

# The Breakfast Club

## Constitutional Minute for 6 April 2024

### American Education – Part 1 of 5

#### Let's Start With Constitution(s)

*"[T]he Constitution guarantees a public-school K-12 education for every child in the U.S."*<sup>1</sup>

Eighteen years ago (April 15, 2006), a front-page article in the Wall Street Journal by Miriam Jordan<sup>2</sup> made the preceding claim. The tear-jerker story that contained the statement was about an illegal immigrant, one "Dan-el Padilla," who had risen from poverty to attain a 3.9 GPA at Princeton and an invitation to study at Oxford, England, only to realize that if he left the country to study abroad he would not be allowed to re-enter the country. Ms. Jordan makes no attempt to substantiate her claim about the Constitution's supposed "guarantee." That same week the article and quote caught the eye of David Boaz, a writer for the Cato Institute, who posted a [short critique](#) explaining why Ms. Jordan was wrong in her claim.<sup>3</sup> Ms. Jordan's quote expresses the belief of many Americans today, most of whom wouldn't know their Constitution from, well, the Wall Street Journal. Ms. Jordan claim is indeed false of course—at the moment—but, as you will see, the U.S. is on a trajectory which may bring us to the point where the statement becomes true. More on that at the end of the essay.

America's founders were strong proponents of an educational system that would "diffuse knowledge and morals" among the people; they said this on many occasions:

"The best means of forming a manly, virtuous, and happy people will be found in the right education of youth. Without this foundation, every other means, in my opinion, must fail." George Washington<sup>4</sup>

"It is an object of vast magnitude that systems of education should be adopted and pursued which may not only diffuse a knowledge of the sciences but may implant in the minds of the American youth the principles of virtue and of liberty and inspire them with just and liberal ideas of government and with an inviolable attachment to their own country." Noah Webster,<sup>5</sup>

"The good Education of Youth has been esteemed by wise Men in all Ages, as the surest Foundation of the Happiness both of private Families and of Common-wealths. Almost all Governments have therefore made it a principal Object of their Attention, to establish and endow with proper Revenues, such Seminaries of Learning, as might

supply the succeeding Age with Men qualified to serve the Publick with Honour to themselves, and to their Country." Benjamin Franklin<sup>6</sup>

## At the Convention of 1787

Despite this strong support for education in general, the Framers of the Constitution gave no power to the national government to establish a national education system, preferring to leave the issue to the states (see the 10<sup>th</sup> Amendment). But they did discuss a much more limited role in education for the federal government, Congress specifically: At the Constitutional Convention on August 18, 1787, James Madison proposed giving Congress the power to establish a "university." The same day, South Carolina's Charles Pinkney proposed establishing "seminaries for the promotion of literature and the arts & sciences."<sup>7</sup> Both proposals were referred to the Committee on Detail, who chose not to include either in the draft of the Constitution.

Almost a month later, Madison and Pinkney tried again; on September 14<sup>th</sup> Madison proposed adding a power "*to establish an University, in which no preferences or distinctions should be allowed on account of Religion.*" You may recall that Madison graduated from what would become Princeton, at the time a Presbyterian-run college. Gouverneur Morris pointed out that the plenary power<sup>8</sup> they had given Congress over the "seat of government" (which became the District of Columbia) should suffice.<sup>9</sup>

Three days later the Constitution was signed and delivered to the Confederation Congress.

But while the Constitution was being drafted in Philadelphia, the Confederation Congress back in New York was busy passing the Northwest Ordinance on July 13, 1787. Article 3 of Section 14 stated:

*Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, **schools and the means of education shall forever be encouraged.***<sup>10</sup> (Emphasis added)

From the Northwest Territory would eventually come the states of Ohio, Indiana, Illinois, Michigan, Wisconsin, and a part of Minnesota. As the land was slowly surveyed to form townships, a section of each township was sequestered from sale so that a public school might be established thereupon. Schools, you should note, were necessary to teach the "*religion, morality and knowledge*" necessary for good government and our society's continued happiness.

## The Constitution begins operation

After the U.S. Constitution was ratified, there were attempts to use Congress' "exclusive legislation" power over the "seat of government" to establish a national university as Madison had envisioned. During his two terms as president, George Washington lobbied hard for such an institution. Madison took Washington's ideas to the floor of Congress and moved that such a school be established within the District of Columbia. The proposal was approved in the Senate, but failed in the House after concerns were raised about its constitutionality.

After leaving the presidency on March 4<sup>th</sup> 1797, "citizen" Washington wrote a letter to St. George Tucker in which he stated: "My Sollicitude (sic) for the establishment of a National University in this Country, has been great, and unceasing; but as the Sentiments of the Legislature have not been in unison therewith, I had postponed the further consideration of the subject to a moment of more leizure (than has lately been my lot) to see if I could devise some Plan by which my wishes could be carried into effect."<sup>11</sup>

In 1810 and 1815, *President* James Madison urged Congress to authorize "a national seminary of learning within the District of Columbia." Congress took no action.

Finally, in 1857, during the presidency of James Buchanan, Congress chartered a public university, Gallaudet University,<sup>12</sup> in the District of Columbia for "the education of the deaf and hard of hearing." Ten years later, Congress chartered a second public university in the District, Howard University,<sup>13</sup> "for the education of youth in the liberal arts and sciences." In 1869, Congress established The National University School of Law.<sup>14</sup> In 1954, the School of Law merged with George Washington University School of Law to create National Law Center at the George Washington University, which has become George Washington University Law School.

## **The Department of Education**

Given these minimal and sporadic efforts by Congress to support education at the national level, how did the Federal Government get its tentacles into the state-run public education systems?

The year 1857 saw the formation of the National Teachers Association (NTA).<sup>15</sup> This eventually was renamed the National Education Association (NEA). At its first public meeting the NTA board proposed the establishment of a Department of Education; it would take them only ten years to see success. A Department of Education was created in 1867 by legislation signed by President Andrew Johnson,<sup>16</sup> but was quickly reduced the following year to an Office of Education and then a Bureau. In 1939, the Bureau of Education was transferred to the Federal Security Agency and renamed the Office of Education. In 1953, the Federal Security Agency was upgraded to cabinet-level status and became the Department of Health, Education, and Welfare (HEW). In 1979, President Jimmy Carter proposed creating a cabinet-level Department of Education. The proposal was opposed by many Republicans who argued it was unconstitutional, unnecessary and a bureaucratic intrusion into local affairs. The National

Education Association, unsurprisingly, supported the proposal while the newly established American Federation of Teachers opposed it. Congress created it anyway.

Presidential candidate Ronald Reagan called for the elimination of the U.S. Department of Education. Once in office, Reagan significantly reduced DOE's budget but, faced with a Democrat House of Representatives, he was not able to eliminate it. Most Republican Presidents since then have not even tried and some (George W. Bush, supporting his former school teacher/librarian wife) have even expanded its role.

On February 7, 2017, Representative Thomas Massie (R-KY) introduced H.R. 899. His one-sentence-bill stated: "The Department of Education shall terminate on December 31, 2018." The Department of Education is still with us.

But simply having a Department of Education doesn't give it power to interfere with or impose its will upon state education systems; how did that happen? Glad you asked.

Two methods were used. The first was bribery:

By offering states millions of dollars earmarked for their schools, DOE gets states to "voluntarily" incorporate the DOE programs like "No Child Left Behind" (or whatever the program du jour is called). The DOE tries to downplay the amount of money the federal government provides to state education programs, claiming they only spend 8% of \$1.15 trillion annually spent on education nationwide.<sup>17</sup> I was terrible at math in high school, but that seems to come to a hefty \$92 billion. What state will turn down "its share" of \$92 Billion. \$1.15 trillion is no chump change. If you had a trillion dollars and spent a million each day, it would take you just under 2,740 years to spend it all.

The second approach is through the Commerce Clause. One example:

Congress passed the Gun-Free School Zones Act of 1990 (GFSZA) making it illegal to carry a gun within 1000 feet of any school in the U.S. When the Act was challenged in court, Congress claimed the power for the Act resided in the Commerce Clause. In *United States v. Lopez, Jr.*, 514 U.S. 549 (1995), the government [argued](#) (as summarized in Wikipedia) "that the possession of a firearm in an educational environment would most likely lead to a violent crime, which in turn would affect the general economic condition in two ways. First, because violent crime causes harm and creates expense, it raises insurance costs, which are spread throughout the economy; and second, by limiting the willingness to travel in the area perceived to be unsafe. The government also argued that the presence of firearms within a school would be seen as dangerous, resulting in students' being scared and disturbed; this would, in turn, inhibit learning; and this, in turn, would lead to a weaker national economy since education is clearly a crucial element of the nation's financial health."<sup>18</sup> See the logic?

Presented with such threadbare arguments, the court simply ruled that Mr. Lopez' possession of the gun was not economic activity and therefore fell outside the Commerce Clause. Undeterred, Congress rewrote the GFSZA to apply only to guns which had taken part in interstate or foreign commerce and passed the new Act. The amended Act has yet to be challenged, indicating that potential challengers likely conclude that Congress found a constitutionally-resilient argument.

## What About the States?

When establishing a state public education system, the normal sequence would be: first, establish the requirement for a public education system in the state constitution and then pass laws to that effect in the legislature. However, 169 years had passed from 1607, when the Virginia Colony was settled, until 1776 when state constitution-making began. By 1776, all the states had educational systems, whether public, private, or a mixture of both. Thirteen colleges were operating by that year and twelve years later when the Constitution was ratified another fifteen had opened their doors. The American colonies were already fully invested in the education of their citizens when it came time to write their new constitutions. Because of this “fait accompli,” the constitutions of New Hampshire (Jan 5, 1776), South Carolina (Mar 26, 1776), Virginia (Jun 29, 1776), New Jersey (July 2, 1776) and Delaware (Sep 21, 1776), made no mention of education. Pennsylvania broke the ice; their constitution of Sep 28, 1776, stated:

SECT. 44. A school or schools shall be established in each county by the legislature, for the convenient instruction of youth, with such salaries to the masters paid by the public, as may enable them to instruct youth at low prices: And all useful learning shall be duly encouraged and promoted in one or more universities.<sup>19</sup>

Less than three months later, North Carolina (Dec 18, 1776) copied Pennsylvania's article with only minor wordsmithing:

XLI. That a school or schools shall be established by the Legislature, for the convenient instruction of youth, with such salaries to the masters, paid by the public, as may enable them to instruct at low prices; and all useful learning shall be duly encouraged, and promoted, in one or more universities.<sup>20</sup>

Finally, on Feb 5, 1777, Georgia's new constitution proclaimed:

ART. LIV. Schools shall be erected in each county, and supported at the general expense of the State, as the legislature shall hereafter point out.<sup>21</sup>

What about Massachusetts?

Massachusetts had been the first colony to establish a colony-wide public education system.<sup>22</sup> In 1642, they passed a law requiring all children be taught to read and write. Five years later

[“The Old Deluder Satan Act”](#) was passed. The following year, a law extended the requirements set out in 1642. Children needed to be able to read and write so they could read the Bible and explain it in writing.

By 1780, laws requiring a public education system were firmly in place, so the new Massachusetts Constitution enacted that year only suggested that education be “cherished” and “encouraged.”<sup>23</sup>

Other states, like Virginia, followed a similar path. In 1778 and 1780, Thomas Jefferson introduced a "Bill for More General Diffusion of Knowledge"<sup>24</sup> to create a state-wide education system, but the bill was not put to a vote. James Madison re-introduced the bill several times while Jefferson was serving as our Ambassador to France, also to no avail. Despite these setbacks, private education flourished, such as the Donald Robertson School in King & Queen County that James Madison attended on and off for four years.

After the Civil War, the new state constitutions that were required for re-admittance to the union routinely established state public education systems. The Virginia Constitution of 1870 contained these words in Article VIII, Section 3:

The 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 fall introduction into all the counties of the state by the year eighteen hundred and seventy-six, or as much earlier as practicable.

Compulsory education was established in the next paragraph:

The general assembly shall have power, after a full introduction of the public free school system, to make such laws as shall not permit parents and guardians to allow their children to grow up in ignorance and vagrancy.

Today, the whole of [Article VIII](#) is devoted to education.

## **Moving Us to a National Education System**

Despite the fact that the U.S. Constitution does not even mention education, let alone secure a right to one (and the Supreme Court said so emphatically in [San Antonio Independent School District v. Rodriguez](#), 411 U.S. 1 (1973)), this has not stopped the Left from trying to force the federal court system into acknowledging such a right (remember the Ninth Amendment?). Some lay their hopes on the Equal Protection Clause of the 14<sup>th</sup> Amendment,<sup>25</sup> pointing to the widely disparate educational results from district to district across the U.S.

In 1982, in *Plyler v. Doe*, 457 U.S. 202 (1982), a 5-4 court stated that, based on the Equal Protection Clause, Texas could not withhold funding for immigrant children in the U.S. illegally.

More recently, in *Martinez v. Malloy* (2016, in a Connecticut District Court) the plaintiffs argued that the Constitution guarantees substantial equality of educational opportunity. The Judge dismissed that claim, stating: "there is no fundamental right to substantial equality of educational opportunity under the Equal Protection Clause."

In *Gary B. v. Snyder* (2016, in Michigan District Court), the plaintiffs argued that the Constitution contains an *implied* right of access to literacy instruction. On June 29, 2018, the District Court judge dismissed the lawsuit, stating that access to literacy is not a fundamental right. The plaintiffs appealed to the 6th Circuit Court of Appeals and the case was retitled *Gary B. v Whitmer* (now the new Governor of Michigan). On April 23, 2020, a three-judge panel [ruled](#) 2-1 that "a review of the Supreme Court's education cases, and an application of their principles to our substantive due process framework, demonstrates that we should recognize a basic minimum education to be a fundamental right." They remanded the case back to the District Court for further proceedings. However, on May 13, there was a settlement agreement between all parties and the case has apparently been dismissed.<sup>26</sup> The Court's ruling applies only to the four states in the Sixth Circuit: Michigan, Ohio, Kentucky and Tennessee. Will the Supreme Court eventually be prodded into reversing *Rodriguez* and declaring a national right to an education? Time will tell.

Why is a national right to an education so important to the Left? A national and, more importantly, a *fundamental* right to education would allow the Federal Government to weigh in wherever inequities in that education are found. National standards will no longer be suggested, they will be imposed; and tons of money will be thrown at underperforming schools. State authority over public education will be eclipsed and we will move, perhaps not overnight but inexorably, to a national educational system. Private and Christian schools will likely be required to meet these new national standards; destroying their independence.

I hate to end this essay with such a depressing outlook, but that's clearly where the Left wants to take this country. Of that there can be no doubt.

Next week: In the next essay we shall consider the educational experience in the founding period in more detail. Stay tuned.

For further reading:

[American Education ; The Colonial experience, 1607-1783 \(1970\)](#), and [American Education: The National Experience, 1783-1876 \(1980\)](#) both by Lawrence A. Cremin.

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- <sup>1</sup> Miriam Jordan, "Illegal at Princeton," *Wall Street Journal*, April 15, 2006. Archive accessible only through subscription at <https://www.wsj.com/articles/SB114505937960426590>.
- <sup>2</sup> <https://www.wsj.com/news/author/miriam-jordan>
- <sup>3</sup> I have a copy of the original WSJ article if anyone wants to see it.
- <sup>4</sup> George Washington, letter to George Chapman, 15 December, 1784, accessed at: <https://founders.archives.gov/documents/Washington/04-02-02-0149>.
- <sup>5</sup> Noah Webster, *On Education of Youth in America*, 1790.
- <sup>6</sup> Benjamin Franklin, *Proposals Relating to the Education of Youth in Pennsylvania*, 1749, accessed at: <https://archives.upenn.edu/digitized-resources/docs-pubs/franklin-proposals/>.
- <sup>7</sup> James Madison, *Notes on the Convention*, accessed at: <https://www.consource.org/document/james-madisons-notes-of-the-constitutional-convention-1787-8-18/>.
- <sup>8</sup> Article 1, Section 8 Clause 17 of the Constitution gave Congress power: "To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States. "In all cases whatsoever" included education.
- <sup>9</sup> James Madison, *Notes on the Convention*, accessed at: <https://www.consource.org/document/james-madisons-notes-of-the-constitutional-convention-1787-9-17/>.
- <sup>10</sup> [https://avalon.law.yale.edu/18th\\_century/nworder.asp](https://avalon.law.yale.edu/18th_century/nworder.asp).
- <sup>11</sup> Accessed at: <https://founders.archives.gov/documents/Washington/06-01-02-0131>.
- <sup>12</sup> [https://en.wikipedia.org/wiki/Gallaudet\\_University](https://en.wikipedia.org/wiki/Gallaudet_University).
- <sup>13</sup> [https://en.wikipedia.org/wiki/Howard\\_University](https://en.wikipedia.org/wiki/Howard_University).
- <sup>14</sup> [https://en.wikipedia.org/wiki/National\\_University\\_School\\_of\\_Law](https://en.wikipedia.org/wiki/National_University_School_of_Law).
- <sup>15</sup> <https://www.nea.org/about-nea/mission-vision-values/history-nea>.
- <sup>16</sup> [https://en.wikipedia.org/wiki/United\\_States\\_Department\\_of\\_Education](https://en.wikipedia.org/wiki/United_States_Department_of_Education).
- <sup>17</sup> <https://www2.ed.gov/about/overview/fed/role.html>.
- <sup>18</sup> [https://en.wikipedia.org/wiki/United\\_States\\_v.\\_Lopez](https://en.wikipedia.org/wiki/United_States_v._Lopez).
- <sup>19</sup> [https://avalon.law.yale.edu/18th\\_century/pa08.asp](https://avalon.law.yale.edu/18th_century/pa08.asp).
- <sup>20</sup> [https://avalon.law.yale.edu/18th\\_century/nc07.asp](https://avalon.law.yale.edu/18th_century/nc07.asp).
- <sup>21</sup> [https://avalon.law.yale.edu/18th\\_century/ga02.asp](https://avalon.law.yale.edu/18th_century/ga02.asp).
- <sup>22</sup> Virginia was the first colony to establish a school, Henricus College, but it focused on the education of Indian children.
- <sup>23</sup> See Chapter V, Section 2 at: <http://www.nhinet.org/ccs/docs/ma-1780.htm>.
- <sup>24</sup> Available at: <https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0079>.
- <sup>25</sup> <https://www.purduegloballawschool.edu/blog/constitutional-law/14th-amendment-protects-rights-education>.
- <sup>26</sup> <https://clearinghouse.net/case/15474/>.