note is grounded in a longer historical arc. These three analytical angles demonstrate why a coherent legal theory of the relationship between the Constitution and education must include the state-level events and actors of the Reconstruction South.

A. *The Academy and the Schoolhouse*

Scholars (and citizens) have long bemoaned the divergence between *Brown*'s lofty ideals and the subsequent realities of American schooling. Matthew Patrick Shaw, for example, has described *Rodriguez* as "an impregnable firewall against any meaningful federal constitutional intervention in students' rights to public education."²³ Writing around the fiftieth anniversary of *Brown*, Erwin Chemerinsky described what he saw as the "Deconstitutionalization of Education," noting that the Supreme Court exhibited an "overall refusal to enforce any parts of the Constitution when it comes to public schools."²⁴ The United States had "failed to live up to *Brown*'s promise and its mandate."²⁵ This deconstitutionalization is all the more distressing if we accept Justin Driver's premise that "the public school has served as the single most significant site of constitutional

23. Shaw, *supra* note 2, at 1181.

24. Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 111, 113 (2004).

25. *Id.* at 134; *see also id.* at 135 ("For far too long, the problem of separate and unequal schools has been ignored.").

interpretation within the nation's history."²⁶ Deconstitutionalizing the "preeminent" locus of constitutional interpretation is an unsettling proposition.²⁷

A host of scholars have tried to reconstitutionalize education, penning articles that purport to find the right to education in the Founding charter. Kara A. Millonzi points to the Privileges or Immunities Clause for such a right.²⁸ Then-professor Goodwin Liu took a related route, finding a right to a "meaningful floor of educational opportunity" in the Citizenship Clause of the Fourteenth Amendment.²⁹ Chemerinsky argues that a "fundamental right to education" was the logical result of *Brown's* holding.³⁰ Barry Friedman and Sara Solow, using a range of interpretive methods, argue that a federal right to an adequate education solidified in the twentieth century.³¹ Shaw takes a creative route, via the Due Process Clause, and treats "public education as a due process-protected property interest."³²

And then there's the historical approach. Many see the history of American education in the nineteenth century as providing evidence of a tradition of universal education for the nation's children.³³ Derek W. Black has been the leading voice in this strand of scholarship.³⁴ Further, Steven G. Calabresi and Sarah E.

26. JUSTIN DRIVER, *THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND* 9 (2018).

27. *Id.* at 12.

28. Kara A. Millonzi, *Education as a Right of National Citizenship Under the Privileges or Immunities Clause of the Fourteenth Amendment*, 81 N.C. L. REV. 1286, 1294 (2003) ("The Privileges or Immunities Clause of the Fourteenth Amendment, specifically in its protection of rights of national citizenship, may implicate the question of whether inadequate [school] funding is constitutionally permissible." (footnotes omitted)).

29. Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 334-35 (2006).

30. Chemerinsky, *supra* note 24, at 111 ("*Brown* offered the promise that the federal courts would recognize a fundamental right to education and use the Constitution to ensure equal educational opportunity for all children in the United States.>").

31. Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92, 96 (2013).

32. Shaw, *supra* note 2, at 1184; *see also id.* at 1188 ("Public education is the archetypical regulatory property to which there is a public right.>").

33. *See, e.g.*, Friedman & Solow, *supra* note 31, at 121-27; Liu, *supra* note 29, at 367-96; Caroline A. Veniero, Comment, *Education's Deep Roots: Historical Evidence for the Right to a Basic Minimum Education*, 88 U. CHI. L. REV. 981, 1020 (2021).

34. *See generally* Derek W. Black, *Freedom, Democracy, and the Right to Education*, 116 NW. U. L. REV. 1031 (2022) (exploring the development of an affirmative right to education during the Reconstruction era); Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. 1059 (2019) [hereinafter D. Black, *The Fundamental Right to Education*] (offering an originalist analysis of a fundamental right to education); Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735 (2018) [hereinafter D. Black, *The*

Agudo have produced a crucial study assessing the state constitutions in effect at the time of the Fourteenth Amendment's ratification.³⁵ Together, Black, Calabresi, and Agudo provide the methodological backdrop of this Note.

In a series of articles in recent years, Black has argued for a constitutional right to education using originalist-inflected arguments.³⁶ Assessing the abstract and practical meaning of education from the Founding up through Reconstruction, Black correctly and persuasively argues that an “extremely compelling historical record exists to recognize education as a fundamental right” that could potentially be substantively nested in the Due Process Clause.³⁷ He sees the constitutional revolution of the Republic during Reconstruction as the hinge point of American schooling: “Education in the states, quite simply, divides clearly into a pre- and post-Fourteenth Amendment world.”³⁸ The Amendment's ratification was, in Black's terms, the moment the country's espousal of the fundamental importance of education went “from Theory to Reality.”³⁹

In the aftermath of Appomattox, the federal government put tremendous resources—via the Freedmen's Bureau—into schools for Black Americans in the South.⁴⁰ Under the Reconstruction Acts, the conquered Confederate states (except Tennessee) were commanded to draft new constitutions to be approved by Congress for their readmission into the Union.⁴¹ In Congress, there was substantial support for the creation of a universal education system being a precondition for approval of these new constitutions.⁴² Senator Charles Sumner sought to amend the Reconstruction Act of 1867 to include the stipulation that newly admitted states were “to establish and sustain a system of public schools open to all, without distinction of race or color.”⁴³ The amendment, which would have mandated integrated schools throughout the South, garnered a tie vote, 20-20.⁴⁴ Black details the active interest the Reconstruction Congress took in education in the South, culminating in its requirement that the new constitutions of Texas,

Constitutional Compromise to Guarantee Education] (contending that the Fourteenth Amendment's Citizenship Clause conferred an implicit right to education).

35. Calabresi & Agudo, *supra* note 9, at 13; *see also* ZACKIN, *supra* note 12, at 67-74 (detailing the timeline of the addition of common-school provisions into state constitutions).

36. *See supra* note 34.

37. D. Black, *The Fundamental Right to Education*, *supra* note 34, at 1070.

38. *Id.* at 1067.

39. *Id.* at 1085.

40. *Id.* at 1086.

41. *Id.*

42. *Id.*

43. *Id.* at 1086-87 (quoting CONG. GLOBE, 40th Cong., 1st Sess. 581 (1867) (statement of Sen. Charles Sumner)).

44. *Id.* at 1087.

Mississippi, and Virginia “never be so amended or changed as to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by” their new charters.⁴⁵

In Black’s telling, these new state constitutional provisions for systems of universal education were inextricably enmeshed with the passage of the Fourteenth Amendment: “[A]t that very moment in time when the Amendment was finally ratified, education had become a right of state citizenship in the constitution of every readmitted state.”⁴⁶ Consistent with this history, Black has pointed to state constitutions—both past and present⁴⁷—as pivotal tools in the quest to entrench some form of education right. Bringing us from the halls of the Reconstruction Congress to the halls of the Southern state constitutional conventions and state legislatures, Black argues that “[i]n the span of just two years, the Southern states that provided the final votes to ratify the Fourteenth Amendment transformed themselves from a region in which education was not guaranteed anywhere to one in which it was guaranteed everywhere.”⁴⁸ To Black, this history has clear implications for the originalist-minded jurist: “This history ranks education as fundamental at the time of the Fourteenth Amendment.”⁴⁹

These conclusions are bolstered by the findings of Calabresi and Agudo, who assessed the thirty-seven state constitutions functioning at the time of the Fourteenth Amendment’s ratification in 1868.⁵⁰ In conducting their “nose counts”⁵¹ of state constitutional rights, the duo found some form of positive right to education in thirty-six of the thirty-seven constitutions, making the right to education the most common of the existing “state rights without federal analogs.”⁵² These numbers led them to conclude that “[a] right to a public-school education is thus arguably deeply rooted in American history and tradition and is implicit

45. *Id.* at 1088 (quoting Act of Mar. 30, 1870, ch. 39, 16 Stat. 80, 81; Act of Feb. 23, 1870, ch. 19, 16 Stat. 67, 68; Act of Jan. 26, 1870, ch. 10, 16 Stat. 62, 63).

46. *Id.* at 1089; *see also* D. Black, *The Constitutional Compromise to Guarantee Education*, *supra* note 34, at 766 (“Education was specifically mandated in every new Southern constitution and implicit in the republican form of government Congress demanded pursuant to its own existing constitutional authority.”).

47. *See* D. Black, *The Constitutional Compromise to Guarantee Education*, *supra* note 34, at 766 (pointing to past constitutions); Derek W. Black, *Unlocking the Power of State Constitutions with Equal Protection: The First Step Toward Education as a Federally Protected Right*, 51 WM. & MARY L. REV. 1343, 1393–95 (2010) (pointing to present constitutions).

48. D. Black, *The Fundamental Right to Education*, *supra* note 34, at 1090.

49. *Id.* at 1094–95.

50. Calabresi & Agudo, *supra* note 9, at 12, 109.

51. *Id.* at 13–15.

52. *Id.* at 108–09; *id.* at 25 (discussing state rights without federal analogues as measured by number of states); *see also id.* at 26 (discussing the same, as measured by population).

in the concept of ordered liberty.”⁵³ They found this historical pattern “extraordinary” given that “it is usually argued that a distinctive feature of American constitutionalism is that it guarantees negative liberties against government but not positive claims for entitlements from government.”⁵⁴ Calabresi and Agudo suggest that the ubiquity of these provisions could support an argument that “a right to a public-school education in 1868 was a privilege or immunity for Fourteenth Amendment purposes as to which the states were not allowed to discriminate on the basis of race.”⁵⁵

Of course, there is only so much that “nose counts” can tell us. But when combined with Black’s more substantive nose counting, Calabresi and Agudo’s assessment makes it all the clearer that the Reconstruction state constitutions have more to offer. As we will see, these texts reveal a wealth of information about a critical group of constitutional actors and their vision of the reconstructing federal order that scholars are only beginning to assess. The arguments and actions of these state constitutional-convention delegates convey legal insights that exceed the limited scope of the current stalemated discussion of whether education is a fundamental right.

Importantly, we must resist the interpretive temptation to read Reconstruction state constitutions through the lens of their dismantling. These documents—and not the Black Codes that devoured them—reflected the original power and radical reach of the Reconstruction Amendments.⁵⁶ If we can better understand this revolution in universal public schooling—the aims of the state delegates and the contentious contexts into which these school systems were born—we will be in a better position to judge the Fourteenth Amendment’s relation to the schoolhouse.

Mining the records of the Reconstruction state constitutional conventions allows us to probe the depth and scope of a potential right to education in a way that “nose counts”⁵⁷ of state constitutional common-school provisions cannot. A subsidiary aim here is to test a hypothesis that is a reformulation and retro-extension of Justin Driver’s thesis that public schools in the twentieth and twenty-first centuries have been the “preeminent site of constitutional interpretation.”⁵⁸

53. *Id.* at 108.

54. *Id.*

55. *Id.* at 110. They note, “The framers and ratifiers of the Fourteenth Amendment may well not have understood that the Amendment outlawed segregation in education, but arguably that is precisely what it did.” *Id.*

56. Derek Black gives a similar warning. It is a grievous mistake, he insists, to look to the post-Reconstruction South and Jim Crow America for education precedent. D. Black, *The Fundamental Right to Education*, *supra* note 34, at 1095.

57. Calabresi & Agudo, *supra* note 9, at 109.

58. DRIVER, *supra* note 26, at 12.

Were the nascent common-school systems of Reconstruction a parallel site of constitutional meaning-making?

B. Brown and the Importance of Being Inconclusive

Brown v. Board of Education was a profound recognition of the centrality of education to human development, but the opinion's historical account of American education has had jurisprudential consequences that are troubled by a closer examination of state Reconstruction constitutions. For its holding that school segregation violates the Equal Protection Clause of the Fourteenth Amendment, *Brown* rightly resides in the inner sanctum of Supreme Court jurisprudence.⁵⁹ The Court unanimously decreed that "in the field of public education the doctrine of 'separate but equal' has no place."⁶⁰ To get to this long-awaited holding, the Court first concluded (after a substantial round of reargument "largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868") that the historical evidence of the Fourteenth Amendment's original meaning regarding segregation was "inconclusive."⁶¹

This methodological move was perhaps the most consequential tack ever taken in a Supreme Court decision. With the thicket of history – and all its conflicting primary sources – cleared, Chief Justice Warren could get to the real task at hand: rejecting the notion that separate but equal could ever be equal. The move, though, came at a cost. Warren not only abandoned any attempt at an affirmative historical argument, but he also conceded the realm of history altogether.

In reaching its conclusion, the Court noted that it had heard extensive reargument that "covered exhaustively consideration of the [Fourteenth] Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment" and conducted its "own investigation."⁶² The Court explained that while the historical "sources cast some light, it is not enough to resolve the problem with which we are faced."⁶³ Chief Justice Warren pointed out two seemingly insurmountable problems with using this historical evidence. First, one could not discern any clear or unified intent of the members of Congress or the members of state legislatures responsible for the Amendment's drafting and ratification.⁶⁴ Second,

59. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

60. *Id.*

61. *Id.* at 489.

62. *Id.*

63. *Id.*

64. *Id.*

the history of schooling in the United States was equally inconclusive, inhibiting any attempt to divine the contemporary public understanding of segregated education and integrated schooling.

It is worth dwelling on Chief Justice Warren's reasoning regarding this second point of inconclusiveness. In the course of conceding the realm of history, he offered his own historical account of schooling in the United States:

An additional reason for the inconclusive nature of the Amendment's history, with respect to segregated schools, is the status of public education at that time. In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.⁶⁵

In a footnote, Chief Justice Warren provided greater detail on his read of the history: "Although the demand for free public schools followed substantially the same pattern in both the North and the South, the development in the South did not begin to gain momentum until about 1850, some twenty years after that in the North."⁶⁶ He continued, "In the country as a whole, but particularly in the South, the War virtually stopped all progress in public education."⁶⁷ Citing various histories, he noted the "low status of Negro education in all sections of the country, both before and immediately after the War" and the fact that "[c]ompulsory school attendance laws were not generally adopted until after the ratification of the Fourteenth Amendment."⁶⁸ Scanning the historical evidence, Warren did not see a viable path to striking down *de jure* educational segregation. He thus declared the history inconclusive and argued directly from the constitutional text.

Ironically, in the process of eschewing historical argumentation, Chief Justice Warren offered his own telling of the history of public education. But was his telling of the history really inconclusive? In Warren's narrative, public

65. *Id.* at 489-90 (footnote omitted).

66. *Id.* at 489 n.4.

67. *Id.*

68. *Id.* at 490 n.4.

education was not developed enough during the Reconstruction Era for there to have been an accepted application of the Fourteenth Amendment to schooling. Further, segregated education was an accepted premise in both the North and South at the time.⁶⁹ Warren's historical narrative of education leaves the reader with two unsavory conclusions to choose from, both of which are quite *conclusive*: (1) there was no accepted application of the Fourteenth Amendment to schooling during Reconstruction; or (2) the contemporaneous and widely accepted existence of school segregation demonstrated that there was no incompatibility between the Fourteenth Amendment and segregated schooling.

This portion of the *Brown* opinion can be read as a methodological bargain. The Court ceded the realm of history (via inconclusiveness) in exchange for the ability to reason straight from the Amendment's text. The Chief Justice chose this analytical route and succeeded in delivering a legally correct, morally right, and unanimous opinion in a moment of immense legal and social contestation. The benefits of Chief Justice Warren's methodological bargain are plain. Enough time has passed, and we can now explore its costs. As the field of education and equal protection has advanced and shifted, it is well worth asking if the *Brown* Court left money on the historical table. Indeed, we will see that, in many respects, Warren's history leaves no room for the radical revolution in education that took place in these state drafting conventions, as Black and white Americans sought to fashion education systems befitting the new constitutional order. Later cases — like *Rodriguez*, *Plyler*, and *SFFA* — have taken this methodological bargain as a given and skipped over a core cast of constitutional characters and a set of constitutionally significant texts. Part II of this Note does not make the same error.

C. *Prophetic Antebellum Failures*: Crandall and Roberts

Two antebellum Northern cases that failed to bolster individual rights related to the schoolhouse illustrate the backdrop against which the postwar constitutional conventions discussed in Part II unfolded. In each, able advocates proffered arguments that presaged the constitutional changes wrought by Reconstruction and affirmed in *Brown*. These cases demonstrate how many of the themes raised in the Reconstruction state constitutional conventions, as well as by the *Brown* Court, were already circulating in antebellum legal discourse. In these earlier legal contests, lawyers argued that education was a natural and fundamental right, that the denial of education was a core component of American

69. See *id.* at 491 n.6. Warren noted that “in the North segregation in public education has persisted in some communities until recent years. It is apparent that such segregation has long been a nationwide problem, not merely one of sectional concern.” *Id.*

slavery, that access to schooling was central to the nation's republican governance, and that segregated schooling was inherently unequal and imposed a stigmatic and social harm on Black children. These cases illuminate the central place of education in antebellum conceptions of human dignity, individual rights, and American identity. Further, they demonstrate how Reconstruction was both a period of legal revolution and ideological continuity. These arguments about the incompatibility of segregated education and human equality were roundly rejected in courts before the Civil War. It would take constitutional change at the state and federal levels for such arguments to succeed. A postwar multiracial coalition of elected constitutional actors – not judges – would catalyze the constitutionalizing of many of these prewar themes.

*Crandall v. State*⁷⁰ is Connecticut's *Dred Scott v. Sandford*. In 1832, Prudence Crandall allowed one Black student, Sarah Harris, to attend her Canterbury Female Boarding Academy in Canterbury, Connecticut.⁷¹ Despite drawing the ire of those in the community who did not wish to see an integrated school in town, Crandall then converted the school into an institution for Black female students, "Young Ladies and Little Misses of Color."⁷² Crandall specifically aimed the school at families in Boston, New York, and Philadelphia who wished to send their daughters to boarding school.⁷³

The Connecticut Legislature targeted Crandall, passing a law that made it illegal to teach Black students from outside of Connecticut.⁷⁴ Crandall soon found herself on trial in the County Court of Windham County.⁷⁵ Her trial before Judge Daggett (a founder of Yale Law School), conviction, appeal to the Supreme Court of Errors of Connecticut, and ultimate vindication turned on whether Black Americans were citizens such that they were protected under the Privileges and Immunities Clause of Article IV of the Constitution.⁷⁶

70. 10 Conn. 339 (1834).

71. See DAVID W. BLIGHT & THE YALE & SLAVERY RSCH. PROJECT, *YALE AND SLAVERY: A HISTORY* 154 (2024); Kathryn James & Fred Shapiro, *Race, Slavery & The Founders of Yale Law School*, YALE UNIV. 12 (Sep. 28, 2022), <https://bpb-us-w2.wpmucdn.com/campuspress.yale.edu/dist/e/3942/files/2022/11/Founders-Exhibit-Booklet-11.28.22.pdf> [https://perma.cc/V38D-YBU5].

72. BLIGHT & THE YALE & SLAVERY RSCH. PROJECT, *supra* note 71, at 154; accord James & Shapiro, *supra* note 71, at 12–13.

73. BLIGHT & THE YALE & SLAVERY RSCH. PROJECT, *supra* note 71, at 154.

74. *Id.* at 155.

75. James & Shapiro, *supra* note 71, at 13.

76. *Id.*; U.S. CONST. art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

Crandall won on appeal thanks to the clever statutory parsing⁷⁷ of judges who clearly did not want to uphold her conviction, reach the constitutional merits, or offend their colleague on the bench (for some reason, Judge Daggett was on the panel hearing the appeal of his own case).⁷⁸ But Daggett's instructions to the jury in the trial below had lasting consequences. In a lengthy charge to the empaneled Connecticuturs, he concluded that as a matter of law Black Americans were "*not citizens* within the obvious meaning of that section of the constitution of the *United States*" (the Privileges and Immunities Clause).⁷⁹ Chief Justice Taney was listening. Citing *Crandall* in *Dred Scott v. Sandford* over two decades later, he wrote, "Chief Justice Dagget[t] . . . held, that persons of that description were not citizens of a State, within the meaning of the word citizen in the Constitution of the United States, and were not therefore entitled to the privileges and immunities of citizens in other States."⁸⁰

One of Crandall's attorneys, William Ellsworth, made a series of arguments that elucidate the centrality of education to contemporary conceptions of liberty and American identity. Talking to the jury in the Windham courthouse, Ellsworth blurred appeals to legal and moral authority. A core tenet of his argument was that education was an accepted *fundamental right* that could not be infringed upon by the state without running afoul of the Federal Constitution. Before making this argument outright, he morally primed his audience: "The moral sentiment of this community will not sanction the idea that a man of color shall not direct, according to his ability, the education of his child."⁸¹ He continued with a florid description of knowledge as a natural right of Black Americans that whites had transgressed:

The people of this country forced the ancestors of these pupils from Africa; they have since kept their descendants in bonds, and darkness, and now talk of right and prejudice founded on slavery and the degradation of the negro, as a justification for our continued wrong, and the deprivations, this day, attempted to be maintained on principle and morality Let this law perish. Be *you* the executioners. It[s] object is to extinguish the light of knowledge; to fasten chains and ignorance upon

77. *Crandall v. State*, 10 Conn. 339, 369 (1834) ("It is the *unlicensed* schools which are the objects of this supervision; and these only are the schools forbidden.").

78. James & Shapiro, *supra* note 71, at 13-17 (discussing the feelings of Daggett's colleagues); *see also Crandall*, 10 Conn. at 367 ("I feel no disposition to volunteer an opinion on [the constitutional question].").

79. *Crandall*, 10 Conn. at 344.

80. 60 U.S. (19 How.) 393, 415 (1857).

81. CNTY. CT. FOR WINDHAM CNTY., REPORT OF THE TRIAL OF MISS PRUDENCE CRANDALL 11 (Brooklyn, Conn., Unionist Press 1833).

those, whom the God of all has made equal with ourselves; whose future destiny is as high; whose hopes are as dear as ours.⁸²

With this foundation set, he reframed the question presented in the case to center knowledge as a fundamental right: “[C]an our Legislature prohibit the citizens of other states from residing here to pursue the acquisition of knowledge, as all our citizens may do?”⁸³ In answering this question, Ellsworth unequivocally labeled education as a fundamental right and privilege of being an American citizen:

Will it be asserted that education is not one of the fundamental rights, included in the broad words “privileges” and “immunities?” The Pope of Rome and the Despots of Turkey may say this, but an enlightened jury of Connecticut will not say it. What right so valued by us? What so much applauded by us? . . . Education, is the first and fundamental pillar on which our free institutions rest, — *the last privilege we will give up*.⁸⁴

With a final flourish, he turned to the jury and urged:

I trust you will see your way clear before you convict my client of a crime, for teaching children of color, what is daily taught to your children — for endeavoring to elevate and enlighten an unfortunate portion of our race. Are you, gentlemen, prepared to say, *that teaching the word of God is a crime?*⁸⁵

On appeal, Ellsworth repeated that citizens from other states “may come here to be *educated*. The right of education is a *fundamental* right. It is the main pillar of our free institutions.”⁸⁶

Ellsworth had made several interlocking arguments. First, education was a “fundamental right.” Second, knowledge was a good that white parents sought for their own children. Could they legally deny it to the children of others? Third, the right to education was a natural right derived from a divine law (with which the Constitution was in accordance). Fourth, stifling the intellectual advancement of another was contrary to the will of God and was a core component of slavery in the United States. While Ellsworth’s ideals did not carry the day legally, they illustrate the development of an intellectual and philosophical groundwork upon which the postbellum convention delegates would build.

82. *Id.* at 11–12.

83. *Id.* at 12.

84. *Id.*

85. *Id.* at 14.

86. *Crandall v. State*, 10 Conn. 339, 351 (1834).

About fifteen years later, Bostonian Benjamin Roberts sued his city on behalf of his five-year-old daughter, Sarah, who was denied access to a nearby school because she was Black. Benjamin was refused a ticket of admission for his daughter, and Sarah was “ejected from the school by the teacher” on her first day.⁸⁷ While the court ruled against Sarah, the opinion fortunately included the arguments made by her lawyer, Charles Sumner—a future primary architect of Reconstruction.

Soon-to-be-Senator Sumner argued that “[t]he exclusion of colored children from the public schools, which are open to white children, is a source of practical inconvenience to them and their parents, to which white persons are not exposed, and is, therefore, a violation of equality.”⁸⁸ Similarly, “[t]he separation of children . . . on account of color or race, is in the nature of caste, and is a violation of equality.”⁸⁹ Such “discrimination” was “not legally reasonable.”⁹⁰ Sumner then presented an argument that presaged the arguments made against “separate but equal” in *Brown* over a century later. Proponents of such separation of children believed that “in thus classifying the children” the school committee had “not violated any principle of equality” because there were schools open for Black children “where they enjoy equal advantages of instruction with those enjoyed by the white children.”⁹¹ To such arguments for separate but equal, Sumner responded:

1st, The separate school for colored children is not one of the schools established by the law relating to public schools, and having no legal existence, cannot be a legal equivalent. 2d. It is not in fact an equivalent. It is the occasion of inconveniences to the colored children, to which they would not be exposed if they had access to the nearest public schools; it inflicts upon them the stigma of caste; and although the matters taught in the two schools may be precisely the same, a school exclusively devoted to one class must differ essentially, in its spirit and character, from that public school known to the law, where all classes meet together in equality. 3d. Admitting that it is an equivalent, still the colored children cannot be compelled to take it. They have an equal right with the white children to the general public schools.⁹²

87. *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 200 (1849).

88. *Id.* at 202.

89. *Id.*

90. *Id.* at 203.

91. *Id.*

92. *Id.* (citation omitted).

Here we have Charles Sumner, just before beginning his career in Washington, arguing that separate but equal can never be equal in the field of education. Forcing Black students to attend separate schools, even if the institutions hypothetically were equal in quality, “inflicts upon them the stigma of caste.”⁹³ Sumner, who would help bring the Fourteenth Amendment into being, was anything but inconclusive on this front.

Sarah and Sumner lost the case. The trial judge held that even though Black Bostonians were “entitled by law, in this commonwealth, to equal rights, constitutional and political, civil and social,” forcing them to attend separate schools was not illegal.⁹⁴ The judge noted, “It is urged[] that this maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste, founded in a deep-rooted prejudice in public opinion. This prejudice, if it exists, is not created by law, and probably cannot be changed by law.”⁹⁵

Sumner and Ellsworth (Prudence Crandall’s lawyer) demonstrate that there were antebellum legal voices advocating for more equal access to school. They both mirrored contemporary views on education and prefigured future legal strategies. In their arguments, we see the interlocking principles that human beings possess a natural right to knowledge and development through education and that the denial of proper education to Black Americans was therefore fundamentally unjust. Such a denial was enmeshed with the evils of American slavery. Further, in Sumner’s arguments—long before *Plessy v. Ferguson*, and over a century before *Brown*—we see public rumblings of the principle that separate schoolhouses were inherently unequal. Without the subsequent context of the constitutional rebirth of education in Reconstruction, however, these early rumblings appear more like isolated moments of attempted reform.

These cases are also of analytical importance because they were failures, because the arguments of Sumner and Ellsworth did not win the day. Despite their eloquence and value as indicators of public sentiment, these arguments were failed attempts by white Northern lawyers in Northern courthouses to push their communities toward less discriminatory educational practices. Their task was necessarily limited by their purpose of winning relief for their clients. Sumner and Ellsworth could not leverage political power in the courtroom. Further, the Black students in question were left more or less on the sidelines of these legal challenges. These were legal failures with little influence. It would require a political crisis of monumental magnitude before the ideals presaged by Ellsworth and Sumner could be injected into the constitutional soul of the country and its states. These ideas would only become legally possible after the tumult of the

93. *Id.*

94. *Id.* at 206.

95. *Id.* at 209.

Civil War, in a moment of constitutional ferment when Black Americans were able to exercise electoral power.

To summarize, legal scholarship on a right to education, the jurisprudential framework set by *Brown*, and the historical narrative of segregated schooling in nineteenth-century America each contains gaps that an excavation of Reconstruction state constitutional conventions can help fill.

II. A NEW BIRTH OF FREEDOM (AND EDUCATION) IN SOUTHERN CONSTITUTIONAL CONVENTIONS

The rupture of Reconstruction offered Republican lawmakers a singular opportunity to recast American education. Turning to the Southern constitutions and drafting conventions, we find historical material that might help dislodge the scholarly logjam and point the jurisprudential dialogue on education in new directions. Further, these materials, when connected with the legal prologue of *Crandall* and *Roberts*, demonstrate that this moment of constitutional rupture was also a moment of continuity in reformist understandings of education.

Each of the following sections presents a case study and has a general pattern. Each begins by assessing the final text of a state's Reconstruction constitution. Then, it moves into a discussion of the state's convention and the coalitions that worked to change the American educational landscape and keep it free of constitutionalized segregation.

A. Virginia: The “Old Slavery Notion of Having Two Schoolhouses”

Virginia, the former seat of the Confederacy, saw intense debate in its constitutional convention over segregated education, with Republicans eventually succeeding in keeping de jure segregation at bay. Virginia's Reconstruction constitution began with a bill of rights. It opened with a reformulation of the Declaration of Independence: “That all men are by nature equally free and independent, and have certain inherent rights”⁹⁶ The state bill of rights went on to establish free elections (with some key caveats)⁹⁷ and abolish slavery in the state

96. VA. CONST. of 1868, art. I, § 1.

97. *Id.* art. I, § 8 (“That all elections ought to be free, and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage . . .”).

with language nearly identical to the Thirteenth Amendment of the Federal Constitution.⁹⁸

Article VIII was devoted to education. It provided for the appointment of a superintendent of public instruction to oversee “the public free school interests of the State” and who was to propose “a plan for a uniform system of public free schools” for future consideration by the state General Assembly.⁹⁹ Further, “[t]he General Assembly shall provide by law, at its first session under this Constitution, a uniform system of public free schools, and for its gradual, equal and full introduction into all the counties of the State, by the year 1876, or as much earlier as practicable.”¹⁰⁰ The constitution instituted a funding system for the schools “for the equal benefit of all the people of the State—the number of children between the ages of five and twenty-one years in each public free school district being the basis of such division.”¹⁰¹ Textbooks were to be provided to those students who could not afford them.¹⁰² Article VIII ended with an enforcement clause demanding that the General Assembly “shall make all needful laws and regulations to carry into effect the public free school system provided for by this article.”¹⁰³ The ratified text made no mention of school segregation.

These tidy provisions belie the contention at the state constitutional convention. The election of convention delegates took place from October 18 to 21, 1867, and over 105,000 Black Virginians were registered to vote (nearly matching the roughly 120,000 whites registered).¹⁰⁴ The convention consisted of 105 delegates, twenty-two of them Black Virginians.¹⁰⁵ Three Black delegates sat on the eleven-member Committee on Education and Public Instruction.¹⁰⁶

Early in the convention, the idea of a public-school system was broached by a delegate who proposed the formation of the Committee on Education to assess

98. Compare *id.* art. I, § 19 (“That neither slavery nor involuntary servitude, except as lawful imprisonment may constitute such, shall exist within this State.”), with U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime . . . shall exist within the United States . . .”).

99. VA. CONST. of 1868, art. VIII, § 1.

100. *Id.* art. VIII, § 3.

101. *Id.* art. VIII, § 8.

102. *Id.*

103. *Id.* art. VIII, § 12.

104. EDGAR W. KNIGHT, RECONSTRUCTION AND EDUCATION IN VIRGINIA 5 (1916). The actual number of voters in each group was likely far different; Knight notes that roughly 44,000 registered whites did not vote. *Id.*

105. *Id.*

106. *Id.* For the name of the committee, see JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF VIRGINIA 14 (Richmond, Off. of the New Nation 1867) [hereinafter VIRGINIA JOURNAL].

“the propriety of establishing such a system of public schools as shall secure to the youths of Virginia, of all classes, the advantages of a primary education.”¹⁰⁷

Other delegates echoed this sentiment throughout the early days of the convention. One proposed a resolution “[t]hat the constitution . . . should guarantee for the future, a system of common school education, to be supported by the State, which shall give to all classes a free and equal participation in all its benefits.”¹⁰⁸ This resolution was referred to the Committee on Education, but Thomas Bayne, a Black delegate representing Norfolk, quickly stood and added, “I would like to amend the resolution, just read, by making it without distinction of color.”¹⁰⁹ This amendment was deemed improperly timed and discounted.¹¹⁰ The question of segregation or unequal schools was never far beneath the surface.

On December 19, the thirteenth day of the convention, a letter was introduced into the record signed by over five hundred Black citizens from Elizabeth City and Warwick counties.¹¹¹ It asked the delegates to ensure segregation was not permitted on steamboats, rail lines, or streetcars. Similarly, it exhorted the convention “that there be no separate schools; but simple Christian legislation, such as becomes a people who believe that ‘God hath made of one blood all nations of men.’”¹¹²

The convention also received a letter from the Conference of the Methodist Episcopal Church of Virginia and North Carolina, which was meeting concurrently in Richmond.¹¹³ The letter, written by the Committee on Education of the Church Conference, espoused that education was of the highest importance: “In every employment and department of life, it is essential to success; and where it is not found, bigotry, indolence, superstition and prejudice abound . . .”¹¹⁴ Further, “Education is onward, progressive, and as our greatest auxiliary, we must follow it up. Not to do so is retrogressive, both in church and State. The people

107. VIRGINIA JOURNAL, *supra* note 106, at 17; THE DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF VIRGINIA, ASSEMBLED AT THE CITY OF RICHMOND, TUESDAY, DECEMBER 3, 1867, at 31 (Richmond, Off. of the New Nation 1868) [hereinafter VIRGINIA DEBATES AND PROCEEDINGS].

108. VIRGINIA DEBATES AND PROCEEDINGS, *supra* note 107, at 96 (reproducing the statement of Mr. Kelso); see also VIRGINIA JOURNAL, *supra* note 106, at 35 (describing Mr. Kelso’s proposed resolution).

109. VIRGINIA DEBATES AND PROCEEDINGS, *supra* note 107, at 96.

110. *Id.*

111. *Id.* at 151.

112. *Id.* at 150–51; see also VIRGINIA JOURNAL, *supra* note 106, at 54–55 (quoting the same letter).

113. VIRGINIA DEBATES AND PROCEEDINGS, *supra* note 107, at 237.

114. *Id.*; see also VIRGINIA JOURNAL, *supra* note 106, at 70 (describing the communication as “read and referred to the Committee on Education”).

thirst for knowledge, and their importunings must be heard.”¹¹⁵ The Methodist Episcopal Conference, therefore, supported the founding of common schools.¹¹⁶

At one point, a representative of the Peabody Education Fund—a fund started by a Northern philanthropist meant to advocate for and fund “[f]ree schools for the whole people”—addressed the convention, pushing it to adopt a common-school system.¹¹⁷ The Reverend Dr. Sears exhorted the delegates:

The business of education is mainly to bring out the talents which God, with a liberal hand, has scattered among the people. Why should we not be satisfied with the education of the few? Because God has not confined rare talents to any aristocracy of rank. He has not bestowed intellectual greatness exclusively upon any one class of society . . . But wherever there is a human being, whether of high or low birth, rich or poor, one of God’s jewels may be there, and the only way to find it is to go over the whole field.¹¹⁸

As Sears crescendoed to his conclusion, he commanded his audience:

Let every one be ambitious of the honor of striking the shackles of ignorance from the people; and I tell you the day is coming . . . when it will be deemed an honor worthy of a record in history, to have inaugurated a system of universal education for the people of this old and honored Commonwealth.¹¹⁹

The convention formally thanked Sears and ordered ten thousand copies of his speech printed for public consumption.¹²⁰

Delegates themselves echoed these sentiments. One delegate introduced his own common-school provisions to the Committee on Education by proclaiming, “Whereas, universal education is an essential guarantee of liberty and social stability, as well as true and noble national economy.”¹²¹ While there was much contention over the taxes needed to fund a common-school system, another delegate noted, “I am willing to allow the State to collect from individuals a tax, not to

115. VIRGINIA DEBATES AND PROCEEDINGS, *supra* note 107, at 237.

116. *Id.*

117. *Id.* at 604–05.

118. *Id.* at 605.

119. *Id.* at 613.

120. *Id.*

121. *Id.* at 442.

exceed one dollar, to go into this sacred school fund, for the benefits of it will distill, like the dews of Heaven, upon all alike — the rich and the poor.”¹²²

As in the conventions of other states, the issue of education often spilled into other topics like the right to vote. In discussions over suffrage qualifications, one delegate argued that Black Virginians were not educated enough to be entrusted with the vote. Another delegate sharply responded that this deprivation of education was a core component of the slavery the state had inflicted on these citizens:

If you give this people a chance the time will come, and that at no distant day, when it cannot be charged upon them that they are destitute of the education of the schools — a destitution which to-day is among them by the wrong and the tyranny and the usurpation exercised over them by the slaveholders of Virginia.¹²³

The question of segregated schools ignited when the Committee on Education’s report was openly debated on the convention floor on March 27, 1868. A white delegate sought to amend the proposed education provisions to include: “Provided, that in no case shall white and colored children be taught at the same school or in the same house.”¹²⁴

A Black delegate (most likely Willis A. Hodges¹²⁵) vociferously objected to this proposal. While his statement was not reported in official records of the convention, the Richmond *Daily Dispatch* reprinted his fiery words. The clause had to be struck, he warned, or else other segregation clauses would be added, such as one mandating segregation in houses of worship.¹²⁶ As for “this thing of mixin’ children together,” Hodges said he feared sending his children to school

122. *Id.* at 735.

123. *Id.* at 478.

124. VIRGINIA JOURNAL, *supra* note 106, at 299.

125. See ERIC FONER, FREEDOM’S LAWMAKERS: A DIRECTORY OF BLACK OFFICEHOLDERS DURING RECONSTRUCTION 105–06 (rev. ed. 1996) (“With Thomas Bayne, [Hodges] led the successful opposition to a Conservative proposal requiring segregation in public schools.”). While this Part highlights the actions of Black delegates in these conventions, it should be noted that many of these individuals were of mixed racial heritage. For more information on the individual backgrounds of these leaders, see generally FONER, *supra*.

126. *The Virginia Convention*, DAILY DISPATCH (Richmond, Va.), Mar. 28, 1868, at 2; see also KNIGHT, *supra* note 104, at 8–9 (explaining why this debate was reported by newspapers instead of official records). This newspaper account refers to Hodges by his nickname “Old Specs.” See “Irrespective of Race or Color”: African Americans and the Making of a New Virginia Constitution, UNCOMMONWEALTH: VOICES FROM LIBR. VA. (Apr. 17, 2019), <https://uncommonwealth.virginiamemory.com/blog/2019/04/17/irrespective-of-race-or-color-african-americans-and-the-making-of-a-new-virginia-constitution> [https://perma.cc/2K7A-DAZR].

with white “secesh children.”¹²⁷ Despite this concern, he opposed de jure segregated education because it played into the prejudices of white Virginians: “[H]e didn’t want dis [clause] to commodate de prejudices of rebels and seceshes. He considered himself as high over a rebel and a traitor [as] heaven was over hell.”¹²⁸ Underlining the strength of his feelings on the issue, Hodges noted that he had missed the steamboat out of town that morning and “knew God had some reason for keepin’ him here.”¹²⁹ God wanted him to oppose this segregation provision. Hodges was quickly backed up by Bayne. The press reported that Bayne “was red-hot on this subject, and opposed vehemently dis old slavery notion of having two school-houses [where] one would do.”¹³⁰ Hodges and Bayne succeeded temporarily in stymieing the segregationist effort.

Later that session, a white delegate sought to scuttle the school provisions by replacing the 1876 deadline for the General Assembly to institute a free school system with the year 2001!¹³¹ Another delegate, Eustace Gibson, soon proposed a new section: “There shall be separate schools for white children and for colored children; and the capitation tax derived from white polls shall be devoted exclusively to education in the white schools, and that from colored polls to education in the colored schools.”¹³² Immediately, Lewis Lindsey—a Black delegate representing Richmond—added what could only have been a sardonic poison-pill amendment to Gibson’s proposal: “And there shall also be a separate Legislature, for the convenience of all classes.”¹³³ White delegates tried to get Lindsey’s amendment severed from Gibson’s segregation section, but failed. Lindsey succeeded in sinking Gibson’s attempt at constitutionalizing segregated education.¹³⁴

On Tuesday, April 7, Thomas Bayne attempted to weave the right to integrated schools into the discussion. His proposal, which caused much debate but ultimately failed, read:

The free public schools in this State shall be open free to all classes, and no child, pupil or scholar shall be ejected from said schools on account of race, color, or any invidious distinction; and the General Assembly shall

127. *The Virginia Convention*, *supra* note 126, at 2.

128. *Id.*

129. *Id.*

130. *Id.*

131. *VIRGINIA JOURNAL*, *supra* note 106, at 301.

132. *Id.*

133. *Id.*

134. *Id.*

not have power to make any law that will admit of any invidious distinction in any of the free public schools in this State.¹³⁵

On April 8—the ninety-seventh day of the convention—a Captain Parr attempted to push an amendment requiring segregation through:

In each school district in which there may be white and colored children there shall be two schools, one for the white and the other for the colored children. The children of one shall not be admitted to the school of the other, except by the unanimous consent of all the parents of the children attending such school.¹³⁶

This too was defeated.

The case study of Virginia reveals the intense contestation that produced the 1868 Constitution. The relatively clear and simple text of the common-school provision does not convey the extent to which a coalition of Republican delegates had to fight to keep segregation out of the constitutional framework. One could argue that this confirms the general thrust of Chief Justice Warren’s “inconclusive” thesis, but it in fact does the opposite. In this moment of constitutional ferment—when Black Virginians (men) were finally able to exercise the vote, hold office, and shape the political direction of their state—forceful efforts to impose constitutionalized segregated schooling failed. As these delegates reformulated their state constitution in the image of the evolving Federal Constitution, they instituted a common-school system and refused to allow it to be tainted with constitutionally mandated segregation.

B. North Carolina: “A Right to the Privilege of Education”

The delegates of North Carolina’s constitutional convention established education as an explicit right of North Carolinians. Further, the convention debates illustrate the crucial point that the absence of language constitutionalizing segregated education was both meaningful and highly contentious in many state constitutional conventions. The new constitution, ratified in 1868, christened education as a *right*: “The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.”¹³⁷ This unambiguous

135. *Id.* at 333; see also KNIGHT, *supra* note 104, at 9 (describing Thomas Bayne’s vehement opposition to segregated schools).

136. *The Virginia Convention Ordered by Congress to Frame a State Constitution: Ninety-Seventh Day*, DAILY DISPATCH (Richmond, Va.), Apr. 9, 1868, at 2; see also KNIGHT, *supra* note 104, at 9 (discussing the defeat of the proposed segregation amendment).

137. N.C. CONST. of 1868, art. I, § 27.

statement came toward the end—Section 27—of a lengthy Declaration of Rights which comprised the Constitution’s first Article. As in the constitutions of other reconstructing states, this first Article publicly refashioned North Carolina’s core charter in the image of the Federal Reconstruction Constitution. “[W]e do declare,”¹³⁸ the article began, “[t]hat we hold it to be self-evident that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.”¹³⁹ Further, the text disavowed any right to secession, promising “[t]hat this State shall ever remain a member of the American Union.”¹⁴⁰ As required, the text explicitly abolished slavery in North Carolina.¹⁴¹

Nestled among these rights was the right to education. The text’s ninth Article detailed the state’s plan for universal public education, providing the substantive scaffolding behind this newly minted right. In line with Article I, Section 27’s espousal that the state now had an obligation “to guard and maintain” the “right” of education, Article IX began with a fitting proclamation: “Religion, morality, and knowledge being necessary to good government and happiness of mankind, schools and the means of education shall forever be encouraged.”¹⁴²

The first assembly after the Constitution’s ratification was obliged to “provide by taxation and otherwise for a general and uniform system of public schools, wherein tuition shall be free of charge to all the children of the State between the ages of six and twenty-one years.”¹⁴³ The state was further granted the power to mandate school attendance, unless a child was being “educated by other means.”¹⁴⁴ Article IX would be amended in 1876, upon the close of Reconstruction, to include a provision mandating school segregation: “And the children of the white race and the children of the colored race shall be taught in separate public schools, but there shall be no discrimination made in favor of, or to the prejudice of, either race.”¹⁴⁵ For roughly eight years, then, the text of the North Carolina Constitution mandated universal, free education from the age of six to twenty-one as a right that the State was obligated to protect and encourage. No allowance for segregation was made in the ratified text.

¹³⁸. *Id.* art. I.

¹³⁹. *Id.* art. I, § 1.

¹⁴⁰. *Id.* art. I, § 4.

¹⁴¹. *Id.* art. I, § 33.

¹⁴². *Id.* art. IX, § 1.

¹⁴³. *Id.* art. IX, § 2.

¹⁴⁴. *Id.* art. IX, § 17.

¹⁴⁵. *Id.* art. IX, § 2 (1876).

The journal of the 1868 constitutional convention reveals how the biracial body of delegates crafted these provisions and how Black delegates, in particular, worked to prevent education-segregation provisions from taking root in the text. Thirteen Black Carolinians were elected to the convention: Reverend J.W. Hood, Briant Lee, Parker Robbins, Wilson Carey, Clinton D. Pierson, Henry C. Cherry, Henry Eppes, W.T.J. Hayes, Cuffee Mayo, John H. Williamson, John Hyman, Abraham Galloway, and James J. Harris.¹⁴⁶ These thirteen delegates were among 107 Republicans out of a total of 120 delegates.¹⁴⁷

The thirteen-member “Committee on Education, Common Schools, University and the Means of Their Support” contained two Black delegates, Hood and Hayes.¹⁴⁸ The Committee presented their report, which very closely presaged the textual language eventually passed by the convention and ratified by the state, to the full convention on March 6.¹⁴⁹ The proposed text – making no mention of race – directed the state to institute a free common-school system and ensure that education “shall forever be fostered and encouraged.”¹⁵⁰ Fissures soon revealed themselves on the convention floor, however.

One white delegate, a Mr. Graham representing Orange, refused to sign his name to the otherwise unanimous committee report. The press reported that he told his fellow delegates that “he had not thought proper to sign the report” for a range of “various objectionable features in the report.”¹⁵¹ Regardless of his concerns, the convention proceeded to adopt the first sections of the proposed text relating to common schools with little dissent.¹⁵² Then, the issue of school segregation spilled out into plain view.

Plato Durham of Cleveland County sought to add a provision to the common-school requirement. It read: “The General Assembly shall provide separate and distinct schools, for the black children of the State, from those provided for white children.”¹⁵³ Mr. French, representing Bladen, countered that “according to the report, the Counties would regulate such matters,” and counseled the

146. Leonard Bernstein, *The Participation of Negro Delegates in the Constitutional Convention of 1868 in North Carolina*, 34 J. NEGRO HIST. 391, 391-94 (1949).

147. *Id.* at 394.

148. JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NORTH-CAROLINA, AT ITS SESSION 1868, at 44, 338 (Raleigh, Joseph W. Holden 1868) [hereinafter JOURNAL N.C. CONVENTION]; Bernstein, *supra* note 146, at 395.

149. JOURNAL N.C. CONVENTION, *supra* note 148, at 338-41.

150. *Id.* at 338.

151. *Morning Session*, DAILY SENTINEL (Raleigh, N.C.), Mar. 7, 1868, at 2.

152. *Id.*

153. JOURNAL N.C. CONVENTION, *supra* note 148, at 342.

rejection of Durham's proposal.¹⁵⁴ One delegate, Samuel Ashley, swiftly denounced Durham's suggestion, noting that "this article was framed for the benefit of all children."¹⁵⁵ James Harris, a Black representative from Wake, "objected to it, on the same grounds."¹⁵⁶ The newspaper reporting indicates Hood concurred with Harris on the floor, recording simply: "Hood (negro) ditto."¹⁵⁷ Ashley countered Durham's disruptive proposal with an amendment to this proposed addition: "It being understood, however, that this section is not offered in sincerity, or because there is any necessity for it, but that it is proposed for the sole purpose of breeding prejudice and bringing about the practical enslavement of the colored race."¹⁵⁸ These overlapping objections demonstrate the combined effort of delegates to keep any mention of segregated education out of the constitutional text.

The atmosphere was clearly acrimonious. Durham complained that he and "other Conservatives" were being called to order unfairly by the convention leadership. Further, he felt his integrity had been attacked by the responses to his proposal.¹⁵⁹ "He had been denounced, his honesty and sincerity called in question, and his personal motives reflected upon, by a delegate whom he could not notice (Harris, of Wake, negro.) The Chair did not call *him* to order."¹⁶⁰ Durham had been ruffled by being challenged on the convention floor by a Black delegate. A back-and-forth involving several members ensued, as the lines of debate became clear:

Mr. Hodnett said that he regretted to see party spirit manifested on this question. He had hoped to have separate schools established. The prejudices of his people would not allow otherwise. A wise statesman had said a wise legislator should ever respect the prejudices of the people. His constituents would [think] that the article insidiously meant to put the children together.

Mr. Abbott asked, did not the article leave the question to the counties?

Mr. Hodnett: But the article says that schools shall be established for *all*.

154. *Morning Session*, *supra* note 151, at 2.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

Mr. Tourgee: Is not a policy adopted now, leaving this matter to the counties, where the article says a school or schools shall be established?

Mr. Hodnett: Well, what will we do in our country, where there are five or six hundred colored majority?

Mr. Pool: I desire to ask you a question.

Mr. Hodnett: It seems, from the number of questions that I am asked, that I am touching you on a tender point.

Mr. McDonald, of Chatham, and Harris of Wake, (negro,) next had a say.¹⁶¹

Ashley succeeded in getting his poison-pill amendment added to Durham's proposal, and Durham's segregation provision subsequently failed on the convention floor, eleven votes to eighty-six.¹⁶²

The issue of segregated education was far from over, however, as the convention turned to the Committee on Education's proposals regarding higher education and the University of North Carolina. Mr. Graham recommended the amendment "[t]hat there shall be separate and distinct schools and colleges for the black and white races."¹⁶³ Durham once again took center stage, rejecting the idea that the question of segregation could be left to the counties. A constitutional provision mandating segregation was necessary, he argued, to protect white Carolinians living in majority-minority counties:

Mr. Durham said that it had been stated, on this floor, that the colored people did not wish mixed schools. Then why do you refuse to say, here, that such mixture shall in no case be made: You say that counties will regulate these matters, but the white people, in those counties that have a negro majority, demand that we shall here incorporate, in the Constitution, *a clause to protect them*. . . . [I]f you refuse to incorporate such a clause in the Constitution, we have a perfect right to draw the inference that you are determined to force "*social equality*." What other construction can the people, as sensible people, place upon your action?¹⁶⁴

Durham's concerns demonstrate a larger truth about the crafting of Reconstruction constitutions: the *absence* of mandated school-segregation provisions in these constitutions was no accident and was of paramount importance to delegates and voters on both sides of the issue. It might be tempting to put more stock in the fact that these conventions—with the exceptions of Louisiana and

161. *Id.*

162. JOURNAL N.C. CONVENTION, *supra* note 148, at 342.

163. *Morning Session*, *supra* note 151, at 2.

164. *Id.*

South Carolina — did not mandate that schools be open to all students regardless of race, but Durham's reaction reveals how conservative whites read these texts. To many conquered Confederate conservatives, the absence of mandated school segregation was intolerable; it raised the specter of integration and "mixed schools."¹⁶⁵

Abraham Galloway, a Black delegate representing North Hanover, vociferously contested Graham's amendment and Durham's speech. He rejected the amendment as "intended to frighten weak kneed Republicans" and stated, "If such an amendment was adopted, he would canvass against the Constitution."¹⁶⁶ Galloway was threatening to mobilize Black voters against the new Constitution should it contain a provision mandating school segregation. Cuffee Mayo, a Black delegate representing Granville County, joined Galloway and opposed Graham's attempt as well.¹⁶⁷ One white delegate stated that, while he did not wish to see such a provision in the Constitution, he was willing to adopt it as he believed separate schools would result regardless.¹⁶⁸

Around the same time, "separate but equal" once again reared its head and once again failed to take hold. Another delegate proposed an alternate amendment mandating separate but equal schools:

That separate and distinct schools may be provided for any class of citizens in the State: *Provided*, That in all cases where distinct schools shall be established, there shall be as ample, sufficient and complete facilities afforded for the one class as for others, and entirely adequate for all, and in all districts where schools are divided, the apportionment to each shall be equal.¹⁶⁹

Both proposed amendments were rejected, and the education report subsequently passed eighty-eight votes to twelve.¹⁷⁰ Mandated segregation had been *rejected*. Separate but equal schools had been rejected. A coalition of white and Black Republicans had succeeded in staving off multiple attempts at stitching segregated education into North Carolina's Reconstruction constitution. Further, these leaders had solidified a right to education for all North Carolinians through the university level.

^{165.} *Id.*

^{166.} *Id.*

^{167.} *Id.*

^{168.} *Id.*

^{169.} JOURNAL N.C. CONVENTION, *supra* note 148, at 343.

^{170.} *Id.*

This history should not be read, however, as an unambiguous call for integrated schools (or for the right to integrated education). A few days later, for example, Hayes—one of the two Black delegates who had served on the Committee on Education—proposed a resolution that was promptly adopted by the convention: “*Resolved*, That it is the sense of this Convention that intermarriages and illegal intercourse between the races should be discountenanced, and the interests and happiness of the two races would be best promoted by the establishment of separate schools.”¹⁷¹ Such a statement troubles any attempt to conclude that the convention saw itself as inaugurating multiracial education.

Indeed, equality in education was seen as wholly bound up in this larger question of supposed discrimination against whites. Outside of the convention hall, the establishment press railed against the convention and its decisions on education. One commentator for the *Daily Sentinel* in Raleigh bemoaned the “mongrel Convention” and its “so-called Constitution.”¹⁷² The writer accused the proposed constitutional text of discriminating *in favor* of Black Carolinians:

The equality of all men, and equal civil and political rights, will be granted alike to white and black, except that we look for discrimination, in favor of the blacks, in the matter of suffrage; blacks and whites will be put upon the same footing as to sitting on juries, and as to holding office, without the usual and necessary guarantees as to capacity, responsibility or moral integrity; the property qualification, so material to the protection of society and property, will be generally discarded; no prohibition as to mixing up blacks and whites in the militia, or in the public schools, or as to intermarriage, will be made, but every encouragement, both in the law and in the practice and intercourse of the advocates of negro equality, will be given to Africanization. Poor white men, unable to educate their children, are to be compelled to send them to school with the blacks.¹⁷³

Here, we see an intriguing nexus of equality, education, and preference. To this white Southern writer, “equality of all men,” was simply “discrimination, in favor of the blacks” in disguise. In this view, white students were being coerced by the state to undergo “Africanization” in the schoolroom, all in the name of equality. Education, voting, serving on juries, and holding office—all were interconnected pieces of the same issue of equality, an equality the ex-Confederates saw as forced upon the states by the federal government (and subsequently forced upon the conquered whites of North Carolina by Republican state officials).

171. *Id.* at 473; see Bernstein, *supra* note 146, at 407.

172. *The New Constitution*, DAILY SENTINEL (Raleigh, N.C.), Mar. 7, 1868, at 2.

173. *Id.*

Another author sought to alarm readers that the convention had voted down both attempts to stitch school segregation into the text. The “negrophilists” of the convention had “on two distinct test issues, voted down propositions to insert, in the Article on Education, a prohibition of the mingling of white and negro children in Schools and white and negro youth in Colleges,” they wrote.¹⁷⁴ “It will be borne in mind,” the column continued, “that there is a *compulsory* section in the Article, *requiring* all children, between certain ages who cannot obtain an education otherwise, to attend the public schools for a certain length of time.”¹⁷⁵ In a virulently racist passage, the author explained that the exclusion of explicitly segregationist provisions in the constitution would lead to race mixing and a state-sponsored *preference* for Black teachers:

So that the negro worshipping hybrids in the Convention have thus voted, virtually and emphatically, *to force the attendance of white children in schools with the negroes*, — and that, too, so far as anything to the contrary appears in the Constitution, UNDER NEGRO TEACHERS! — If S.S. Ashley, the Yankee pedagogue, should be elected Superintendent of Public Instruction, we may be sure that his instinctive partialities will impel him to give the preference of employment to n*gger instructors!¹⁷⁶

These passages instruct us as to how North Carolina’s 1868 constitution was understood by contemporary readers. To put it bluntly, many read the new constitution as Durham had read it: mandating integrated schools.

The intense, racist public reaction underscores just how successful the reformist Republican delegates had been. They had instituted a right to public education where none had existed before. Further, they kept segregationists at bay and neutralized accusations that they were instituting systems that would preference Black North Carolinians over their white neighbors.

C. South Carolina: “Without Regard to Race or Color”

South Carolina’s constitutional convention was of singular importance as Black Americans comprised a majority of the delegates — 76 of 124.¹⁷⁷ The first article of the constitution they drafted was a bill of rights that reflected a country stitched together after the war. Section 1 recapitulated the truths of the Declaration of Independence — “All men are born free and equal — endowed by their

174. *Mongrelism*, DAILY SENTINEL (Raleigh, N.C.), Mar. 7, 1868, at 2.

175. *Id.*

176. *Id.*

177. Edward F. Sweat, *Some Notes on the Role of Negroes in the Establishment of Public Schools in South Carolina*, 22 PHYLON 160, 161 (1961).

Creator with certain inalienable rights . . . ”¹⁷⁸ Section 2 abolished slavery in the state.¹⁷⁹ Section 4 pledged the allegiance of all South Carolinians to the Federal Constitution, and Section 5 established that the state could never again leave the Union.¹⁸⁰

The constitution’s tenth Article directed the future state legislature to “provide for a liberal and uniform system of free public schools throughout the State.”¹⁸¹ Unlike every other Reconstruction constitution except for Louisiana, the new South Carolina constitution mandated that public educational institutions be open to students irrespective of race at all levels: “All the public schools, colleges, and universities of this State supported in whole or in part by the public funds, shall be free and open to all the children and youths of the State, without regard to race or color.”¹⁸²

South Carolina’s convention opened on January 14, 1868, with an exhortation from the chairman that placed racial equality at the center of their communal exercise:

We, the delegates of the loyal people of South Carolina, are assembled here for the purpose of restoring our State to her proper relations in the Federal Union.

It becomes us to frame a just and liberal Constitution, that will guarantee equal rights to all, regardless of race, color or previous condition — a Constitution which will comply with the Reconstruction Acts of Congress, thereby insuring our speedy admission into the Union.¹⁸³

On the nine-member Committee on Education, five delegates were Black: Francis L. Cardozo, Landon S. Langley, Henry E. Hayne, Henry L. Shrewsbury, and David Harris.¹⁸⁴ Early in the convention, a Black delegate, Benjamin Randolph of Orangeburg County, submitted a petition signed by constituents asking that a Bureau of Education be set up as soon as possible because of the “want of an efficient system of public schools for the education of thousands who have been

178. S.C. CONST. of 1868, art. I, § 1.

179. *Id.* art. I, § 2.

180. *Id.* art. I, §§ 4–5.

181. *Id.* art. X, § 3.

182. *Id.* art. X, § 10.

183. PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA, HELD AT CHARLESTON, S.C., BEGINNING JANUARY 14TH AND ENDING MARCH 17TH, 1868, at 5–6 (Charleston, Denny & Perry 1868) [hereinafter S.C. PROCEEDINGS].

184. *Id.* at 56; see FONER, *supra* note 125, at 254–57 (listing these five names as Black officeholders in South Carolina).

deprived of such school privileges.”¹⁸⁵ In the meantime, the petitioners asked that the Freedmen’s Bureau be permitted to continue offering schooling.¹⁸⁶ During that same session, William Nash—a Black representative from Richland—proposed language (very similar to what would end up in the final text) that would open schools and colleges and universities to all South Carolinians “of every grade, without any distinction or preference whatever.”¹⁸⁷

Espousals of educational equality were a prominent part of the entire convention. On day six, Alonzo Ransier of Charleston, a Black delegate who would later represent South Carolina in the U.S. Congress,¹⁸⁸ proposed that a Board of Education would have control over school districts and would “make all needful regulations for the education of youth, no discrimination to be made in favor of any class of persons.”¹⁸⁹ On January 23, Robert Smalls—perhaps the most famous Black lawmaker of the Reconstruction Era—submitted the following proposal, which was referred to the Committee on Education:

Whereas, the maintenance of an intelligent government, faithful to the interests and liberties of the people, must in a great measure depend upon the intelligence of the people themselves; and,

Whereas, the experience of those States which have opened to the poor and rich alike the opportunities of instruction has demonstrated the utility of common schools in elevating the intellectual character of their population; therefore,

Resolved, That the Committee on the Constitution be directed to report an article providing for a system of common schools, of different grades, to be open without charge to all classes of persons.¹⁹⁰

Smalls must have been pleased when the Committee on Education’s preliminary draft of the constitution’s article on education was presented on February 5, eighteen days into the convention. The committee’s text was very close to the text that would ultimately be adopted. It began, however, with an extended preamble on the value of education, which would not end up in the final constitutional text:

Whereas, we hold these statements as axioms: that education is knowledge; that knowledge is power; that knowledge rightly applied is

¹⁸⁵. S.C. PROCEEDINGS, *supra* note 183, at 68; FONER, *supra* note 125, at 256.

¹⁸⁶. S.C. PROCEEDINGS, *supra* note 183, at 68.

¹⁸⁷. *Id.* at 70–71; FONER, *supra* note 125, at 256.

¹⁸⁸. See FONER, *supra* note 125, at 176–77.

¹⁸⁹. S.C. PROCEEDINGS, *supra* note 183, at 88.

¹⁹⁰. *Id.* at 98, 100.

the best and highest kind of power; that the general and universal diffusion of education and intelligence among the people is the surest guarantee of the enhancement, increase, purity and preservation of the great principles of republican liberty; therefore it shall be the duty of the General Assemblies, in all future periods of this Commonwealth, to establish, provide for, and perpetuate a liberal system of free public schools . . .¹⁹¹

And this was only half of the preamble! The draft went on to include what would ultimately become Article X, Section 10, mandating that all public schools, colleges, and universities be open to all “without regard to race or color.”¹⁹²

The issue of separate schools inevitably arose—this time, however, in the guise of debates over compulsory school attendance. Interestingly, this debate was largely among Black delegates. Robert DeLarge, a delegate representing Charleston (whose father had been a free Black slaveholder¹⁹³) felt that compelling parents to educate their children was unrepugnant.¹⁹⁴ Further, DeLarge worried that the racial history and makeup of the state would make the implementation of compulsory attendance extremely difficult:

Again, this clause will lead to difficulties of a serious character, to which neither you nor myself can blind our eyes. In Massachusetts there is a population cradled in the arms of freedom and liberty, free of all prejudice and devoid of passion, to a great extent. In South Carolina we have an entirely different set of people. We are about to inaugurate great changes, which it is our desire shall be successful.¹⁹⁵

This comment received quick indignation from other delegates. “Do I understand you to say that the people of Massachusetts have no prejudices of race?”¹⁹⁶

With the temperature of debate clearly rising, DeLarge responded that while he supported schools being open “to all persons, irrespective of color,” a provision compelling attendance

may be used by our enemies to appeal to the worst passions of a class of people in this State. The schools may be opened to all . . . but to declare that parents “shall” send their children to them whether they are willing

191. *Id.* at 264.

192. *Id.* at 266.

193. FONER, *supra* note 125, at 61.

194. S.C. PROCEEDINGS, *supra* note 183, at 686–87.

195. *Id.* at 687.

196. *Id.*

or not is, in my judgment, going a step beyond the bounds of prudence.¹⁹⁷

Delegate Ransier quickly rose to quash this line of reasoning. “I contend that in proportion to the education of the people so is their progress in civilization,” he mused.¹⁹⁸ Compulsory education, therefore, was a must. Aiming his polite but fiery rhetoric at DeLarge, he continued, “My friend does not like it, because he says it is contrary to the spirit of republicanism. To be free, however, is not to enjoy unlimited license, or my friend himself might desire to enslave again his fellow men.”¹⁹⁹ It seems this may have been a reference to DeLarge’s family’s previous status as Black slaveholders. Ransier continued, “Civilization and enlightenment follow fast upon the footsteps of the schoolmaster; and if education must be enforced to secure these grand results, I say let the compulsory process go on.”²⁰⁰ Education brought moral advancement, and if the state had had such a guarantee to education in its charter before the war, Ransier argued, the rebellion would not have occurred and “we would not have been called upon to mourn the loss of the flower of the youth of our country.”²⁰¹

Other Black delegates offered forceful support of compulsory education. Benjamin Randolph, a Black delegate and Oberlin graduate, argued that the state militia could be used to force parents to send their children to the public schools.²⁰² Randolph believed that compulsory education was “for the protection of all the citizens of a State, and the promotion of the general welfare.”²⁰³ Of education, he continued:

Blackstone lays it down as one of the objects, the furthering, as far as it can consistently be done, of the general welfare of the people It proposes to further civilization, and I look upon it as one of the most important results which will follow the defeat of the rebel armies, the establishment among the people who have long been deprived of the privilege of education, a law which will compel parents to send their children to school.²⁰⁴

197. *Id.*

198. *Id.* at 688.

199. *Id.*

200. *Id.*

201. *Id.* at 688–89.

202. *Id.* at 689.

203. *Id.* at 689–90.

204. *Id.* at 690.

Randolph detailed his experience as a school principal, noting that school attendance was a vital issue with which teachers constantly grappled.²⁰⁵ Randolph would be murdered by Ku Klux Klan members just months later while he was campaigning in Abbeville County.²⁰⁶

The delegates seemed to agree that the real issue was white students. Could they be compelled to go to a mixed school if their parents could not afford to send them to private school? Francis Cardozo, who had been educated at the University of Glasgow and later led the Temple Street Congregational Church in New Haven, Connecticut, before moving to South Carolina,²⁰⁷ tried to couch mixed schools in as uncontroversial a light as possible: “We only compel parents to send their children to some school, not that they shall send them with the colored children; we simply give those colored children who desire to go to white schools, the privilege to do so.”²⁰⁸ John Chestnut, a formerly enslaved man representing Kershaw County, did not mince words:

[Y]ou cannot by any persuasive and reasonable means establish civilization among an ignorant and degraded community, such as we have in our country. Force is necessary, and, for one, I say let force be used. Republicanism has given us freedom, equal rights, and equal laws. Republicanism must also give us education and wisdom.²⁰⁹

Chestnut was most concerned with compelling the attendance of Black students, and he believed that if white parents refused to send their children to mixed schools, the “consequences will rest with themselves.”²¹⁰

A white delegate also stood to support compulsory education, fearing that parents would “lock up their children at home.”²¹¹ “I have seen white children sitting by the side of colored children in school,” he continued, “and observed that there could not have been better friends. I do not want the privilege of attending schools confined by any exclusive class. We want no laws made here to prevent children from attending school.”²¹²

The conversation in the hall continued to boil. Eventually, one white delegate blamed what he viewed as the radical bent of the constitutional text on delegates

205. *Id.*

206. FONER, *supra* note 125, at 176.

207. *Id.* at 39; Joe M. Richardson, *Francis L. Cardozo: Black Educator During Reconstruction*, 48 J. NEGRO EDUC. 73, 73 (1979).

208. S.C. PROCEEDINGS, *supra* note 183, at 691.

209. *Id.* at 692; *see* FONER, *supra* note 125, at 45.

210. S.C. PROCEEDINGS, *supra* note 183, at 692.

211. *Id.* at 693.

212. *Id.* at 694.

hailing from the North and surmised the text would not pass a public vote. Cardozo objected strongly to this implication: "I would simply say, that I do not think there is a colored delegate but what knows that we have carried the Convention against the white people of this State, and will carry the Constitution also."²¹³ He repeated his view that the text would not force white and Black children to go to school together, but would rather ensure Black children could attend any school.²¹⁴

The meeting adjourned with no resolution.²¹⁵ The next day, March 4, Cardozo gave a lengthy speech meant to push the convention past the compelled-education logjam. He again repeated that the constitution, as drafted, did not force white and Black children to go to school with one another. If white parents wanted their children to be in a segregated school, they could pay for private education. He argued that the free-schools provision

does not say, nor does the report in any part say there shall not be separate schools. There can be separate schools for white and colored. It is simply left so that if any colored child wishes to go to a white school, it shall have the privilege to do so.²¹⁶

He believed, in fact, that most Black parents would want their children in "separate schools, particularly until some of the present prejudice against their race is removed."²¹⁷ Speaking directly to the Black members of the convention, Cardozo stated:

I do desire we shall use the opportunities we now have to our best advantage, as we may not ever have a more propitious time. We know when the old aristocracy and ruling power of this State get into power, as they undoubtedly will, because intelligence and wealth will win in the long run, they will never pass such a law as this. Why? Because their power is built on and sustained by ignorance.²¹⁸

Eager to push the measure through, Cardozo added an amendment that would ensure attendance could not be compulsory until the school system had been

²¹³. *Id.* at 703.

²¹⁴. *Id.*

²¹⁵. *Id.*

²¹⁶. *Id.* at 706.

²¹⁷. *Id.*

²¹⁸. *Id.* at 707.

fully organized. The amendment and the constitutional provision, as a whole, passed.²¹⁹ Compelled attendance, however weakened, survived.

Opponents of integrated common schools continued to push back against reformist efforts. On the fifty-first day of the convention, March 14, a white delegate, B.O. Duncan, gave a lengthy speech against what would become Article X, Section 10 (the core common-school provision), arguing that compelling mixed schools would undo the progress underway in the state toward increasing educational opportunities for Black students.²²⁰ Doing so would sow discord: “[Y]ou bring trouble, quarrelling [sic] and wrangling, into every neighborhood.”²²¹ He proposed that schools be “separate” but “impartial in their organization.”²²² As the final vote on the section neared, Cardozo again assured the room that the language did not command that schools be integrated—indeed, “there may be separate schools, and I have no doubt there will be such in most of the districts The colored pupils in my school would not like to go to a white school.”²²³ The text passed ninety-eight votes to four.²²⁴ When the convention ended, its president noted triumphantly, “Thus have we broadly sown the seeds of public education, and thus shall we, in no distant time, reap the rich harvest of public virtue.”²²⁵

The South Carolina Reconstruction convention and constitution are of singular significance and deserve a unique place in historical-legal arguments about the Reconstruction Amendments. When given voting power at the constitutional crux of the nation, Black South Carolinians elected a majority Black delegation charged with reworking their state constitution. These delegates chose to mandate that public schools be established and open to all races for all age levels; the people of the state ratified this choice.

D. Texas: “Equally Distributed Among All the Scholastic Population”

Texas—which would eventually spawn both *Rodriguez* and *Plyler* roughly a century later—adds a unique perspective to our discussion. The state adopted a constitution in 1866, before Black Texan men could vote, and then adopted a new constitution in 1869, following the Reconstruction Act of 1867. The

²¹⁹. *Id.* at 708–09.

²²⁰. *Id.* at 889–94.

²²¹. *Id.* at 891.

²²². *Id.* at 892.

²²³. *Id.* at 901.

²²⁴. *Id.* at 901–02.

²²⁵. *Id.* at 925.

constitutional convention that produced the 1866 text had no Black delegates²²⁶ and specifically provided for segregated schools.²²⁷ The constitutional convention that produced the 1869 text had nine Black delegates and did not sanction segregation in education.²²⁸ While the exact contours of the Texas constitutional convention's debate over segregated schools are difficult to distill from the existing record, the record reflects a final decision to remove a previously adopted segregation provision, underscoring the efforts of Republican delegates to block the inclusion of such language.

The 1866 Constitution decreed, "The Legislature shall, as early as practicable, establish a system of free schools throughout the State."²²⁹ It provided for a "perpetual fund exclusively for the education of all the white scholastic inhabitants of this State."²³⁰ Five sections later, the text permitted the state legislature to levy a tax for supporting schools

provided, that all the sums arising from said tax which may be collected from Africans, or persons of African descent, shall be exclusively appropriated for the maintenance of a system of public schools for Africans and their children; and it shall be the duty of the Legislature to encourage schools among these people.²³¹

The Reconstruction constitution of 1869 – despite sharing many identical provisions – was a clear break from Texas's constitutional status quo. Its bill of rights (the first article of the text) began by denouncing "the heresies of nullification and secession."²³² Further, the bill of rights had a unique provision, one

226. *The 1860s: Reconstruction*, TEX. ST. LIBR. & ARCHIVES COMM'N, <https://www.tsl.texas.gov/exhibits/forever/freedom/page5.html> [<https://perma.cc/7BEC-P2SG>].

227. TEX. CONST. of 1866, art. X, § 2 ("[T]he public school fund . . . shall be a perpetual fund exclusively for the education of all the white scholastic inhabitants of the State, and no law shall ever be made appropriating said fund to any other use or purpose whatsoever." (formatting altered)). For a valuable online archive of Texas constitutions during this period, see Tarlton L. Libr., *Constitutions of Texas 1824-1876*, TEX. L., <https://tarlton.law.utexas.edu/c.php?g=787043&p=5635509> [<https://perma.cc/P63S-SHZ2>].

228. CHARLES WILLIAM RAMSDELL, *RECONSTRUCTION IN TEXAS* 201 (1910). However, another source notes the number of Black delegates as ten. Claude Elliot, *The Texas Constitutional Convention of 1868-69: A Struggle for Civil Rights and Governance* (1952), reprinted by TEX. ST. HIST. ASS'N, *HANDBOOK OF TEXAS* (Oct. 19, 2020), <https://www.tshaonline.org/handbook/entries/constitutional-convention-of-1868-69> [<https://perma.cc/7N4T-Y7AB>]; *The 1860s: The 1868-69 Constitutional Convention*, TEX. ST. LIBR. & ARCHIVES COMM'N, <https://www.tsl.texas.gov/exhibits/forever/freedom/page6.html> [<https://perma.cc/8NCM-VYH7>].

229. TEX. CONST. of 1866, art. X, § 2.

230. *Id.* art. X, § 2 (formatting altered).

231. *Id.* art. X, § 7 (emphasis omitted).

232. TEX. CONST. of 1869, art. I.

seemingly meant to mirror the Fourteenth Amendment: “The equality of all persons before the law is herein recognized, and shall ever remain inviolate; nor shall any citizen ever be deprived of any right, privilege, or immunity, nor be exempted from any burdens, or duty, on account of race, color, or previous condition.”²³³

Article IX on “Public Schools” was substantially different from its 1866 predecessor. Any mention of race or disparate treatment had been conspicuously excised from the text. It began, “It shall be the duty of the Legislature of this State, to make suitable provisions for the support and maintenance of a system of Public Free Schools, for the gratuitous instruction of all the inhabitants of this State, between the ages of six and eighteen years.”²³⁴ The Public School Fund, outlined in Section VI, had no mention of segregated funds for segregated schools.²³⁵ Its language mirrored the 1866 text, with the clear omission of segregation: “And said fund and the income derived therefrom, and the taxes herein provided for school purposes, shall be a perpetual fund, to be applied, as needed, exclusively for the education of all the scholastic inhabitants of this State.”²³⁶ The Article closed with a section stressing that it was “the imperative duty of the Legislature to see to it, that all the children in the State, within the scholastic age, are, without delay, provided with ample means of education” and that appropriations for the schools would “be equally distributed among all the scholastic population of the State.”²³⁷ As the next Part explains, this crucial fact was absent in Justice Powell’s opinion in *Rodriguez*.

From the outset, establishing a free public-school system for all Texas children was a priority for the 1868 constitutional convention.²³⁸ The education committee eventually consisted of eight delegates, two of whom were Black—Ralph Long, who had been born enslaved, and George Ruby, who had been a correspondent for the *National Anti-Slavery Standard* in Louisiana and an agent

²³³ *Id.* art. I, § XXI.

²³⁴ *Id.* art. IX, § I; *see also id.* art. IX, § IV (“The Legislature shall establish a uniform system of Public Free Schools throughout the State.”).

²³⁵ *Id.* art. IX, § VI.

²³⁶ *Id.*

²³⁷ *Id.* art. IX, § IX.

²³⁸ Governor E.M. Pease exhorted the convention to “make a liberal provision, by taxation upon property, for the immediate establishment of Free Public Schools for the education of every child in the State.” 1 JOURNAL OF THE RECONSTRUCTION CONVENTION, WHICH MET AT AUSTIN, TEXAS, JUNE 1, A.D., 1868, at 14 (Austin, Tracy, Siemering & Co. 1870) [hereinafter TEX. JOURNAL FIRST SESSION].

for the Freedmen's Bureau in Texas.²³⁹ Ruby had opened schools for Black students in Louisiana before coming to Texas, and he taught at a school in Galveston (the district he represented at the convention).²⁴⁰

On June 27, one delegate proposed a declaration that a quarter of taxes raised by the state “shall be sacredly dedicated to the education of the children living and resident in the State, without regard to race, color and previous condition.”²⁴¹ A few days later, a similar resolution was proposed by another member to ensure that the “school fund” established by the constitution would “forever remain a sacred trust, solely for the education of the children of Texas, regardless of race or color, or former condition.”²⁴² When the committee released its initial draft of the constitutional text on education, the committee chairman, Joseph Talbot, introduced it by observing that “[t]he necessity that exists in all free States for the education of all the children of the State, has come to be so universally acknowledged, that no argument appears necessary to justify the committee in having made so liberal provision for the support and maintenance of public schools.”²⁴³

Interestingly, the proposed text of the article on education specifically mandated that schooling be provided “without distinction on account of race, color or previous position,” but this language does not appear in the final constitutional text.²⁴⁴ While this might appear to cast doubt on the convention's stance

239. *Id.* at 25, 33; FONER, *supra* note 125, at 136, 187; see also Paul M. Lucko, *Ralph Long: Delegate of the 1868 Constitutional Convention*, TEX. ST. HIST. ASS'N (Nov. 22, 2020), <https://www.tshaonline.org/handbook/entries/long-ralph> [<https://perma.cc/R4ZS-WCG2>] (providing a biography of Ralph Long).

240. FONER, *supra* note 125, at 187. For more on Ruby's time as a Louisiana educator, see generally Barry A. Crouch, *Black Education in Civil War and Reconstruction Louisiana: George T. Ruby, the Army, and the Freedmen's Bureau*, 38 LA. HIST. 287 (1997).

241. TEX. JOURNAL FIRST SESSION, *supra* note 238, at 157–58.

242. *Id.* at 182, 185.

243. *Id.* at 610.

244. *Id.* (“A general diffusion of knowledge being essential to the preservation of the rights and liberties of the people, it shall be the duty of the Legislature of this State to make suitable provision for the support and maintenance of a system of public free schools, for the gratuitous instruction of all the scholastic inhabitants of the State between the ages of six and eighteen years, without distinction on account of race, color or previous condition.”); see also RAMSDELL, *supra* note 228, at 228 (“The most noteworthy features of that report were the provisions for increasing the existing permanent school fund by adding to it all money to be received from the sale of the public domain, and for applying all the available fund to the education of all children within the scholastic age—from six to eighteen years—without distinction of race or color.”). The final, ratified text of Section I read: “It shall be the duty of the Legislature of this State, to make suitable provisions for the support and maintenance of a system of Public Free Schools, for the gratuitous instruction of all the inhabitants of this State, between the ages of six and eighteen years.” TEX. CONST. of 1869, art. IX, § I.

on segregation and education, a closer look at the convention debates reveals that delegates (including both Long and Ruby) staved off an extended—and nearly successful—attempt to constitutionalize explicitly segregated schooling. One such proposal began by mandating an “equal and uniform” school system that would supply “whites and blacks the same benefits,” but ended by mandating “provisions shall be made in said law to keep the races separate, to avoid prejudice that would otherwise arise.”²⁴⁵ After this provision failed, another was suggested that blatantly commanded “the Board of Education to establish separate schools for white children and for colored children.”²⁴⁶ It appears that this segregation provision *passed*.²⁴⁷

What followed is difficult to glean clearly from the available record. After the convention reconvened for its second session, beginning in December 1868, there was a successful movement to have the education report “recommitted” to the committee on education.²⁴⁸ After reviewing the report, the committee sent it back to the full convention with *no changes* to the original text.²⁴⁹ This meant the segregation provision was essentially erased. Newspaper reports supply little clarity on these events. An early historian of Reconstruction in Texas confirms, however, that the education committee specifically crafted the school-funding system “without distinction of race or color” and notes that “[t]he convention was careful to wipe out all such distinctions wherever they had previously existed.”²⁵⁰ Despite the less clear historical record of Texas’s constitutional revolution, we can still discern the key theme present in the other state case studies: the absence of language constitutionalizing segregated education was a victory for Republican delegates. Further, it was a victory not easily won. The efforts of biracial coalitions of Republican state politicians to establish public-school systems free of constitutionalized segregation across the geographic breadth of the South demonstrates that these constitutional actors believed such systems were part and parcel of the broader constitutional change brought by Reconstruction.

245. TEX. JOURNAL FIRST SESSION, *supra* note 238, at 896.

246. *Id.* at 897-98.

247. *Id.* at 897-98, 911-12.

248. 2 JOURNAL OF THE RECONSTRUCTION CONVENTION, WHICH MET AT AUSTIN, TEXAS, DEC. 7, A.D. 1868: SECOND SESSION 146-47 (Austin, Tracy, Siemering & Co. 1870) [hereinafter TEX. JOURNAL SECOND SESSION]. For a brief description of the adjournment and passage, see RAMSDELL, *supra* note 228, at 228.

249. TEX. JOURNAL SECOND SESSION, *supra* note 248, at 229.

250. RAMSDELL, *supra* note 228, at 228.

E. Louisiana: "There Shall Be No Separate Schools"

The Louisiana convention, which met from November 1867 to March 1868,²⁵¹ produced a particularly emphatic and forward-looking text. Title VII on "Public Education" unambiguously repudiated segregated schooling:

The General Assembly shall establish at least one free public school in every parish throughout the State, and shall provide for its support by taxation or otherwise. All children of this State between the ages of six (6) and twenty-one (21) shall be admitted to the public schools or other institutions of learning sustained or established by the State in common without distinction of race, color, or previous condition. There shall be no separate schools or institutions of learning established exclusively for any race by the State of Louisiana.²⁵²

Further, Title VII ordered the foundation of a University of New Orleans that Black Louisianians could attend: "It shall be composed of a law, a medical, and a collegiate department," and "all departments of this institution of learning shall be opened in common to all students capable of matriculating."²⁵³ The article stressed that "[n]o rules or regulations shall be made . . . violating the letter or spirit of the articles under this title."²⁵⁴ While avoiding the direct anti-segregation language of the article on primary and secondary schools, this provision was clear—the University of New Orleans was established on paper to be open to Louisianians irrespective of race.

In the September 1867 election of delegates to the Louisiana constitutional convention, 127,639 people were recorded as registered to vote; 82,907 of these were Black Louisianians.²⁵⁵ The ninety-eight delegates were evenly split—forty-nine Black delegates and forty-nine white ones.²⁵⁶ The convention opened on November 23, 1867, and soon a Committee on Public Education, comprised of thirteen members, was formed.²⁵⁷ Henry G. Bonseignuer, Ovide C. Blandin, William Butler, Dennis Burrell, and Pierre G. Deslonde were the Black delegates

251. See OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE CONVENTION FOR FRAMING A CONSTITUTION FOR THE STATE OF LOUISIANA 3, 287 (New Orleans, J.B. Roudanez & Co. 1868) [hereinafter LA. JOURNAL].

252. LA. CONST. of 1868, tit. VII, art. 135.

253. *Id.* tit. VII, art. 142.

254. *Id.*

255. Charles Vincent, *Negro Leadership and Programs in the Louisiana Constitutional Convention of 1868*, 10 LA. HIST. 339, 341 (1969).

256. *Id.*

257. LA. JOURNAL, *supra* note 251, at 3, 8, 13.

who sat on the committee.²⁵⁸ Deslonde would go on to serve both in the Louisiana legislature and as Louisiana Secretary of State.²⁵⁹

Education was first broached on the floor of the convention on the sixth day, when James Ingraham proposed draft provisions instituting a public-school system:

Section 1. The General Assembly shall provide by law at its first session after the adoption of this Constitution, for the establishment of at least one Free Public School in every parish in the State.

Sec. 2. The children of all the residents of the State shall attend school in the same schoolhouses.²⁶⁰

Ingraham — who was emancipated at the age of six, rose to the rank of captain in the Union army, became a prominent activist voice in New Orleans, and later sat on the board of trustees of the University of New Orleans — was the chair of the convention’s Committee on the Bill of Rights.²⁶¹ With these proposed provisions, Ingraham set the expectation early on that *integrated* schools would be a priority of the convention. Soon after, another delegate rose and offered his own proposed education provisions, including the language, “All children of this State between the ages of six and eighteen, shall be admitted to the public schools in common, without distinction of race, color, or previous condition. There shall be no separate schools established for any race.”²⁶² This second set of provisions called for the establishment of a university in New Orleans that would be open to matriculation “without distinction of race, color, or previous condition.”²⁶³

In a stark moment epitomizing the political realities of the convention, the Committee on Public Education submitted two different proposed constitutional texts — one dubbed the “minority report,” signed by four white delegates, and the other the “report of the majority,” signed by a coalition of five Black delegates and two white delegates.²⁶⁴ What was the conspicuous difference between the two? The majority report mandated integrated schools. It was this report —

258. *Id.* at 13; see FONER, *supra* note 125, at 249–51.

259. FONER, *supra* note 125, at 62.

260. LA. JOURNAL, *supra* note 251, at 16–17.

261. *Id.* at 13; FONER, *supra* note 125, at 113–14.

262. LA. JOURNAL, *supra* note 251, at 17. For another proposal for education “of every race and color, without regard to any previous condition,” see *id.* at 45.

263. *Id.* at 17. One can compare this proposal to the future iterations of the text considered by the convention. See *id.* at 108, 203.

264. *Id.* at 60–61. For a list of Black delegates at the convention, see A.E. Perkins, *Some Negro Officers and Legislators in Louisiana*, 14 J. NEGRO HIST. 523, 526 (1929).

containing the command, “There shall be no separate schools established for any exclusive race by the State of Louisiana” — that would morph into the ratified text.²⁶⁵

The main language mandating integrated schools was adopted sixty-one to twelve, but the vote provoked considerable consternation from certain members. One delegate complained, “I do most heartily protest against the 134th article of the Constitution, and think it will be the great means of defeating the Constitution on the day of ratification.”²⁶⁶ One nay voter supported the system but wished it included children starting at the age of four as opposed to six.²⁶⁷ A white Republican nay voter assured the hall, “I am a friend of all men, and more especially of all children, regardless of race or color,” but believed forcing integration would lead to the exclusion of Black children from the schools.²⁶⁸ Thomas Martin, a Black delegate representing Jefferson Parish, also recorded the reasons for his aye vote, arguing that the system “will elevate and enrich the community, which ignorance dishonored and burthened.”²⁶⁹

Interestingly, when the article about the university in New Orleans was brought to the floor, one delegate tried to insert the language “without distinction of race, color or previous condition” regarding the matriculation of students.²⁷⁰ This amendment was unsuccessful, and the text moved forward as originally drafted (saying only that the university would “be open in common to all students capable of matriculating”).²⁷¹

Despite attempts to make the language of the constitutional text less unambiguously integrationist, the text survived and continued to spark consternation.²⁷² Once the text was adopted, Victor M. Lange, a Black ice-cream seller representing East Baton Rouge, told the convention that he supported the document in part because “the free school system, secures to my child and to all children throughout the State their education which their forefathers have been deprived of for two hundred and fifty years.”²⁷³ Two white delegates lodged an official protest listing several reasons for rejecting the constitution, one of which read, “[A] system of public education is forced upon the people, whereby the whites, who are to support the schools by taxes levied on their property, will be

265. LA. JOURNAL, *supra* note 251, at 60.

266. *Id.* at 201.

267. *Id.*

268. *Id.*

269. *Id.*; see also *id.* at 8, 54 (noting that Martin represented Jefferson).

270. *Id.* at 203.

271. *Id.*

272. See *id.* at 240, 268.

273. *Id.* at 289; see FONER, *supra* note 125, at 127.

practically debarred of the advantages of the public schools. Mixed schools will not elevate the negroes, but will debase the whites.”²⁷⁴ A similar protest lodged by another white delegate echoed these concerns, adding that the public-school provisions were “another attempt to establish, by law, the social equality of all classes and color. I believe the system will work irreparable injury to the colored race — because the whites will never mix with them or allow their children to go to the same schools”²⁷⁵ The protest ended with bitingly racist condescension: “I accepted a position in this body . . . believing also, the freedmen of the State could be made to understand their best interests. I have been sadly deceived.”²⁷⁶ Louisianans voted to ratify the constitution, 51,737 to 39,076.²⁷⁷

The example of Louisiana confirms what we have seen in the previous case studies. Establishing universal public-school systems — free from constitutionalized segregation — was seen by Republican delegates as a core aspect of their Reconstruction project. Louisiana went further in explicitly denouncing separate schools. We can comfortably surmise that the particularly large proportion of Black delegates (one-half of the overall convention body) helped make this result achievable. The somewhat-opaque language regarding university-level education is particularly interesting. On its face, the final language appears to forbid mandated separate schooling. But the failed attempt to more explicitly guarantee integrated education at the university level is equally telling. Reformist Louisiana Republican delegates, like their colleagues in other state conventions, faced consistent opposition to their efforts, but their vision of the constitutional revolution they were living through won the day.

F. The Contested Rebirth of American Schooling

It is worth taking stock of what these documents show. Each state demonstrates key aspects of the constitutionalization of public education during Reconstruction. Virginia exhibits the intensity of debates over whether to insert the language of segregation into the new public-school provisions. The state constitution’s final lack of any language of segregated schooling belies the extent of contestation that produced that constitutional absence. In Virginia and other states, the idea of children of different races attending school together prompted scores of amendments, responses, motions, and virulently racist statements. White and Black Republicans pushed back against the vociferous efforts of those still sympathetic to the Confederate cause. These successful efforts, in most cases

274. LA. JOURNAL, *supra* note 251, at 290–91.

275. *Id.* at 292.

276. *Id.*

277. Vincent, *supra* note 255, at 350.

(save Louisiana and South Carolina), produced constitutional silences of immense interpretive and legal value.

North Carolina similarly demonstrated the intensity of debate on the issue of segregated schooling. Further, that convention elucidates how white Southerners interpreted the *lack* of constitutionally mandated segregated schooling. Often, they viewed the absence of the language of segregation as raising the distinct danger of interracial schools. This silence on segregation was explosive. Further, in the example of North Carolina, we see articulations of a theme present in discussions of affirmative action today: claims that activists are using the language of equality as a tool to enforce *preference* for Black Americans. Of course, perhaps the most significant aspect of the North Carolina constitution (and its convention) was the explicit espousal of education as a *right* of North Carolinians. Further, as under Texas's Reconstruction state constitution, equal access to schooling entailed equal funding as well.

In Louisiana, which constitutionalized integrated schooling seemingly through the university level, there were echoes of these complaints by white Southerners who bitterly protested what they viewed as attempts to enforce "social equality." Such complaints—and an entire alternate text proposed by a minority of the education committee—were defeated. Similarly, South Carolina's convention—in which Black delegates held a substantial majority and held four of nine seats on the Committee on Education—constitutionalized integrated schooling through the university level. One struggles to imagine stronger evidence that Black constitutional actors in this moment saw education as a core component of the equality Reconstruction was meant to guarantee. But Louisiana's and South Carolina's conventions also demonstrated a larger truth across the conventions: Black delegates frequently disagreed with each other and expressed varying degrees of comfort and discomfort with the idea of integrated schools. What remained consistent, however, was their successful effort to keep the language of segregated schooling out of these constitutional texts.

There were certainly distinctions among these states and their conventions. Each state had a different historical and economic relationship to slavery. Similarly, the racial and political makeup of the conventions varied quite widely. Across the board, however, we see broadly the same constitutional clash play out. Reactionary white delegates sought to constitutionalize segregated schooling, and biracial coalitions of Republican delegates defeated them. This clash took place against a backdrop of unified belief in the necessity of constitutionalizing common-school systems. While most, if not all, school systems would quickly become segregated, the difference between Jim Crow legalized and Jim Crow constitutionalized is indeed a significant one. Many of these state-level constitutional actors believed that their task of creating state constitutions in the image

of the reconstructing Federal Constitution entailed constitutionalizing public-school systems and keeping the language of segregated schooling at bay.

Having assessed education in the constitutions and constitutional conventions of Virginia, North Carolina, South Carolina, Texas, and Louisiana during Reconstruction, we can ask whether this history troubles *Brown*'s methodological bargain. Do these debates and the texts they generated trouble any attempt to dismiss this history as merely inconclusive? To put it another way: is this the narrative we see in *Brown*? No. While *Brown* unambiguously reached the right conclusion, its rejection of historical analysis has reverberated throughout the jurisprudence of public schooling and affirmative action.

These documents reveal that establishing universal public schools—free from constitutional mandates of segregation—was a core component of these delegates' constitutional project. Further, we see in these debates and texts a group of pivotal constitutional actors who are often completely overlooked in constitutional-interpretation methodologies based on historical analyses of original public meaning.

III. REVISITING THE DESCENDANTS OF *BROWN*'S INCONCLUSIVENESS

This Part assesses two cases, *San Antonio Independent School District v. Rodriguez* and *Plyler v. Doe*, that severely limited the possibility of arguing for a constitutional right to education, and then it turns to *SFFA*. In *Rodriguez* and *Plyler*, the Court vociferously invoked *Brown* and mirrored its ambivalence regarding the value of history in assessing American children's right to the schoolhouse. Rather than treat these two cases as an equal-protection dead end, though, this Part focuses on how the history above both unsettles aspects of their reasoning and suggests vectors for forward movement. Further, the Court's recent decision in *SFFA* not only underscores the challenges flowing from these cases but also highlights how Reconstruction state constitutional conventions can help address those challenges.

A. *Rodriguez* and the Missing Reconstruction Context

The reasoning in *San Antonio Independent School District v. Rodriguez*, in which the Court held that education was not a fundamental right, overlooked the key Reconstruction history described above. *Rodriguez* dealt with an equal-protection claim brought against Texas's financing scheme for its public-school system.²⁷⁸ The dispersion of funds partially depended on a district's "share of

278. *S.A. Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 6 (1973).

assessable property” within a given county.²⁷⁹ The plaintiffs took two equal-protection routes in their suit: (1) claiming the system discriminated against poor Texans, which constituted a suspect class, and (2) arguing education was a fundamental right.²⁸⁰ Either of these would trigger strict scrutiny, which Texas “virtually concede[d]” it could not meet.²⁸¹ The Court rejected both equal-protection arguments, and the decision holds an ominous place in education law for its holding that “[e]ducation, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.”²⁸²

The *Rodriguez* decision, as it relates to the place of education in the United States’s constitutional order, suffers from three defects. First, Justice Powell’s opinion erroneously conflated the “importance” and “significance” of a potential right with an assessment of the right’s fundamentality. Second, this conflation led to a misplaced discussion on the role of the judiciary in establishing fundamental rights for the American public. Third, the opinion offered an impoverished assessment of the history of education in Texas, one that skipped over Reconstruction, missing the strongest historical evidence for some form of a right to education. That said, *Rodriguez*’s idea of “some identifiable quantum of education”²⁸³ that might warrant protection offers a path forward.

Beginning his assessment of education as a potential fundamental right, Justice Powell started in a natural place, with *Brown*. Powell quoted *Brown*’s premise “that ‘education is perhaps the most important function of state and local governments.’”²⁸⁴ Powell went on, “This theme, expressing an abiding respect for the vital role of education in a free society, may be found in numerous opinions of Justices of this Court writing both before and after *Brown* was decided.”²⁸⁵ Powell tripled down on this theme and noted, “We are in complete agreement with the conclusion of the three-judge panel below that ‘the grave significance of education both to the individual and to our society’ cannot be doubted.”²⁸⁶

The proper question, however, was not whether education was important, vital, or significant to American life, but rather whether it was a *fundamental* right inherent in the country’s constitutional order. While importance and fundamentality are no doubt linked, conflating the concepts created a category error that

279. *Id.* at 9–10.

280. *Id.* at 16.

281. *Id.*

282. *Id.* at 35.

283. *Id.* at 36.

284. *Id.* at 29 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

285. *Id.* at 30 (collecting cases).

286. *Id.* (quoting *Rodriguez v. S.A. Indep. Sch. Dist.*, 337 F. Supp. 280, 283 (W.D. Tex. 1971)).

infected the *Rodriguez* Court's analysis in a doctrinally significant way. Rather than address the particular history of education and its unique connection to human dignity and development, Justice Powell instead answered a far simpler question that few people were asking: Does the mere fact that a potential right is important mean it is fundamental and therefore guaranteed by the Constitution? Clearly not. Or, in Powell's words: "But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause."²⁸⁷

The stress on importance allowed the Court to rest its decision on inapt comparisons to other significant human needs. In *Lindsey v. Normet*,²⁸⁸ decided the term before, the Court had rejected the idea that the "need for decent shelter" and "right to retain peaceful possession of one's home" were fundamental rights.²⁸⁹ Justice Powell quoted *Lindsey's* reasoning, "We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill."²⁹⁰ Powell then turned to *Dandridge v. Williams*, which concerned welfare benefits under the Aid to Families with Dependent Children program.²⁹¹ Again, Powell noted that "the central importance of welfare benefits to the poor" could not affect the Court's equal-protection analysis.²⁹²

Justice Powell's category error was intertwined with a second mistake, the Court's misplaced discussion of the judiciary's role in "constitutional analysis of legislative classifications involving questions of economic and social policy."²⁹³ This argument simply reformulated the "importance" strawman assessed above. Quoting Justice Stewart's concurrence in *Shapiro v. Thompson*, Powell noted that the Court was not meant to "pick out particular human activities, characterize them as 'fundamental,' and give them added protection."²⁹⁴ To do so would be to take on "a legislative role."²⁹⁵ In other words, it would be improper for the Court to use metrics like significance and importance as cover for making policy decisions about whether a societal value deserved the title of right, with its

²⁸⁷. *Id.*

²⁸⁸. 405 U.S. 56 (1972).

²⁸⁹. *Rodriguez*, 411 U.S. at 32 (quoting *Lindsey*, 405 U.S. at 73).

²⁹⁰. *Id.* (quoting *Lindsey*, 405 U.S. at 74).

²⁹¹. 397 U.S. 471, 472-73 (1970).

²⁹². *Rodriguez*, 411 U.S. at 33.

²⁹³. *Id.*

²⁹⁴. *Id.* at 31 (quoting *Shapiro v. Thompson*, 394 U.S. 618, 642 (1969) (Stewart, J., concurring)).

²⁹⁵. *Id.*

concomitant protections.²⁹⁶ The core black-letter question was “whether there is a right to education explicitly or implicitly guaranteed by the Constitution.”²⁹⁷

This rule is hardly objectionable, but Justice Powell’s discussion of significance and the proper role of the Court took the place of assessing the right in question, education. His reasoning took an odd path: education is important; importance is not adequate to establish a right; establishing a right based on importance would be an improper use of judicial power; we must instead look to the Constitution; and education is not protected explicitly or implicitly in the document. In other words, Powell reached his conclusion before probing the precise alleged right in question.²⁹⁸ He, instead, could have assessed the unique qualities of education and determined whether those qualities necessitated constitutional coverage. Powell relied on the shaky argument of importance and the judicial role to bypass the more challenging question of whether education was implicitly protected by Constitution.

Finally, *Rodriguez* purported to explore the history of education in Texas but provided a skeletal account that left out Reconstruction. The Court began its assessment of Texas’s school-funding system with a discussion of its nineteenth-century roots. “The first Texas State Constitution promulgated upon Texas’ entry into the Union in 1845, provided for the establishment of a system of free schools,” the Court noted.²⁹⁹ Justice Powell even included in the footnotes substantial language from the 1845 constitution.³⁰⁰ With little fanfare, he proceeded to skip right over Reconstruction: “As early as 1883, the state constitution was amended to provide for the creation of local school districts empowered to levy ad valorem taxes”³⁰¹ Within four sentences, Justice Powell was already in the twentieth century, leaving no mention of the most significant constitutional transformation in the nation’s history, one that saw millions of individuals become American citizens and eligible for public schooling.³⁰²

This omission is staggering. First, Justice Powell demonstrated a willingness to grapple with the various iterations of Texas’s constitutional texts, citing various constitutional documents and amendments from 1845, 1876, 1883, and

296. *See id.* at 33.

297. *Id.* at 33–34.

298. Justice Powell proceeded to address education’s relation to speech rights and the right to vote. *Id.* at 34–37. While this discussion exhibited a more substantive grappling with the nature of education, it came after the holding was established and existed mainly to refute the appellee’s arguments. *Id.*

299. *Id.* at 6.

300. *Id.* at 6 n.6 (quoting TEX. CONST. of 1845, art. X, § 1).

301. *Id.* at 6–7.

302. *Id.*

1918.³⁰³ Why skip over the state constitutions of 1866 and 1870? Second, the absence of any discussion of Reconstruction in a case about the Equal Protection Clause of the Fourteenth Amendment—in a decision that consciously turns to history for guidance—was profoundly unfortunate. While Justice Powell was focused specifically on detailing the evolution of Texas’s school-financing system (as opposed to education in the state broadly), the state’s Reconstruction Era constitutions provided ample material for his analysis.

This was a case specifically about alleged discrimination against specific groups of schoolchildren. While the equal-protection claim rested in part on invoking poverty as a suspect class, the case was unambiguously racially coded. The plaintiffs were “Mexican-American parents whose children attend[ed] . . . an urban school district in San Antonio” and “brought a class action on behalf of schoolchildren throughout the State who are members of minority groups or who are poor and reside in school districts having a low property tax base.”³⁰⁴ Yet the Court saw no need to address the racial rebirth of American schooling that paralleled Reconstruction.

As we have seen, the rebirth of education in Texas after the Civil War would have had much to tell the Justices of the *Rodriguez* Court.³⁰⁵ First, the Reconstruction constitutional convention demanded that appropriations for the new public-school system “be equally distributed among all the scholastic population of the State.”³⁰⁶ The precise machinations of the school system were somewhat hazy in the text, and it is not hard to imagine that the system the delegates envisioned would indeed have included a combination of taxation and land sales that did not end up being distributed exactly equally. Still, this provision surely had interpretive value to the *Rodriguez* Court, especially when the Court specifically invoked iterations of the Texas Constitution to divine the historical trajectory of Texas’s public-school-funding system.

At the constitutional crux of Texas history—when scores of individuals became Texas citizens and those who were male achieved suffrage—a biracial coalition of democratically elected officials constitutionalized a free public-school system characterized by equal appropriations across the population. Texans then ratified this constitutional text. Yet this fact was missing in the Supreme Court’s assessment of a claim brought by Texans belonging to a racial minority who argued that the state’s appropriations system illegally disadvantaged their children. *Plyler* would be an important partial corrective to *Rodriguez*, but it would further separate education from fundamental-right status.

303. *Id.* at 6 & n.6, 7 & nn.7–12.

304. *Id.* at 4–5.

305. See *supra* Section II.D.

306. TEX. CONST. of 1869, art. IX, § IX.

B. Plyler's *Backtracking*

Plyler v. Doe, which struck down policies designed to hinder undocumented children's access to public schools, represented a return to the core themes of *Brown*. But the Court once again struggled—without deploying a proper historical foundation—to locate education's place in relation to the Fourteenth Amendment. *Plyler* concerned an equal-protection claim brought against Texas for its policy, initiated in 1975, of withholding school funds for the education of undocumented children and authorizing schools to deny such children enrollment.³⁰⁷ Citing *Rodriguez* while striking down the policy, Justice Brennan observed, "Public education is not a 'right' granted to individuals by the Constitution,"³⁰⁸ but continued, "neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation."³⁰⁹ "Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction," Brennan noted.³¹⁰ Here we begin to see a line of thinking absent in *Rodriguez*—the individual effect of education (or its "deprivation") on a child.

Plyler's interpretation of *Rodriguez* highlights potential paths forward from the earlier decision's restrictive rule. In particular, Justice Brennan discussed at length the role of education as a predicate to a functioning social and political sphere. This reasoning, though, was not far removed from concerns about the *individual* child and education as that child's "means to absorb the values and skills upon which our social order rests."³¹¹ To deprive a child of education was to harm the individual deeply:

The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause.³¹²

307. *Plyler v. Doe*, 457 U.S. 202, 205 (1982).

308. *Id.* at 221 (citing *Rodriguez*, 411 U.S. at 35).

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.* at 222.

Deprivation of educational opportunity “imposes a lifetime hardship,” and the “stigma of illiteracy will mark them for the rest of their lives.”³¹³ While adhering to *Rodriguez*’s holding that education was not a fundamental right, Justice Brennan used this more nuanced assessment of education’s relationship to an individual’s “well-being” and advancement to conclude that this “deprivation” was a constitutional violation. No “substantial state interest” could justify this “denial.”³¹⁴ The doctrinal holding of the case, however, was somewhat unstable. The majority described how the Equal Protection Clause bars state action “inconsistent with elemental constitutional premises.”³¹⁵ But since undocumented children “cannot be treated as a suspect class” and education is not a fundamental right, the Court instead held that Texas’s withholding of funds failed rational-basis review.³¹⁶

The three concurrences enhance *Plyler*’s potential as a corrective to *Rodriguez*. Justice Marshall, in line with his *Rodriguez* dissent, was unambiguous: “I continue to believe that an individual’s interest in education is fundamental”³¹⁷ To him, “a class-based denial of public education is utterly incompatible” with equal protection.³¹⁸ Justice Blackmun, on the other hand, defended his vote with the majority in *Rodriguez*, but gave his own spin on that opinion: “*Rodriguez* implicitly acknowledged that certain interests, though not constitutionally guaranteed, must be accorded a special place in equal protection analysis.”³¹⁹ The textbook case of this was applying strict scrutiny to unequal voting laws.³²⁰ While education was not a fundamental right, in this view, it deserved a higher scrutiny threshold, especially “[g]iven the extraordinary nature of the interest involved” in the case of undocumented children who might be legally able to stay in the country.³²¹ Justice Powell concurred as well, stating, “I agree with the Court that [these] children should not be left on the streets uneducated.”³²² “These children thus have been singled out for a lifelong penalty and stigma. A legislative classification that threatens the creation of an underclass” violated “the fundamental

313. *Id.* at 223.

314. *Id.* at 230.

315. *Id.* at 216.

316. *Id.* at 223.

317. *Id.* at 230 (Marshall, J., concurring).

318. *Id.* at 231.

319. *Id.* at 233 (Blackmun, J., concurring).

320. *Id.* at 233–34.

321. *Id.* at 235–36.

322. *Id.* at 238 (Powell, J., concurring).

purposes of the Fourteenth Amendment.”³²³ Powell repeatedly noted that this situation was “unique.”³²⁴

The upshot of the opinion and these concurrences was that the Court acknowledged—if with a somewhat unsure tone—that education was in fact different. To Justice Brennan, it was not “merely some governmental ‘benefit.’”³²⁵ To Justice Marshall, it was “fundamental.” To Justice Blackmun, it entailed an “extraordinary” interest. To Justice Powell, the author of *Rodriguez*, this was simply a “unique” situation, and the children could not justly be left uneducated. Each of these perspectives is a long way from *Rodriguez*. Further, these statements align better with the way education was treated and talked about during the Reconstruction state constitutional conventions.

Plyler thus reached a satisfying holding, but the Justices further muddled the doctrinal waters originally clouded by *Rodriguez*. Rather than base the decision on a solid historical foundation, the majority instead fell back on trying to make the opinion rhyme jurisprudentially with *Brown*. Basing the opinion on issues of “caste,” “stigma,” and the differential treatment of groups of children, the *Plyler* Court reached the right conclusion by echoing the themes of *Brown*. In doing so, it repeated the exclusion of the constitutionally significant place of education—as a catalyst of both civic participation and individual advancement—in the Reconstruction debates at both the federal and state levels.

Chief Justice Burger’s dissent in *Plyler* helps explain the majority’s missed opportunity. He agreed “without hesitation that it is senseless for an enlightened society to deprive any children—including illegal aliens—of an elementary education.”³²⁶ The issue, in Burger’s eyes, was the majority’s confusing attempt to find a home for education in the Court’s doctrinal framework of the tiers of scrutiny: “[B]y patching together bits and pieces of what might be termed quasi-suspect-class and quasi-fundamental-rights analysis, the Court spins out a theory custom-tailored to the facts of these cases.”³²⁷ Burger’s critique of the majority’s discussion of education is particularly tart but cogent:

[T]he Court’s analysis rests on the premise that, although public education is not a constitutionally guaranteed right, “neither is it merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation.” Whatever meaning or relevance this opaque observation might have in some other context, it simply has no bearing on the issues

323. *Id.* at 238–39.

324. *Id.* at 236, 239.

325. *Id.* at 221 (majority opinion).

326. *Id.* at 242 (Burger, C.J., dissenting).

327. *Id.* at 244.

at hand. Indeed, it is never made clear what the Court's opinion means on this score.³²⁸

The majority's discussion of the importance of education, in other words, is irrelevant given the firm framework set by *Rodriguez*.³²⁹ Education is not a fundamental right, so there is no application of strict scrutiny. Burger rejected what he viewed as the majority's attempt to circumvent the straightforward holding of *Rodriguez* in particular and the Court's doctrine of the tiers of scrutiny more broadly.³³⁰ He zeroed in on perhaps the core uncertainty of the *Plyler* opinion: "[T]he Court points to no meaningful way to distinguish between education and other governmental benefits in this context. Is the Court suggesting that education is more 'fundamental' than food, shelter, or medical care?"³³¹ There is indeed a way to distinguish education's relationship to the Fourteenth Amendment: history. Unfortunately, *Brown* closed the door on this line of argument, and *Rodriguez* locked the deadbolt. While the Court in *Plyler* reached the right result and utilized sound reasoning, it again overlooked perhaps the strongest evidence outside of the Constitution's text itself.

Placing the tiers of scrutiny temporarily to the side, the observations of the *Plyler* majority mesh well with the sentiments of the reform-minded Republican state constitutional-convention delegates addressed above. The Court's reasoning clearly chafed against the tiers-of-scrutiny framework. In the Court's telling, education waffled inside and outside the bounds of fundamentality: "In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests."³³² Further: "By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions."³³³ The majority's concerns thus closely paralleled the concerns of Republican reformers seeking to expand education to all children, who understood that barring education was a core pillar of chattel slavery. These reformers believed that without access to education, Americans of all races would be unable to be economically productive and contribute to the civic life of the Republic. Education was the necessary catalyst for effective citizenship and effective use of the vote. Education was not only

328. *Id.* at 247 (footnote omitted) (citation omitted).

329. *Id.*

330. *Id.* at 247-48.

331. *Id.*

332. *Id.* at 221 (majority opinion).

333. *Id.* at 223.

necessary to eradicate the residue of slavery; it was necessary to create a national population of equally equipped members of society.

To summarize, we are left with an unsatisfying picture: a rich Reconstruction history of constitutional actors at the state level pushing for a right to education, a pivotal and rightly exalted 1954 Supreme Court decision in *Brown* that cast the die of all subsequent education-law cases but overlooked this history, and a lineage of later cases that continue to elide this history. Rectifying this situation requires a simultaneous recommitment to the principles of equality foregrounded in *Brown* and a reassessment of that case's methodological bargain. Once the inconclusiveness thesis is troubled, *Rodriguez's* seemingly ironclad conclusion that education is outside the historical bounds of what is protected by the Fourteenth Amendment can be troubled as well. With *Rodriguez* shaken, the Court could more easily return to the principles it espoused in *Brown* and *Plyler*: the unique role of education in the individual advancement of children and in training them for civic engagement. Most importantly, a return to these principles would be in line with the historical evidence of the contemporary beliefs and aims of Republican lawmakers during Reconstruction.

While such prodigious doctrinal changes might be far-off, the Supreme Court has made it clear that it sees a return to history as the key to understanding education's place in the country's constitutional order. *Plyler*, struggling under the weight of *Rodriguez*, espoused many core principles that echoed the history of Reconstruction and education. Now, *SFFA* has injected historical argumentation into the very heart of the discussion. With historical reasoning now all but required by the Supreme Court when assessing American education, it is time to bring the constitutional conventions of the Reconstruction South into the national legal conversation.

C. SFFA's Competing Historical Accounts

The primary-source material assessed in Part II has much to add to all four historical vignettes offered by the Court in *SFFA*. First, let us briefly return to the four visions in greater detail. Chief Justice Roberts began his assessment of the merits with the history of Reconstruction.³³⁴ Quoting four Republican Reconstruction congressmen, he argued for a colorblind reading of the Equal Protection Clause. After this brief glance toward Reconstruction, Roberts jumped to the 1879 decision *Strauder v. West Virginia*,³³⁵ and then detailed how "[f]or almost a century after the Civil War, state-mandated segregation was in many

334. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181, 201-03 (2023).

335. 100 U.S. 303 (1879).

parts of the Nation a regrettable norm.”³³⁶ Justice Thomas, concurring, offered a far more extensive historical excavation, centering his analysis on “that equality principle,”³³⁷ meaning Justice Harlan’s idea that the “Constitution is color-blind, and neither knows nor tolerates classes among citizens.”³³⁸ Thomas presented his own narrative of Reconstruction “to offer an originalist defense of the color-blind Constitution.”³³⁹ He thoroughly assessed the debates over the Thirteenth and Fourteenth Amendments as well as the Civil Rights Acts of 1866 and 1875, concluding that “[t]he history of these measures’ enactment renders their motivating principle as clear as their text: All citizens of the United States, regardless of skin color, are equal before the law.”³⁴⁰

Justice Sotomayor, dissenting, made sure to look outside the halls of the Reconstruction Congress, noting that “Black people’s yearning for freedom of thought, and for a more perfect Union with educational opportunity for all, played a crucial role during the Reconstruction era.”³⁴¹ Stressing a different aspect of Justice Harlan’s dissent in *Plessy*, she noted that the Fourteenth Amendment was meant “to secure to a race recently emancipated, a race that through many generations [was] held in slavery, all the civil rights that the superior race enjoy.”³⁴² Sotomayor’s telling of Reconstruction – highlighting the work of the Freedmen’s Bureau and the provisions of the Civil Rights Act explicitly invoking race – foregrounded the idea that the Fourteenth Amendment was not understood historically as a “blanket ban on race-conscious policies.”³⁴³ Quite the opposite: it ushered in tremendous federal efforts to protect and advance Black Americans.

Justice Jackson’s dissent encourages us to assess admissions practices “with history in hand.”³⁴⁴ When history is properly considered, Jackson demonstrates, actions that on the surface might seem equal or unequal might not be so. She writes, “History speaks. In some form, it can be heard forever. The race-based gaps that first developed centuries ago are echoes from the past that still exist today.”³⁴⁵ Jackson’s interpretation hinged on the theme of “[g]ulf-sized race-based gaps” separating white and nonwhite Americans that “were created in the

336. *SFFA*, 600 U.S. at 203.

337. *Id.* at 231 (Thomas, J., concurring).

338. *Id.* (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

339. *Id.* at 232.

340. *Id.* at 233.

341. *Id.* at 320 (Sotomayor, J., dissenting).

342. *Id.* at 322 (alteration in original) (quoting *Plessy*, 163 U.S. at 555–56 (Harlan, J., dissenting)).

343. *Id.* at 322–25.

344. *Id.* at 396 (Jackson, J., dissenting).

345. *Id.* at 393.

distant past, but have indisputably been passed down to the present day through the generations.”³⁴⁶ These gaps were rooted in slavery, and in Jackson’s telling, the Second Framers sought to reconstruct the American constitutional order in such a way as to “right historical wrongs.”³⁴⁷

A common order exists across Chief Justice Roberts’s, Justice Thomas’s, Justice Sotomayor’s, and Justice Jackson’s assessments of history in *SFFA*: (1) the establishment by the Reconstruction Founders of *some* form of constitutionalized equality, (2) the retreat from Reconstruction and the failure to enforce this equality, and (3) the admission that the Supreme Court was a central player in this retreat. The key friction among the Justices is over the form of equality embedded in the Fourteenth Amendment.

The constitutional ferment catalyzed in the Reconstruction South by delegates like Thomas Bayne, Willis Hodges, Abraham Galloway, and William Nash needs inclusion in the Supreme Court’s ongoing dialogue on the place of education in our constitutional order. The multiracial coalition of Republicans that ushered in universal public-education provisions while blocking attempts to constitutionalize segregation sheds light on (1) contemporary understandings of education as necessary for the promotion of individual dignity and civic participation, (2) the ubiquitous belief among Republican reformers that education was an antidote to the individual and societal effects of slavery, and, therefore, (3) education’s indelible connection to the constitutional order christened by the Thirteenth, Fourteenth, and Fifteenth Amendments. Similarly, the virulent resistance to these constitutional actors and the failed attempts to constitutionalize segregated education demonstrate these historical truths from the opposite angle.

The material assessed in this Note troubles the sort of “colorblind” interpretive lens promoted by Chief Justice Roberts and Justice Thomas. Every hour of these conventions was undergirded by a racial revolution and a constitutional rebirth that were intimately intertwined. The pages of the convention records and the resulting constitutional texts make clear that the eradication of racialized chattel slavery and the undoing of its pernicious, deep-set effects propelled this constitutional rebirth forward. Crucially, though, this historical material fits squarely in the originalist framework utilized by Roberts and Thomas. A dive into the abyss of scholarship on originalist theory need not detain us here, but utilizing these constitutional documents and sources gets us closer to the original intended meaning of the Reconstruction alterations to the Constitution. In particular, these sources allow us to understand better how the Republican

346. *Id.* at 384.

347. *Id.* at 387.

politicians tasked with carrying out Reconstruction in their respective states viewed the new constitutional order.

Finally, these materials supply ample evidence for the dissenting opinions of Justices Sotomayor and Jackson. They demonstrate that the Reconstruction Amendments were molded in part around a national story of race and education. Just as slavery and the denial of education were wedded, so too were freedom and access to the schoolhouse. Further, Republican lawmakers across the Reconstruction South, many of them having just recently experienced emancipation, fought not just for education, but for education without mandated segregation. These reformers (and indeed their opponents) understood well the individual and social realities that would legally surface much later in *Brown*. Racial equality, the death of slavery, and the inherent right of all individuals to advance themselves through the acquisition of knowledge are stitched into the constitutional story of Reconstruction. That reality must guide present-day assessments of the relationship between education and the Fourteenth Amendment. This Note has, therefore, been motivated in part by a hope that these vital constitutional actors will appear in the United States's evolving jurisprudence of the schoolhouse.

CONCLUSION

This assessment of Southern Reconstruction state constitutions and constitutional conventions has surfaced several historical facts which must affect our understanding of the relationship between education and the Constitution: (1) each former state of the Confederacy constitutionalized a public-school system; (2) in the drafting conventions of nearly every one of those states, attempts were made to include language mandating segregated schools, and these attempts failed; (3) African American delegates were pivotal members of the education committees of these conventions and were often vocal in the efforts to defeat segregation provisions; (4) many Republican delegates fought and succeeded in keeping de jure segregation out of state constitutional texts; (5) while some (perhaps most) delegates believed that schools would ultimately become segregated by local action, Republican delegates still worked to keep the language of segregation out of their constitutions; and (6) delegates frequently extolled education as a necessary component of human advancement and a tool to move the South past slavery and rebellion.

As *Crandall v. Connecticut* and *Roberts v. City of Boston* reveal, these Reconstruction reformers were not the first to envision education as deeply embedded in the constitutional promise of the Republic. But it was not until Reconstruction – the critical hinge point – when ideals of universal education could be more fully enmeshed within the country's constitutional narrative. In these constitutional conventions, education intertwined with the new constitutional order.

The reality of this history has gone ignored in no small part because Chief Justice Warren simply stated that it did not exist in *Brown v. Board of Education*.

As evidenced by *Rodriguez* and *Plyler*, the Supreme Court has struggled to form a coherent legal theory about education and its relationship to the Fourteenth Amendment. Education exists in a limbo between constitutional right and simple government service. It is something significant, important, extraordinary, but apparently not fundamental. History can fill this analytical gap. Indeed, *SFFA* demands that we return to Reconstruction for answers.

As the Federal Constitution was reforged, Republican delegates — many of them Black men who had just attained suffrage — believed education to be a necessary tool for repairing the Republic and eradicating the enduring effects of slavery. Free-school provisions were added to state constitutions as these delegates sought to mirror the change they saw in the Federal Constitution. To these constitutional actors, the schoolhouse was indelibly linked to the constitutional order wrought by war and the destruction of slavery.