The Constitution and Federal Jurisdiction In American Education

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Published by Lonang Institute
www.lonang.com

> *It is too probable that no plan we propose will be adopted. Perhaps another dreadful conflict is to be sustained. If, to please the people, we offer what we ourselves dis-approve, how can we afterward defend our work? Let us raise a standard to which the wise and honest can repair; the event is in the hand of God.*
>
> George Washington, Address to the Constitutional Convention - 1787

I. INTRODUCTION

When President Andrew Johnson and Congress created a Department of Education in 1867, it was not simply a matter of organization and appropriation. Congressional debate reiterated what former Presidents including Jefferson, Monroe, and Buchanan had clearly articulated: that federal interference in educational matters was unconstitutional. Congressman Rogers in 1866 noted that the formation of a Department of Education was not among the enumerated powers of Congress, declaring that "there is no authority under the Constitution of the United States to authorize Congress to interfere with the education of the different states in any manner, directly or indirectly."[1]

In 1979, however, when President Jimmy Carter and Congress created a Cabinet level Department of Education, congressional debate was monopolized by organizational and appropriation considerations. Absent during the proceedings were discussions of the crucial historical and constitutional limitations which clearly precluded the assertion of federal jurisdiction over education.[2] A proper regard for these limitations requires withdrawal of federal jurisdiction over education and the abolition of the Federal Department of Education and its functions. Such a measure would:

1. Strengthen the people in the exercise of their preexisting inalienable right and power over education acknowledged by the Ninth and Tenth Amendments. This includes education, both publicly and privately, directly and indirectly;

2. Strengthen the federal government by redirecting its time, energy and resources toward those objects for which it bears express constitutional responsibility;

3. Strengthen the national economy by acknowledging the constitutional limitations on the purpose to which the federal treasury may be directed and by reducing federal deficits;

4. Strengthen education by encouraging educational diversity and by opposing continued expansion and centralization of educational policy.

Continued federal intervention into education, however, would only disparage historically acknowledged inalienable rights, and would further distort the constitutionally enumerated limitations on the Congress of the United States. These limitations are compelling and deserve further attention.

II. HISTORICAL AND CONSTITUTIONAL LIMITATIONS

The Constitution of the United States is, by its terms, the Supreme Law of the Land.[3] As such, the Constitution not only comports with preexisting principles of law, but also the preexisting criteria of a legal compact. Sir William Blackstone, in his famous Commentaries, identified these precepts when he wrote

> Man, considered as a creature, must necessarily be subject to the laws of his Creator, for he is entirely a dependent being. And, consequently, as man depends absolutely upon his Maker for everything, it is necessary that he should in all points conform to his Maker's will. This will of his Maker, is called the law of Nature.[4]

Blackstone also asserted that the law of Nature was "binding over all the globe, in all countries, and at all times; no human laws are of any validity if contrary to this; . . . "[5] Thus human laws, whether constitutional, statutory or otherwise could only be valid in light of the preexisting law of nature.

The Creator also revealed law directly. Blackstone stated that the revealed law is "to be found only in the Holy Scriptures." He added that "these precepts, when revealed, are found upon comparison to be really a part of the original law of nature . . . . "[6] After surveying the matter in some depth, he concluded that

> Upon these two foundations, the law of Nature and the law of Revelation, depend all human law; that is to say, no human laws should be suffered to contradict these.[7]

Thus the Constitution, in order to be the Supreme Law of the Land, must comport with preexisting principles of law. That is, the Constitution must be lawful before it can be the Supreme Law of the Land. The Constitution (or its interpretations) may not run contrary to the foundations of law, or else it would not be lawful. Similarly, a Congressional enactment may not run contrary to foundations of law and still remain lawful and constitutional.

As the Supreme Law of the Land, the Constitution is also a legal compact. As a compact, the original parties and their posterity or successors are mutually bound to uphold the compact, modifying it only according to the limited and prescribed means therein expressed. The irrevocable nature of the instrument and its fixed delegation of limited and enumerated power also make up essential elements of a compact. Thus, the Constitution, in order to be the Supreme Law of the Land, must also comport with the preexisting criteria of a legal compact. The Constitution (or its interpretations) may not run contrary to these criteria and still remain a Constitution. A Congressional enactment may not run contrary to these criteria without it also being unconstitutional.

If Congress were to construe the Constitution based on the tenor of the times, the exigencies of the circumstances, or merely relative to human experience, it would unlawfully usurp the compact's authority as the Supreme Law of the Land. In such a case Congress would become a law unto itself. More specifically, it would employ "law" in an unlawful and unconstitutional manner.[8] The whole

aim, however, "of construction, as applied to a provision of the Constitution, is to discover the meaning, to ascertain and give effect to the intent of its framers and the people who adopted it."[9]

Limited and Enumerated Powers

These legal and constitutional principles bound the Congress of 1791 and continue to bind Congress today. This is the nature of law and legal compacts and therefore the nature of the Supreme Law of the Land and the Constitution.

The Constitution, of course, explicitly binds Congress by enumerating which congressional powers are delegated and how they are to be lawfully employed. As a binding compact, any powers exercised by the federal government must be in accordance with that compact. Constitutionally, the federal government is a government of limited and enumerated powers. Power not delegated to the federal government by the written Constitution is reserved to the states or to the people respectively.[10]

Education is not found among the enumerated objects of the Constitution. Article I does not authorize Congress to establish a Department of Education much less grant it jurisdiction to encourage the education of the people in the several states. Furthermore, federal involvement in education is not an appropriate means plainly adapted to carry out an object contemplated by an enumerated power. Congress may, however, maintain voluntary educational facilities and academies if those means are plainly adopted to raising a military and the like.[11]

Though Congress is prohibited from entangling itself with the education of the people in the several states, it may concern itself with those objects enumerated in Article I, Section 8, Clause 17. This clause grants Congress exclusive legislative authority over the District of Columbia. With respect to the District of Columbia, Congress has legislative authority pro-tanto. It may act as a State legislature, but may not abridge any constitutionally retained right of the people over education.

As far as congressional authority over Federal Territories and property is concerned, the Constitution enumerates certain powers in Article IV, Section 3, Clause 2. This Clause grants Congress power to dispose of and make all needful rules and regulations respecting the territories or other property belonging to the United States. This proprietary function differs from the legislative function over the District of Columbia though both constitute grants of power.[12]

The extent, however, of congressional power with respect to education is limited to the promotion of science and arts and is provided for by Article I, Section 8, Clause 8. The means Congress may employ in the promotion of these enumerated objects is also noted. Congress may only promote these objects "by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoverys." Thus both the object and the means are clearly enumerated and explicitly limited.[13] If Congress exercised any other power inconsistent with these objects in respect to education, it would be pernicious both to the states and the people, and contrary to the Constitution as a legal compact and the Supreme Law of the Land.

Congress - Under the Articles of Confederation

These constitutional limitations, however, were not expressly in place when the Congress met under the Articles of Confederation in 1777. In an effort to reduce the Revolutionary War deficit, the Congress under the Articles of Confederation undertook many measures. In 1780 it requested large land states, such as Virginia, to surrender their claim over certain western lands to the General Government. The General Government hoped to dispose of these lands by sale, thereby extinguishing the deficit. To gain an understanding of the proportions of the conveyance, the states of Kentucky, Tennessee, Ohio, Indiana, Mississippi, Illinois, Alabama, Michigan, and Wisconsin were eventually formed out of these territories.[14]

In order to induce settlement and sale of these frontier territories now under the jurisdiction of the General Government, an ordinance for ascertaining the mode of disposing of land in the western territory was established on May 20, 1785. Among other objects, this ordinance reserved a section of every township for the maintenance of public schools. This was the first government enactment concerning land for educational purposes. On July 13, 1787, the Congress enacted another ordinance for the government of the territory of the United States northwest of the Ohio river. This became known as the "Northwest Ordinance." It not only reserved lands for educational purposes as did its predecessor, but constituted the first grant of land for those purposes .[15]

The legality of Congressional action pursuant to the Articles of Confederation, in selling territories with designated tracts for 'educational purposes', in no way indicates that Congress, under the Constitution, possessed any similar power with respect to states. The ordinances of 1785 and 1787 only served to demonstrate that the situation called for the expedited settlement and sale of territories. Thus subsequent congressional enactments setting aside territories or other federal lands for educational purposes, do not set a precedent for education within the several states. Education, however, was not a central object of Congress' concern, but rather an inducement for sale and settlement of territories which had been ceded to the general government voluntarily. Once land was transferred to a state, or a territory was admitted as a state to the Union, any continuing federal influence over education terminated.[16]

Constitutional Convention

No general congressional authority over education has ever been a part of the Constitution. Several attempts, however, were made during the Constitutional Convention of 1787 to give Congress educational powers. On May 29th Mr. Charles Pinckney presented his draft of a federal government which provided that the legislature of the United States shall have the power "to establish and provide for a national university at the seat of government of the United States." When the committee, which considered the matter reported their constitutional draft on August 6, they completely excluded this particular provision.[17] During the Convention on August 18, James Madison and others proposed several items to be included within the legislative power of the United States, including the power:

-To secure to literary authors their copyrights for a limited time.

-To establish a university.
-To encourage by proper premiums and provisions, the advancement of useful knowledge and discoveries.
-To establish seminaries for the promotion of literature, and the arts and sciences.
-To grant patents for useful inventions.
-To establish public institutions, rewards, and immunities, for the promotion of agriculture, commerce, trades and manufactures.

Madison drew a distinction between a national university, seminaries for the promotion of literature, arts and sciences, and other public educational institutions. A national university implied a university which taught all branches of learning, owned and/or operated by the federal government. Seminaries referred to any school, academy, college, or university, in which young persons were instructed in several disciplines, including theology. It did not merely connote a school of theology as it does today. After considering these provisions, they were rejected. Only the patent and copyright provisions were found among the national legislature's authority when the matter was reported out of Committee.[18]

On September 12, 1787 the "Committee of Stile and Arrangement" reported a Constitution which, apart from a few changes, became the present Constitution less amendments. That version contained no specific, enumerated, or expressed power in Congress to legislate concerning education, nor did it provide for Congressional encouragement of education or the advancement of useful knowledge and discoveries, directly or indirectly.[19]

On September 14, Mr. Madison and Mr. Pinckney, during debates on the submitted draft, moved once again to vest Congress with power "to establish an University, in which no preferences or distinctions should be allowed on account of Religion."[20] The proposal was again lost on the Convention as a whole. On September 17 the Constitution, void of congressional power over education, was ratified. Almost a year later on June 21, 1788, the ninth state ratified the Constitution. On April 30, 1789, General George Washington was inaugurated as President of the United States.[21]

It is certain that Congress was denied the power to establish a national university. The establishment of seminaries promoting literature, arts and sciences was also denied Congress' jurisdictional sweep, as well as establishment of other public educational institutions. The only encouragement and advancement of useful knowledge and discoveries granted to Congress was the exception of the patent and copyright provisions of Article I, Section 8, Clause 8.[22] It was wisely considered that the federal government should have no greater constitutional power to encourage education among the several states beyond this particular enumerated object. If the specific power was not enumerated in Congress, Congress failed to obtain it. The Tenth Amendment ratified in 1791 reaffirmed this well known principle.[23]

Thus, when Washington came to office, the only real question regarding education was whether Congress, acting like a State pursuant to its Article I, Section 8, Clause 17 powers over the District of Columbia alone, could establish a national university within the exclusive geographical confines

of the District of Columbia, and whether Congress could constitutionally appropriate movies from the federal treasury for such a purpose.[24] As a practical matter, "education was left where it had always been, in the hands of the states or of the people." [25]

Presidential & Congressional Acknowledgments of Historical & Constitutional Limitations

During his First Annual Address on January 8, 1790, George Washington advanced his goals for the young nation. This included a variety of objects of great importance, such as naturalization, weights and measures, and foreign affairs. He also encouraged Congress to undertake certain projects and advance them by proper means.

Noting the many advantages of knowledge and its desirability, he requested Congress to consider how this end may be properly obtained. Washington stated, "Whether this desirable object will be best promoted by affording aids to seminaries of learning already established, by the institution of a national university, or by any other expedients, will be well worthy of a place in the deliberations of the legislature." [26]

On May 3, Mr. Smith of South Carolina moved that the President's request, which specifically encouraged science and literature, be referred to a selected House committee. This was objected to by Mr. Stone who "inquired what part of the Constitution authorized Congress to take any steps in a business of this kind? Fox his part, he knew of none."[27]

An accurate scenario of what then took place has been preserved in the Annals of Congress. It notes that Mr. Stone continued;

> We have already done as much as we can with propriety; we have encouraged learning by giving to authors an exclusive privilege of vending their works; this is going as far as we have the power to go by the Constitution.
>
> Mr. Sherman, said, that a proposition to vest Congress with power to establish a National University was made in the General Convention, but it was negatived. It was thought sufficient that this power should be exercised by the States in their separate capacity.
>
> Mr. Page observed, that he was in favor of the motion. He wished to have the matter determined, whether Congress has, or has not, a right to do any thing for the promotion of science and literature. He rather supposed that they had such a right; but if, on investigation of the subject, it shall appear they have not, he should consider the circumstances as a very essential defect in the Constitution, and should be for proposing an amendment . . . . [28]

These debates acknowledged the constitutional limitations precluding Congress from assuming jurisdiction over education. They summarized the views of the Founding Fathers on the subject.

Seven years later, in his Eighth Annual Address delivered December 7, 1796 Washington again, "proposed to the consideration of Congress the expediency of establishing a national university and

also a military academy."[29] Meanwhile, on Monday, December 12, 1796 Mr. Madison moved to refer to the House a Memorial from the Commissioners of the Federal City.[30] The Memorial, according to Madison, prayed "that Congress would take such measures as that they may be able to receive any donations which may be made to the institution."[31]

During debate on Monday, December 26, the House took up both the President's request and the Commissioner's Memorial. With respect to the latter, Mr. Madison was of the opinion that, "Congress has sole jurisdiction over that District . . . ."[32] Since the Memorial specifically called for a university in the District of Columbia, he would vote for it. He was quick to note, however, that such a university was materially different than a national university, the former not requiring any funds from the federal treasury.[33]

On the following day, Mr. Craik also expressed the same perception:

> The Commissioners seemed to have anticipated the objections which have been made to a National University, and purposely avoided inserting it in their Memorial. They have cherished similar ideas which I have, of the eligibility of such an institution, but foreseeing that plan would not be approved they have relinquished that, and only requested incorporation to enable them to act in trust for the institution. They do not call upon this House to put their hand into the public Treasury.[34]

While the petition expressed the desirability of a university in the District of Columbia, within the power of Congress over that District, the debate resulted in a vote to postpone the matter indefinitely.[35]

With respect to Washington's proposal, also postponed, the general tenor of Congress was that the President was perfectly entitled to take this last opportunity to recommend such a proposal as a matter of conscience. With respect to both proposals, however, Mr. Nicholas said:

> I would not be supposed to want a due respect either for those Commissioners or for the President; but, merely because recommended by them, we are not warrantable in adopting it.[36]

Thus at the conclusion of Washington's second term, the House was of the opinion that while Congress had been granted power over the District of Columbia, the establishment of a university in that District, even though privately endowed, was a doubtful exercise of that particular grant of authority.[37]

President Thomas Jefferson, also a friend to education, expressed his educational ideas in his Second Inaugural Address delivered on March 4, 1805. With pride, he first reiterated the ability of the United States of America to meet her fiscal obligations by inquiring, "It may be the pleasure and the pride of an American to ask, what farmer, what mechanic, what laborer ever sees a taxgatherer of the United States?"[38] Referring to revenue contributions on the conscription of foreign articles, he continued,

These contributions enable us to support the current expenses of the government. . .and to apply such a surplus to our public debt. . .and that redemption, once effected, the revenue thereby liberated may, by a just repartition of it among the states and a corresponding amendment of the Constitution, be applied in time of peace to rivers, canals, roads, arts, manufacturers, education, and other great objects within each state.[39]

In other words, once the public debt was redeemed, which appeared imminent, the United States would have a surplus. These funds could then be applied to education provided the military needs of the country were first met and provided that the Constitution was amended to permit Congress jurisdiction over education. Furthermore, the federal government could accomplish all this plus manage its constitutional business at hand, without an internal tax on its citizens. It takes no exhaustive knowledge of current events to understand that each of these laudable aspects of Jefferson's administration are reversed today, point by point.[40]

So often proponents of government education stop at this point and erroneously idolize Jefferson as a champion of state controlled secular education. They ignore his official statements, and fail to acknowledge the balance of his federal education proposals. Referring to federal intervention in education based on a surplus of federal revenues, he observed:

> The subject is now proposed for consideration of Congress, because if approved by the time the state legislatures shall have deliberated on this extension of the federal trust, and the laws shall be passed and other arrangements made for their execution, the necessary funds will be on hand and without employment.[41]

Commenting directly on the constitutional issue, he concluded:

> I suppose an amendment to the Constitution, by consent of the States, necessary, because the objects now recommended are not among those enumerated in the Constitution, and to which it permits the public moneys to be applied.[42]

For Jefferson, federal involvement in education was not a matter of 'how much' or the most 'expedient means.' It was an issue of constitutional jurisdiction. An honest observance of the compact revealed that Congress simply had no constitutionally delegated power to establish or encourage education and that it had no recourse to the federal treasury for any educational object as the Constitution stood. His priorities were in fulfilling the military purposes of government.[43] If there were any surpluses, then other worthy objects could be entertained. This of course all presumed that an enabling amendment to the Constitution was prerequisite.

James Madison as President was similarly aware of the constitutional limitations on the Federal Government and particularly Congress. Madison had been instrumental in presenting a measure at the Constitutional Convention to establish a national university which was rejected on at least two separate occasions.[44] He had also transmitted to the House two items: Washington's request that Congress consider establishing a national university, and the Commissioners' Memorial, to establish a local university in the District of Columbia. Both of these items were postponed indefinitely.[45]

Madison was also very well acquainted with the Constitution.[46]

In his First Inaugural Address, delivered March 4, 1809, he reiterated certain constitutional duties of his office,

> to support the Constitution, which is the cement of the Union, as well in its limitations, as in its authorities; to respect the rights and authorities reserved to the States and to the people as equally incorporated with and essential to the success of the general system.[47]

Madison was not parroting the language of expediency. He was not indicating that the same power was shared by the federal and state governments, and the people. He was affirming the Constitution as it was intended, not supposing that the federal government should act beyond the scope of its enumerated power.

Turning specifically to education, he expressed his desire that the federal government should observe proper constitutional restraints. He encouraged Congress "to promote by authorized means (certain internal improvements); to favor in like manner, the advancement of science and the diffusion of information. . ."[48] (emphasis added). In 1815 he clarified what he meant by "authorized means" by calling for a constitutional amendment, in order for the federal government to obtain "national jurisdiction and national means" to implement a series of internal improvements.[49] He then proceeded to urge Congress ("in like manner") to establish a "national seminary of learning within the District of Columbia, and with the means drawn from the property therein, subject to the authority of the General Government."[50] He arrived at this constitutional solution in 1815, partly based on Congress' view of the subject expressed by them in 1811.[51]

The House Committee notes are worth reviewing in detail for they summarize much of what has been articulated

> (I)t was necessary to consider whether Congress possessed the power to found and endow a national university.
>
> It is argued, from the total silence of the Constitution, that such a power has not been granted to Congress, inasmuch as the only means by which it is therein contemplated to promote the progress of science and the useful arts, is, by securing to authors and inventors the exclusive right to their respective writings and discoveries for limited times. The Constitution, therefore, does not warrant the creation of such a corporation by any express provision.
>
> But it immediately occurred that, under the right to legislate exclusively over the district wherein the United States have fixed their seat of Government, Congress may erect a University at any place within the ten miles square ceded by Maryland and Virginia. This cannot be doubted.

> Here, however, other considerations arise. Although there is no Constitutional impediment to incorporation of trustees for such a purpose, at the City of Washington, serious doubts are entertained as to the right to appropriate the public property for its support. The endowment of a University is not ranked among the objects for which drafts ought to be made upon the Treasury. The money of the nation seems to be reserved for other uses.[52]

The Committee concluded that,

> The erection of a university, upon the enlarged and magnificent plan which would become the nation, is not within the powers confided by the Constitution to Congress. . . . If, nevertheless, at any time legislative aid should be asked to incorporate a district university for the local benefit of the inhabitants of Columbia, and of funds of their own raising, there can be no doubt that it would be considered with kindness, as in other cases; but it must be remembered that this is a function totally distinct from the endowment of a national university, out of the treasure of the United States, destined, in its legitimate application, to other and very different purposes .[53]

During the Presidency of Madison's successor, James Monroe, the issue of a seminary for education was once again raised. Outlining his constitutional perspective, he noted in the context of internal improvements that, "the result is a settled conviction in my mind that Congress do(es) not possess the right."[54] He also observed, however, that:

> In cases of doubtful construction, especially of such vital interest, it comports with the nature and origin of our institutions, and will contribute much to preserve them, to apply to our constituents for an explicit grant of power. We may confidently rely that if it appears to their satisfaction that the power is necessary, it will always be granted.[55]

Monroe, however, did not consider the illegitimacy of a seminary of learning to be in doubt. To him, Congress simply did not have the power to intervene in educational affairs or fund educational ventures from the national treasury without a constitutional amendment. The history of the national university and seminaries of learning amply demonstrated that much. Referring to internal improvement measures he stated:

> I think proper to suggest also, in case this measure is adopted, that it be recommended to the States to include in the amendment sought a right in Congress to institute likewise seminaries of learning . . . . [56]

This suggestion was brought before the House and the proposition to consider the resolution was rejected.[57]

The Presidency of John Quincy Adams illustrated a similar concern for the integrity of the

Constitution. In his First Annual Message of 1825 he observed that "moral, political, (and) intellectual improvements are duties assigned by the Author of Our Existence to social no less than to individual man."[58] He strictly cautioned Congress, as they undertook such improvements, to adhere to the powers which were delegated, cautioning; "the exercise of delegated powers is a duty as sacred and indispensable as the usurpation of powers not granted is criminal and odious ."[59]

The principle of limited and enumerated constitutional authority in Congress, acknowledged by former presidents, was also recognized by President Andrew Jackson. In the context of congressional appropriations from the federal treasury for roads and canals without first resorting to an amendment,[60] Jackson stated that,

> If it be the wish of the people that the construction of roads and canals should be conducted by the Federal Government, it is previous amendment of the Constitution, delegating the not only highly expedient, but indispensably necessary, that a necessary power and defining and restricting its exercise with reference to the sovereignty of the States, should be made.[61]

There is little doubt that just as Monroe considered a constitutional amendment as an essential prerequisite in granting the federal government jurisdiction over roads, canals and education, that had education been among the objects of the proposed bill it most likely would have also been vetoed. Even so, the enduring principle that Jackson relied upon is still binding:

> When an honest observance of constitutional compacts cannot be obtained from communities like ours, it need not be anticipated elsewhere. . . and the degrading truth that man is unfit for self-government admitted. And this will be the case if expediency be made a rule of construction in interpreting the Constitution. Power in no government could desire a better shield for the insidious advances which it is ever ready to make upon the checks that are designed to restrain its action.[62]

Land-Grant Legislation

In 1859 President James Buchanan vetoed an Act originally introduced by Justin Morrill which granted public land for the maintenance of agricultural colleges within the several states already admitted to the Union. His veto was based upon the fact that the Act was "both inexpedient and unconstitutional."[63] It was inexpedient because it was "passed at a period when we can with great difficulty raise sufficient revenue to sustain the expenses of the Government."[64] He went on to explain to Congress that the "Constitution is a grant to Congress of a few enumerated but most important powers. . . . All other powers are reserved to the States and to the people."[65] He reiterated for Congress that the "several spheres of government action should be kept distinct from each other."[66] Furthermore, the

> Federal Government, which makes the donation, has confessedly no constitutional power to follow it into the States and enforce the application of the funds to the intended objects. As donors we shall possess no control over our own gift after it

> shall have passed from our hands.[67]

If this lacked clarity, he concluded,

> I presume the general proposition is undeniable that Congress does not possess the power to appropriate money in the Treasury, raised by taxes on the people of the United States, for the purpose of educating the people of the respective States. It will not be pretended that any such power is to be found among the specific powers granted to Congress nor that 'it is necessary and proper for carrying into execution' any one of these powers.[68]

Though Buchanan vetoed the Land Grant Act in 1859, President Lincoln signed into law an almost identical Act three years later. This act was also introduced by Justin Morrill and became known as the Morrill Land Grant Act of 1862.[69] It was hotly debated in both Houses of Congress and has been characterized as the "first real Federal role in education, the first divergence from Constitutional intent."[70]

Morrill himself envisioned a broader federal presence than the Constitution permitted or the Land Grant Act suggested. He declared in 1888 that "I have attempted . . . not wholly unsuccessfully to bring forward a measure that would reinforce the Land-Grant Colleges with a supplemental national fund."[71] (emphasis added)

Buchanan rejected this type of congressional intervention on the grounds of constitutionality. Lincoln, however, did not draw upon Buchanan's constitutional position. Buchanan had accepted prior congressional grants of federal territories and lands made to new states as they successively enter the Union, but rejected the outright donation of lands (suggested by Morrill) to all states for the erection of colleges. The former, if it rested on any congressional power, was contained in Congress' constitutional authority to dispose of territories belonging to the United States.[72] The advocates of the Land Grant bill, however, sustained their position by construing the constitutional phrase "to dispose of" so as to embrace objects not contemplated by an enumerated power in the Constitution.

Buchanan had pointed all of this out very clearly in his Veto Message of February 24, 1859, but by 1862 the exigencies of the circumstances, the ongoing Civil War and the absence of substantial southern representation in Congress, proved detrimental to constitutional limitations.[73] Buchanan's warning that Land Grant legislation would "confer upon Congress a vast and irresponsible authority, utterly at war with the well-known jealousy of Federal power which prevailed at the formation of the Constitution,"[74] was permanently set aside.

Thus between 1777 and 1859, an honest consideration of the constitutional compact was demonstrated. The Constitutional and historical limitations on the authority of the federal government were duly observed. Though a variety of factual rationales for federal intervention into education were asserted, they were always rejected in light of the constitutional enumeration of powers and the Ninth and Tenth Amendments. Not until 1862 did the first wedge of federal

jurisdiction into education become manifested. The most definitive congressional usurpation, however, outside the Article IV, Section 3, Clause 2 Land Grant debate, came in 1867 with the formation of the Federal Department of Education.

III. EARLY FACTUAL LIMITATIONS

The major factual arguments employed by proponents of Congressional intervention in education involved 1) the availability of territories, 2) the lack of suitable American Universities, and 3) the availability of surplus revenues in the treasury.

The Congress, operating under the Articles of Confederation, encouraged settlement of wilderness territories which later became states, by setting aside tracts of land for educational purposes. Today, however, Congress is no longer endowed with territories from which states could be formed. The vast territories formerly held are now under the authority of state governments which preclude federal intervention with respect to non-enumerated matters. Thus, the belief that a precedent was established by assertion of federal jurisdiction over territories, even if proven, could never be utilized to accord the national government jurisdiction over parents or states with respect to education.[75]

George Washington identified another factual basis for federal intervention. He observed in a letter to the Commissioners of the Federal District that, "It has always been a source of serious reflection and sincere regret with me that the youth of the United States should be sent to foreign countries for the purpose of education."[76]

The Commissioner of Education also noted in 1895 that, "The point at which Washington was most at variance with current practice was his strong objection to sending American youth abroad to study. . . . But here, again, conditions have greatly changed."[77] He stated that even "Jefferson wrote, after studying foreign educational institutions, that, besides speaking the modern languages, every article of general education. . . could be as well acquired at William and Mary College as in any place in Europe."[78]

No one today would seriously contend that such a rationale for federal intervention in education is legitimate, though some would argue that the American university is equally at risk as its European counterpart, due to centralized control and influence.

Thomas Jefferson articulated the third rationale inviting federal intervention into education - surplus revenue. Noting that after the federal government paid all its legal obligations, there will "long be an accumulation of moneys in the Treasury." He asked, "To what other objects shall these surpluses be appropriated?"[79] Among those objects in response, was education. While he was certain that a constitutional amendment would be required for such an end, he nevertheless based the immediate factual rationale for federal intervention on the surplus of federal funds.[80]

In the final analysis, whenever transfer of monies to the states for educational purposes was contemplated, it was only when all constitutionally enumerated federal expenses were met, a surplus

existed in the federal treasury, distribution was to be without congressional strings, and a constitutional amendment was presumed necessary. None of these factual arguments proved long lasting. They are all no longer relevant to factually justify any federal intervention into education. This is the nature of factual arguments, both historically and contemporarily.

IV. THE DEPARTMENT OF EDUCATION - 1867

James Buchanan's historical warning, that inventing federal jurisdiction over educational matters would confer upon Congress a vast and irresponsible authority, was ignored in 1862 during the early period of the southern insurrection. In the days of reconstruction after the Civil War, his warning was embraced as a solution. Preferring to construe the Constitution in an unnatural and militaristic fashion, Congress had refused the admission of Senators and Representatives from eleven of the 36 states then in the Union.[81] Rather than obeying their constitutional duties to preserve that document and the Union which framed it, Congress chose to take advantage of this disenfranchisement and enacted a Federal Department of Education 1866. This political reconstruction act was a clear congressional usurpation of jurisdiction with respect to educational matters, at the expense of the Union.

The National Association of State and City School Superintendents had petitioned Congress to establish a Bureau of Education. Their memorial noted that the object of this Bureau was to "render needed assistance in the establishment of school systems where they do not now exist" as well as improve and vitalize existing systems.[82] The assistance requested was to assume six forms:

1. Secure greater uniformity and accuracy in school statistics.

2. Bring together the results of school systems in order to determine their comparative value.

3. Assemble the different methods of school instruction and management for distribution.

4. Collect and diffuse information generated by school districts respecting state school laws, teacher qualifications, modes of heating and ventilation, etc.

5. Help communities in the organization of their school systems.

6. Encourage education as a valuable object and shield of civil liberty.[83]

In essence, the Association sought the Federal Government as a "national channel of communication between the school officers of different states. . . without its being invested with any official control of the school authorities therein."[84] There was neither mention nor desire to utilize the federal treasury to fund any educational programs. There was no hint that the Department would do anything other than collect statistics. In short, the Department was to be an educational statistical service located in Washington, D.C. Though the educational sphere of action was small, the Bill requested Congress to assert jurisdiction over the sphere of education itself.

When debate opened in the House on June 5, 1866, General James Garfield of Ohio (later to be the twentieth President) presented the Bill as modified by himself, which was then read. It provided in part that:

> There shall be established, at the City of Washington, a Department of Education for the purpose of collecting such statistics and facts as shall show the condition and progress of education in the several States and Territories, and of diffusing such information respecting the organization and management of schools and school systems and methods of teaching as shall aid the people of the United States in the establishment and maintenance of efficient school systems, and otherwise promote the cause of education throughout the country.[85] (emphasis added)

The Bill also provided that the Commissioner report to Congress annually, "the results of his investigations and labors, together with a statement of such facts and recommendations as will in his judgment subserve the purpose for which this department is established."[86]

The first speaker, Mr. Donnelly of Minnesota, referring to the southern states and the recent Civil War, suggested that

> We have found that the hitherto governing populations of those states could not be trusted to uphold the national Government, . . the responsibility for all this has been properly charged to slavery. Slavery has been swept away, but the ignorance, the degradation, which were its consequences remain. . . . "[87]

After a rigorous sermon on the evils of ignorance and the illiterate conditions of the southern states and Mexico, he declared,

> Pass this Bill and you give education a mouthpiece and a rallying point. While it will have no power to enter into the states and interfere with their systems, it will be able to collect facts and report the same to Congress, to be thence spread over the entire country.[88]

The import of Mr. Donnelly's address was that ignorance and illiteracy contributed to the Civil War and threatened the Republic. The remedy to prevent further evil of this nature was, "to make every man who votes an intelligent, conscious, reasoning, reflecting being" by education.[89] Mr. Donnelly's concern, however, was not merely to remedy ignorance. It was broader than that. By tying his remedy to voting, he effectively declared that loyalty to the federal government could be secured by indirectly controlling education from Washington. He neglected in his analysis, however, to demonstrate exactly how the availability of statistics would eradicate disloyalty and illiteracy without a related form of control.

It is erroneous to believe, as did Mr. Donnelly, that the southern states did not know how to educate their children. Strategically, Donnelly had reduced education to an issue of loyalty and literacy. He had neglected other dimensions of education prevalent in states where parental rights were

consistently observed. He drew instead heavily upon the claims of anti-parental state systems of education which made literacy the sole benchmark of education and the state the sole provider .[90]

The following speaker, Mr. Rogers of New Jersey, stated that,

> I had reason to believe that. . . no more Federal bureaus would be attempted to be established for the purpose of carrying out any particular ideas of philanthropy of any set of men whatever .[91]

He observed that it was unheard of to establish a centralized "bureau for the purpose of giving the principles by which the children of the different states shall be educated." Turning to the Constitution, he stated, "there is no authority under the Constitution of the United States to authorize Congress to interfere with education of children of the different states in any manner, directly or indirectly."[92]

Congressman Rogers pointed out the inherent flaw in the Bill. It purported to give Congress jurisdiction over education. Once jurisdiction over education, however, was asserted, it could be expanded by Congress as desired. Encouraging education was no different than controlling it, if jurisdiction was once conceded.

Mr. Rogers declared that the Bill,

> proposes to put under the supervision of a bureau established at Washington all the schools and educational institutions of the different States of the Union by collecting such facts and statistics as will warrant them by amendments hereafter to the law now attempted to be passed, to control and regulate the educational system of the whole country.[93]

He correctly noted that the Bill was open on the question of future control, but clearly asserted federal jurisdiction. This opened the door for control either directly or indirectly through funding or other means, at any time in the future when conditions proved that expediency should again be made the rule of constitutional construction. To assert that the degree of federal jurisdiction was small and limited to statistics, in no way impaired the jurisdictional claim. For once jurisdiction was established government could assert complete sovereignty within that sphere at any time.[94]

Rogers also focused on the enormity of the expense of the project and its open-ended nature, the false characterization of southern states as ignorant and illiterate, and the natural right of parents to educate their children.[95] He reiterated that

> no man can find anywhere in the letter or spirit of the Constitution one word that will authorize the Congress of the United States to establish an Education Bureau. If Congress has the right to establish an Educational Bureau, . . for the purpose of collecting statistics and controlling the schools of the country, then by the same parity of reason, a fortiori, Congress has the right to establish a bureau to supervise

> the education of all the children that are to be found in. . .this country. You will not stop at simply establishing a bureau for the purpose of paying officers to collect and diffuse statistics in reference to education.[96]

Mr. Rogers correctly observed that power with respect to education was not to be found among those enumerated to Congress. With these views expressed, the speaker's hammer fell, and debate was ended.

On June 8, 1866 the measure was considered for a second time. Mr. Moulton of Illinois, began the discussion, "Now, sir, what is the scope and object of this bill? What does it propose to do? It is simply a measure for the benefit of universal education."[97] After a discourse on the personal devotion of educational thinkers toward universal education, Mr. Moulton continued by asking,

Now, Mr. Speaker, what is the true, genuine spirit of our institutions? Upon what are they founded? The two great pillars of our American Republic, upon which it rests, are universal liberty and universal education.[98]

Suggesting the former had been achieved by passage of the Civil Rights Act of 1866, he then asserted in his usual rhetorical way,

> Now, sir, in order to make education universal, what do we want? What is the crying necessity of this nation today? Why, sir, we want a head. We want a pure fountain from which a pure stream can be poured upon all the States. We want a controlling head by which the various conflicting systems in the different States can be harmonized, by which there can be uniformity, by which all mischievous errors that have crept in may be pointed out and eradicated.[99]

In case his fellow Congressmen were not sure just what proponents of the Bill intended once Congress assumed jurisdiction, he took great pains to point out for them their plans:

> The very object of establishing a Bureau of Education is that these different systems may be brought together. We want all these school systems all over the land brought under one head, so that they may be nationalized, vitalized, and made uniform and harmonious as far as possible.[100]

This is either an assertion of control over the minds of men, the destruction of State governments, or a somewhat naive demonstration that parents and States would eagerly accept this "pure fountain" of federal information and willingly fall in line with the "pure stream" of educational wisdom annually announced by the Commissioner. Not only was Mr. Moulton lacking in basic understanding of human nature and states' rights, but he demonstrated a broad irresponsibility with respect to the Constitution as well. The power and fervor of the Reconstruction Congress apparently dulled his constitutional faculties, for he then remarked on the constitutional issues raised by Mr. Rogers three days previous; "Let us look at this for a moment. Let us see whether we have constitutional power."[101] Thereafter he misquoted the Constitution, declaring "The Constitution

provides that it shall be the duty of Congress to pass all laws which shall be necessary for the common good and welfare."[102] From all this he somehow concluded that

> I do not desire unnecessarily to concentrate the power of the country here, . . . Then what is this Bureau to do? Simply to collect information, nothing more than that. It will be but an extension of the census of the people.[103]

What is to be made of Congress's "duty to pass all laws" under such a Bill is not clear.

Certainly the federal government is no "pure stream" of educational insight. It possesses no monopoly on the best system of education despite its congressional converts. The logical nexus between a service designated to collect statistics, and one designed to nationalize, vitalize, and harmonize education, sufficiently demonstrates that proponents in Congress sought to control American education indirectly through statistics and, eventually, directly by force. Neither form of control, however, was consistent with any constitutional proposition, including the power of census or the general welfare clause.

Mr. Randall of Pennsylvania also spoke. He introduced an amendment in an effort to satisfy the proponents and opponents of the Bill. It proposed to establish a Bureau of Education for the sole purpose of collecting statistics. Since this was properly within the authority of the Department of the Interior (if any department), he considered it sufficient to placate the fears of the opponents. He gives his reasons plainly:

> The systems of education throughout the country have been left to State authority. The raising of the revenue for educational purposes, the method of its expenditure, and the system of instruction have all been left entirely with the States.[104]

Clarifying the object of the Bill, he proposed that the general government

> leave this question of statistics in reference to the States educational systems to the Secretary of the Interior, where it properly belongs, if it belongs to any Department of the Government. It is . . . a part of the system, or should be part of the system, of taking the census.[105]

Though rejected in this session, the amendment was accepted in essence by a subsequent Congress and the Bureau was placed in the Department of the Interior.

Whatever the constitutional merits of this claim of congressional power, that is, the inclusion of educational statistics in the census, it could only be employed in a manner consistent with an enumerated end. Notwithstanding any of this, it is clear that the original objects of the Bill, diffusing organizational and school management methods as well as teaching methods, are no part of the work of a census, nor does Congressional power to conduct a census permit promotion of the cause of education throughout the country. These objects were part of the original Bill, but were not appropriate items for a census. When the final vote on the Bill to establish the Department of

Education was taken, the measure was defeated 59 to 61, the Democrats voting solidly against it. Later in the day, Congressman Upson of Michigan moved for reconsideration.[106] On June 19, 1866 his motion came to a vote. Garfield, who had introduced the original bill now argued strenuously on its behalf. He claimed that education was an interest that had no lobby to press its claim and urged that the House reconsider "this liberal and progressive measure."[107]

Upon reconsideration, a number of representatives abstained from voting and the Bill passed. The change in the vote was directly tied to the abstentions, "the persistent zeal with which (Garfield) urged the measure in private,"[108] and the obvious fact that no southern representatives were admitted to their congressional seats. Others suggested that Garfield had "bamboozled" the House into passing the Bill.[109] Garfield, however, maintained that the Bill disclaimed any control over the educational systems of the states, though jurisdiction had been asserted by the national government.[110]

Andrew Jackson could not have predicted the rationale employed by proponents of federal jurisdiction over education in clearer terms when in 1830 he said:

> When an honest observance of constitutional compacts cannot be obtained from communities like ours, it need not be anticipated elsewhere . . . and the degrading truth that man is unfit for self-government admitted. And this will be the case if expediency be made a rule of construction in interpreting the Constitution.[111]

The rationale "requiring" federal abridgement of the peoples' inalienable right and power over their own education was devoid of any constitutional basis. It reflected the popular belief that a reconstruction Congress could 'temporarily' suspend the Constitution for the expedient objectives of unity. This abridgement was also complimented by a European styled centralization of education under the general government. Garfield for instance cited approvingly M. Guizot, then Minister of Public Instruction in France.[112] Guizot declared

> Napoleon felt that the educational department . . . should hold closely to the (French) state government, receive its powers from that source, and exercise them under its general control. Napoleon created the University, adapting it to the new state of society.[113]

Decline of Constitutional Restraints

In 1806 Jefferson considered federal presence in education to be unconstitutional. In 1862 the first Morrill Act was successfully passed donating federal lands for higher education. By 1867 Garfield and Congress thought more of European educational experience than the United States Constitution. As a result, the Department of Education was created. After 1867, the jurisdictional issue, having been waylaid, Congress steadily expanded its unconstitutional reach into education. In 1890 a second Morrill Act which provided federal funds for land grant colleges and universities was approved. In 1907 the Nelson Amendment to the Morrill Acts increased aid to land grant institutions. In 1917 the Smith-Hughes Act provided federal aid to states for vocational education. The Bankhead-Jones Act of 1935 increased federal funds for land grant institutions. In 1954

Congress authorized the appointment of a National Advisory Committee on Education charged with the responsibility of advising the Secretary of H.E.W. on problems of national concern in education. The National Defense Education Act of 1958 authorized federal aid to all levels and several categories of education. In 1963 Congress authorized financial assistance for construction and rehabilitation of facilities in higher education which was completely contrary to the House Committee Report of 1811.[114]

Congress had come full circle in education by unilaterally suspending the historical and constitutional limitations imposed upon their power. The expansion of federal jurisdiction beyond its constitutional boundaries, once sustained, provided ready justification for a variety of congressional abridgements with respect to education. The period from 1862 to 1979 was not a transition period as much as it was the consistent expression of unlawful federal jurisdiction over education. The Federal Department of Education Act of 1979 is not the apex of these events but a significant acceleration of the suspension of a limited and constitutional government.

Thus, by 1979 the clarity of Jefferson's position which required a constitutional amendment prior to congressional assumption of jurisdiction over education had been ignored. Congress had expanded their jurisdictional claim so that over 300 separate federal education programs involving expenditures reaching nearly 25 billion dollars including over 40 federal departments and agencies involved in education grants, services and regulations, could carry on business as if the Constitution were non-existent. The prediction of Congressman Rogers in 1866, however, was correct; "You will not stop at simply establishing a bureau for the purpose of paying officers to collect and diffuse statistics in reference to education."[115] Thus, by 1979, what began as the mere collection of statistics by the federal government, had assumed the proportions of a modern Napoleonic Educational Code.[116]

V. THE DEPARTMENT OF EDUCATION - 1979

It is not the purpose here to examine this Act in detail. By its own terms it demonstrates that it flows from the belief that the federal government is vested with constitutional jurisdiction over education in any degree which is expedient. Once jurisdiction was clearly usurped in 1867, the small intrusion of statistics gradually expanded to an 18 billion dollar depletion of the public treasury for philanthropy and special interests. Thus, to exhaustively detail the extent of this present federal effort on behalf of expediency would be to dwell on secondary factors and ignore the controlling jurisdictional issue.

Instead, the key focus will be on the erroneous constitutional basis upon which the Act is wholly structured, the pseudo-legal conception of federalism which "shares" power, the authoritarian nature of federal "protection" of state and parental duties, and the denigration of those parental duties from a constitutionally reserved and inalienable status to mere "traditional functions."

It need not be demonstrated that experts who packaged this Act for a constitutionally inexperienced President neglected the Constitution. It will be evident that they neither understood nor acknowledged that the Constitution was designated as a limitation on the jurisdiction and the powers

of Congress. These specialists merely employed "the rule of expediency" in their construction, thereby presuming that the American people were "unfit for self-government" and therefore in need of federal 'guidance' over their minds and acts.

General Welfare

The federal government is a government of limited and enumerated powers. It is supreme within its own sphere of jurisdiction, but not with respect to state power which is supreme within its separate and distinct sphere. It is a fundamental truism of federalism that power is not shared between the states and the federal government, unless the Constitution specifically authorizes concurrent jurisdiction. It is also true that the general welfare of the United States is best ensured by congressional adherence to their enumerated powers.

There is one provision of the Constitution which refers to the general welfare, though the term is also referred to in the preamble. The preamble states that

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, . . . do ordain and establish this Constitution for the United States of America.[117] (emphasis added)

The preamble outlines the broad purposes of the Constitution. It explains that the people are forming this government in order to achieve some purpose. One such purpose is to promote the general welfare. The preamble is not a grant of power to Congress, nor a prohibition of power. It acknowledges that the Constitution is to be understood as designed to accomplish certain purposes. The Constitution is to be interpreted consistently with the promotion of the general welfare among the people of the United States. The phrase "promote the general welfare" applies to the purpose of the instrument taken as a whole. It is not a grant of power or a bottomless void to be filled by the cleverest branch of government based on the rule of expediency.

An authoritarian Congress with broad and undefined powers is contrary to promoting the general welfare of the people. It is inconsistent with the principle of self-government upon which the Republic has always stood and is adverse to our system of dual governments and civil liberties. A Congress which is given only limited and enumerated powers is the best safeguard against tyranny. This understanding of jurisdiction is consistent with promoting the general welfare of the people.

The Department of Education Organization Act of 1979, however, states:

> The Congress declares that the establishment of a Department of Education is in the public interest, will promote the general welfare of the United States, will help ensure that education issues receive proper treatment at the Federal level, and will enable the Federal Government to coordinate its education activities more effectively.[118] (emphasis added)

Thus Congress, in declaring federal jurisdiction over education, identified the preamble of the Constitution as the basis on which the statute and its consolidated functions rested. The establishment of a Constitution to, inter alia, promote the general welfare, however, cannot sanction an undefined grant of power to Congress. It cannot be construed to grant Congress power to "ensure that education issues receive proper treatment at the Federal level" or enable Congress to "coordinate its educational activities more effectively." Thus, by employing this language of "promoting the general welfare," either Congress acted mistakenly, it acted negligently, or it acted intentionally and usurped the constitutionally retained jurisdiction of the people over education.[119]

It may be true that Congress made a mistake in placing the constitutionality of the statute on the authority of the preamble. They may have confused it with Article I, Section 8 which states,

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; . . . [120] (emphasis added)

Confusion existing between "promoting" and "providing" for the general welfare as reflected in the Preamble and Article I, Section 8, has been further heightened by judicial decisions. For instance, in Steward Machine Co. v. Davis[121] Justice Cardozo continually referred to the promotion of the general welfare. In that case, the Court found that Congress' Article I, Section 8 spending power was broad enough to include the unemployment compensation scheme created by the Social Security Act of 1935. While that Article clearly articulates congressional power to provide for the general welfare, Cardozo expressly justified the measure based on the erroneous belief that the general welfare of the nation could be constitutional promoted thereby.[122] Cardozo failed to acknowledge that the Preamble was not a grant of power to Congress and that congressional authority to provide for the general welfare was not intended to be an open-ended invitation for social reform.

A review of the Constitutional Convention, however, indicates no similar confusion. Grants of power to the national legislature were intimately discussed in relationship to the states. A proposition had been put forward for giving Congress "Legislative power in all cases to which the State Legislatures were individually incompetent."[123]

Mr. Pinkney and Mr. Rutledge objected to the term "incompetent" as vague. They preferred to,

> see an exact enumeration of the powers comprehended by this definition. Mr. Butler repeated his fears that we were running into an extreme in taking away the powers of the States, and called on Mr. Randolph for the extent of his meaning. Mr. Randolph disclaimed any intention to give indefinite powers to the national Legislature, declaring that he was entirely opposed to such an inroad on the State jurisdictions, and that he did not think any considerations whatever could ever change his determination. His opinion was fixed on this point.[124]

When the initial draft of these powers was subsequently reported on Monday, August 6 in Convention,[125] neither the preamble nor the Article VII (now Article I) contained any provision with

respect to the general welfare of the people. When Article VII was taken up on August 16, in Convention,[126] it remained unaltered. When the committee of eleven reported the Article VII on Tuesday, September 4, 1787 it requested that the phrase "provide for the common defense & general welfare, of the U.S." be included. This was agreed to.[127] There was no raging debate that "general welfare" implied some expansive power yet undefined. Precisely the opposite was true. It was added to authorize Congress "to provide for the common defense and general welfare, and for that purpose, among other express grants, they are authorized to lay and collect taxes . . . ."[128]

Just as the preamble noted the Constitution's purpose was to promote the general welfare, by limiting the powers of the national legislature, so too, the Article I power, to provide for the general welfare was not a grant of wide and exhaustive power. It was a grant of specific power, limited in its application in its own right and limited in its application to the objects thereafter stated. It was not a delegation of powers inconsistent with the entire instrument, the educational practices of the states, the decision of the Convention affirmatively rejecting congressional power over education, the views of the Presidents, the reports of the early congressional committees, or the Ninth and Tenth amendments' reservation of educational rights and powers to the people.

Thus the Article I, Section 8 "general welfare clause" in no way included any Congressional power over education. This power was specifically rejected at the Convention as indicated,[129] and cannot be magically resurrected by the disparagement of that clause for the purposes of federal expediency. Congress may have either been negligent or guilty of malfeasance, but it is unlikely to have made a mistake in passing such an unconstitutional Act.

Concurrent Jurisdiction

The Act also suggests that the federal government "shares" jurisdiction with the states. The Constitution, however, provides for the only cases of shared or concurrent jurisdiction. A simple review of the Constitution does not reveal any leeway for a "significant, but carefully restrained federal role in education."[130] It does not provide that "education is and should be of concern to federal, state and local governments."[131] It does not support other fictitious statements such as, "In all cases, Congress has been careful to stick to the Constitutionally-backed principle that the Federal role is limited to supplementing, not supplanting, State and local prerogatives and

Concurrent jurisdictions outlined in the Constitution do not support any rights . . ."[132] These statements are gibberish and nonsense. shared federal-state presence in education. The Constitution does not permit either "supplementing" or "supplanting." These words only describe degrees of control. They are two sides of the same jurisdictional fallacy,[133] contrived to distort the constitutional limitations on Congress which preclude them from intervening in education, directly or indirectly.

Self- Government

The Constitution does not vest in Congress the authoritarian power to protect the states and parents from their own educational choices. The proposal made in Convention giving power to the Congress to legislate in all cases where the state legislatures were individually incompetent, was not construed

so as to be completely at odds with the nature of Congress' limited and enumerated powers.

Similarly, Article IV, Section 4's declaration that each state shall be guaranteed a republican form of government, prohibits the federal government from establishing a centralized government dictating policy to the states. It confirms the controlling principle of self-government, by entrusting the people with a republican government which they participate in, precisely because they can govern themselves. Any unenumerated centralization of power in the hands of Congress is at odds with this principle.

Patently Napoleonic statements such as,

> It is the intention of the Congress in the establishment of the Department to protect the rights of States and local governments and public and private educational institutions . . . [134]

reflect a vast and irresponsible usurpation, denigrating the Constitution from which limited Congressional authority is derived.

VI. INALIENABLE RIGHTS OF PARENTS

Historically, "every standard writer on the subject of either laws or morals proclaims with one voice that parents are bound by the natural law to feed, clothe, and educate their children."[135]

James Kent in his famous Commentaries on American Law, observed this universal precept, stating that:

> The duties of parents to their children, as being their natural guardians, consist in maintaining and educating them during the season of infancy and youth, and in making reasonable provision for their future usefulness and happiness in life, by a situation suited to their habits, and a competent provision for the exigencies of that situation.[136]

Kent also acknowledged that "the rights of parents result from their duties."[137] In a clear exposition of these rights, he concluded that as parents,

> are bound to maintain and educate their children, the law has given them a right to such authority; and in the support of that authority, a right to the exercise of such discipline, as may be requisite for the discharge of their sacred trust.[138]

Francis Wayland, a prominent political writer and one time President of Brown University, wrote in 1841 that several duties devolved upon a parent to secure to their children a physical, intellectual and moral education. He stated that this "obligation requires that it be done either by a parent himself, or that he procure it to be done by another . . . But, let it be remembered it can be done only in part" by the parents' delegee.[139] Furthermore, Wayland clearly pointed out that the "teacher is only

the agent; the parent is the principal,. The teacher does not remove from the parent any of the responsibilities of his relation."[140]

Reiterating the exclusive and original jurisdiction of parents in general and a father in particular, Wayland concluded that "while he discharges his parental duties within these limits, he is, by the law of God, exempt from interference both from the individual and from society" until the child achieves the age of majority.[141] Commenting on the breach of this jurisdiction, Montgomery wrote,

> The law of nature and nature's God, which ordains that it is both the right and duty of parents to educate their children 'in such manner as they believe will be most for their future happiness' is utterly disregarded and set at naught by the State, which ordains that it is neither the right nor the duty of parents, but of the State, to say when, where, by whom, and in what manner our children shall be educated.[142]

Rather than promoting the general welfare, governmental usurpation of parental authority, either on a state or federal level "has always been found one of the surest indications of the decline of social order, and the unfailing precursor of public turbulence and anarchy."[143]

If there was any thought that Congress could utilize the general welfare clause as an open invitation to assume power, it was affirmatively denied and negated by reference to the natural right and duty of parents to direct the education of their children. These inalienable prerogatives were also reiterated in principle by the Ninth and Tenth Amendments.

The Ninth Amendment states that: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people ."[144] The right to educate one's child is not specifically enumerated, except indirectly, in the religious liberty, speech, press and assembly clause of the First Amendment. Thus, as an inalienable and natural right of every parent, it is retained undenied and undisparaged, by parents as a function of the nature of the right itself as well as by the Ninth Amendment.

The Tenth Amendment provides that: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[145]

Congress was affirmatively denied power over education at the Convention. It was not delegated to the United States by the Constitution, nor prohibited to the States by the Constitution. As an inalienable right, however, the civil power to execute this right, was reserved to the people. Parents retained the power to execute their natural right as parents. Education is not the natural right of any state or government, nor within their constitutional sphere of power.

The congressional findings upon which the federal Department of Education Act of 1979 rested, however, rewrote the Tenth Amendment to suit the expedient objectives of influence and control. They introduced unconstitutional distinctions between private and public rights and further suppressed the meaningful exercise of that parental duty. While stating that "parents have the

primary responsibility for education of their children, and States, localities, and private institutions have the primary responsibility for supporting that parental role,"[146] they implicitly limited the parental right to the private sphere.

Thus within the private sphere the state and voluntary institutions are to support parents. But the Congress continued, "In our Federal system, the primary public responsibility for education is reserved respectively to the States and the local school systems and other instrumentalities of the State."[147] Thus in the public sphere the states, rather than parents, are awarded educational custody of children. In both instances, however, Congress made an intentional effort to share educational jurisdiction alongside either the States and parents, or the State and its instrumentalities.

This unauthorized distinction between public and private, and primary and secondary, has no precedent in the Ninth and Tenth Amendments. Similarly, concurrent power over a child's education is not given to the Congress or the state, and is repulsive to the inalienable and natural rights of parents to educate their children, publicly and privately, directly and indirectly. It is also repugnant to our form of constitutional and limited government.

VII. OBJECTIONS CONSIDERED

Arguments of Expediency

The principal objections to withdrawal of federal jurisdiction over education are based on expediency. To that extent, they are not objections, but attempts to improperly dissolve or blur constitutional lines of jurisdiction. For that reason alone they should be rejected because they ignore the preexisting jurisdictional limitations on congressional power and the option to properly amend the Constitution.

Arguments of Economics

Objections indicating that states and local governments will wither up if federal influence and monies are withdrawn are equally invalid. Constitutionally, parents retain the original jurisdiction over the education of their children. Statistically, the federal government supplies only about 8 percent of monies used in the public school cartel. States and local governments supply the balance. The NEA and other political unions, however, want to increase the federal government's share to 33 percent. This would not only solidify their influence, but disparage state and local responsiveness to parental directives.[148] It would also compound federal deficits which are already unmanageable. Acknowledgment of the proper jurisdiction of parents and the private sector, however, would eliminate the need for substantially more than the present federal subsidy. Once a proper jurisdictional understanding is obtained, the financial objections can be properly handled.

Arguments by Educational Unions

Objections that parents will not execute their educational trust presume that teachers' unions, and the state and federal governments, have executed their trust appropriately. Apart from recent

findings that the United States is a "Nation at Risk" due to union and governmental 'assistance,' [149] these entities are hardly in a position to discuss tr-s proper execution of an educational trust. If an honest observance of the constitutional compact cannot be had by Congress, it need not be expected anywhere else. If Congress undertook its governmental trust seriously, it would provide a first step towards rekindling the self-government of the people. Practical effects such as returning to the people self-government over local educational matters, the advantages of constitutionally non-enumerated expenditures, and freeing up the federal government to attend to its proper spheres of jurisdiction would provide decentralized control, the reduction of federal deficits by eliminating the necessary leadership for others to follow suit and improve education rather than strengthen control. Parents on the whole are competent in the proper execution of their educational trust. If they were incompetent, then nothing could be said of their ability to execute their elective franchise with any integrity.

VIII. CONCLUSION

The original jurisdiction of parents and individual adults over education both public and private, is certain and universal. Consistent with that jurisdiction is the delegated authority of the private sector to assist parents or provide educational service on a voluntary basis.

Congressional usurpation of parental jurisdiction is contrary to the law of nature and constitutional restraints on legislative power. Congress may not embrace the rule of expediency in constitutional construction of their power. They may not discard the liberties, freedoms, and constitutional heritage of the people with respect to education under the pretext of general welfare.

When self-government is revived and constitutional limitations observed, all may then enjoy the free exercise of inalienable rights. When such limitations are honored, a constitutional government of limited and enumerated powers acts consistently with the general welfare and happiness of the people.

The unlawful and unconstitutional exercise of congressional power over education, however, is contrary to the rule of law under God, the freedom of the mind from all usurpers, and the Supreme Law of the Land. Education, therefore, is not lawfully or constitutionally subject to federal jurisdiction.[150]

ENDNOTES

1. U.S., Congress, House, Representative Rogers noted the unconstitutionality of the proposed Federal Department of Education, 39th Cong., 2nd sess., 5 June 1866, The Congressional Globe, 2968. Opponents of the Department also predicted that the original budget of $1,678.67 would eventually become expensive and unduly burdensome. One hundred and eighteen years later, that budget reached almost 18 billion dollars. In short, the fruit from this unconstitutional sowing has ripened into an unchecked federal presence in education.

2. See Rufus E. Miles, Jr., A Cabinet Department of Education (Washington, D.C.: American Council on Education, 1976) and U.S., Congress, Senate Committee on Governmental Affairs, Hearings- Department of Education Act of 1977, pts. 1-2, 95th Cong., 1st sess., (Washington, D.C.: Government Printing Office, 1977). These key sources are

inordinately devoid of any jurisdictional understanding which is consistent with the Constitution or history. See Miles, Id. at 38.

3. U.S., Constitution, art. VI, sec. 2 states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme law of the Land . . . ."

4. St. George Tucker, Blackstone's Commentaries, 5 vols. (Philadelphia: William Birch & Abraham Small, 1803; reprint ed., Buffalo, N.Y.: Dennis & Co., 1965), 1:39.

5. Tucker, Blackstone, supra note 4, at 1:41.

6. Tucker, Blackstone, supra note 4, at 1:41.

7. Tucker, Blackstone, supra note 4, at 1:42.

8. The view that law was relative to time and circumstance and rooted in the evolutionary dogma of the times, was expressed by Oliver Wendell Holmes, Jr. in an essay entitled Natural Law. Holmes stated,

> The Jurist who believes in natural law seems to me to be in that naive state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere.

Oliver Wendell Holmes, Jr. Collected Legal Papers, contained in The Common Law & Other Writings (Birmingham, Alabama: The Legal Classics Library, Special Edition, 1982), 312. If acceptability was the test, then that which is familiar today would become equally suspect according to Holmes analysis.

Critical of the duties and rights which flow from natural law, Holmes substituted his own view declaring:

> For legal purposes a right is only the hypostasis of a prophecy - the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it . . . . Id. at 313.

Such a position is completely contrary, however, to the immutable prerogatives guaranteed to free men and embodied in such landmark charters as the Magna Charta. See also Aleksandr I. Solzhenitsyn, A World Split Apart, (New York: Harper & Row, 1978). Solzhenitsyn states: "we have lost the concept of a Supreme Complete Entity which used to restrain our passions and our irresponsibility." Id. at 57.

9. See Home Building and Loan Assn. v. Blaisdell, 290 U.S. 398 at 453 (1934) (Sutherland, J., dissenting). Mr. Justice Sutherland also noted:

> A provision of the Constitution, it is hardly necessary to say, does not admit of two distinctly opposite interpretations. It does not mean one thing at one time and an entirely different thing at another time. Id. at 448-49.

The Court in Ex parts Milligan, (4 Wall. 2, 120-121, 18 L. ed. 281, 295, 296) also stated:

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended doctrine leads directly to anarchy or despotism . . . . Id.

Sutherland observed that without such a perspective as expressed in during any of the great exigencies of government. Such a Milligan, that:

> The Constitution would cease to be the 'Supreme Law of the Land,' binding equally upon governments and (the)

governed at all times and under all circumstances, and become a mere collection of political maxims to be adhered to or disregarded according to the prevailing sentiment or the legislative and judicial opinion in respect of the supposed necessities of the hour. 290 U.S. at 449-50.

10. U.S., Constitution, amend. X states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

11. U.S., Constitution, art. I, sec. 8, states in part:

(1) The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

(3) to regulate Commerce with foreign Nations, and among several States, and with Indian Tribes;

(5) To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

(8) To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

(12) To raise and support Armies, but no Appropriations of Money to that Use shall be for a longer Term than two Years;

(13) To provide and maintain a Navy;

(14) To make Rules for the Government and Regulation of the land and naval Forces;

(15) To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

(16) To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

(17) To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; - And

(18) To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vest by this Constitution in the Government of the United States, or in any Department of Officer thereof.

U.S., Constitution, art. 4, sec. 3, cl. 2 states: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

See also McCulloch v. Maryland 17 U.S. (4 Wheat) 316 (1819). "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." (Marshall, C.J.) Id.

12. U.S., Constitution, art. IV, sec. 3, cl. 2, supra note 11.

13. U.S., Constitution, art. I, sec. 8, cls. 8, supra note 11.

14. See George B. Germann, National Legislation Concerning Education (New York Columbia University, 1899, Library of American Civilization 15623), 13-14.

15. See Germann, National Legislation, supra note 14, at 17-20.

16. For a general discussion of state sovereignty see Hinsdale, U.S. Education, infra note 25 at 1268-74. Today there is no longer the vast expanse of territories which the federal government could feasibly sell to raise revenue. Furthermore, the Congress acknowledged it had no authority to interfere with the educational policy of any parent or state, and confined its actions to territories alone. President Buchanan was to later note in 1859 that numerous congressional land grants for education, "have been chiefly, if not exclusively, made to the new states as they successively entered the Union" (citing the language of the Ordinances of the Con-federate Congress of 1785 and 1787). He resolved that, "It cannot be pretended that an agricultural college in New York or Virginia would aid the settlement or facilitate the sale of public lands in Minnesota or California." J.D. Richardson, ed., Compilation of the Messages and Papers of the Presidents, 1789- 1897, 10 vols., (Washington, D.C.: Government Printing Office, 1896), 5:547, Veto Message, February 24, 1859. He knew that the original rationale for a land designation provision was to induce settlement of territories. Deviation from that rationale would be by pretext and unconstitutional. Thus when Congress reaffirmed the principles of the Northwest Ordinance during its first Session, it did so with respect to territories, not states.

17. Documents Illustrative of the Formation of the Union of the American States, 69th Gong., 1st sess., House Document No. 398 (Washington, D.C.: Government Printing Office, 1927), 119, 471-82. Jonathan Elliot, comp., The Debates in the Several State Conventions on the Adoption of the Constitution, 5 vols. (Philadelphia: J.B. Lippincott Co., 1891), 1:147 & 226.

18. Documents Illustrative, supra note 17, at 563-64. Elliot, Debates, supra note 17, at 1:247.

19. Documents Illustrative, supra note 17, at 702-12. Elliot, Debates, supra note 17, at 1:297.

20. Documents Illustrative, supra note 17, at 725. Mr. Gov. Morris noted in response to Madison, that he was of the opinion that : "It is not necessary. The exclusive power at the Seat of Government, will reach the object." Id.

21. Documents Illustrative, supra note 17, at 1024.

22. U.S., Constitution, art. I, sec. 8, cl. 8 supra note 11.

23. For instance, when the Delegates of the people of Virginia ratified the Constitution, they did so with the understanding that "the powers granted under the Constitution being derived from the People of the United States may be resumed by them whensoever the same shall be perverted to their injury or oppression and that every power not granted thereby remains with them and at their will:" Documents Illustrative, supra note 17, at 1027.

24. U.S., Constitution, art. I, sec. 8, cl. 17, supra note 11. U.S., Constitution, art. I, sec. 9, cl. 7 states in part: "No Money shall be drawn from the Treasury, but in Consequences of Appropriations made by Law . . . ."

25. B. A. Hinsdale, comp., U.S. Office of Education, Documents Illustrative of American Educational History, 53d Cong., 2d sess., 1892-93, House ex. doc. 1, pt. 5, 2 vols. (Washington, D.C.: Government Printing Office, 1895, Library of American Civilization 10588), 2:1293-94. See also U.S., Constitution, amend. X, supra note 2.

26. Richardson, Presidents, supra note 16, at 1:65-66, First Annual Address, January 8, 1790.

27. U.S., Congress, House, Representative Stone noted the unconstitutionality of the President's proposal regarding the promotion of science and literature, 1st Cong., 3 May 1790, The Annals of the. Congress of the United States, contained

in Joseph Gales, comp., The Debates and Proceedings of the Congress of the United States, 42 vols., (Washington: Gales and Seaton, 1834, Library of American Civilization 21604), 2:1550-51.

28. Annals of Congress, supra note 27, at 2:1551.

29. Richardson, Presidents, supra note 16, at 1:202-03, Eighth Annual Address, December 7, 1796.

30. U.S., Congress, House, Representative Madison noted the advantages of building a national university at the permanent seat of government, 4th Cong., 2nd sess., 12 December 1796, Annals of the Congress of the United States, contained in Joseph Gales, comp., The Debates and Proceedings of the Congress of the United States, 42 vols., (Washington: Gales and Seaton, 1834, Library of American Civilization 21608), 6:1600-01.

31. Annals of Congress, supra note 30, at 6:1600.

32. Annals of Congress, supra note 30, at 6:17o2.

33. Annals of Congress, supra note 30, at 6:1702.

34. Annals of Congress, supra note 30, at 6:1706. Referring to the Commissioners' Memorial Representative Harper stated:

> There was nothing in it that contemplated pledging the United States to find funds for its support; nor was it the object of the report to establish a National University . . . the object of the Commissioners was not to establish a National University or obtain money from the United States, but their direct object was, to be incorporated, so as to be enabled to receive such legacies and donations as may be presented to the institution . Id. at 6:1698.

Mr. Baldwin continued that "nothing can prove it improper, since no pecuniary aid is required, no grant of money is asked. If it was, I should . . . disapprove of it . . . ." Id. Representative Livingston though stating the proposition appeared straightforward, nevertheless voiced some reservations by inquiring, "If nothing was intended but a mere incorporation, why not apply to the State that could incorporate such a body? Something further seemed to be intended: public patronage was wanted to support this institution." Id. at 6:1701. Representative Lyman cautioned: "As far as I can understand, the land which is now to be appropriated for this University, is the property of the United States. Does not this look as though the United States are to patronize and support the establishment? If we take this step, I shall very much wonder if our next is not to be called upon to produce money." Annals of Congress, supra note 30, at 6:1699. See also Germann, National Legislation, supra note 14, at 23-25, and Hinsdale, U.S. Education, supra note 25, at 2:1298-1305.

35. Annals of Congress, supra note 30, at 6:1711.

36. Annals of Congress, supra note 30, at 6:1796.

37. U.S., Constitution, art. I, sec. 8, cl. 17, supra note 11. See note 34 supra.

38. Richardson, Presidents, supra note 16, at 1:379, Second Inaugural Address, March 4, 1805. Jefferson also notes that "the suppression of unnecessary offices, of needless establishments and expenses, enabled us to discontinue our internal taxes." Id.

39. Richardson, President, supra note 16, at 1:379 (emphasis in original), Second Inaugural Address, March 4, 1805. Jefferson stated:

> there will still ere long be an accumulation of moneys in the Treasury beyond the installments of public debt which we are permitted by contract to pay. . . . Nor, if our peace continues, will they be wanting for any other

> existing purpose. The question therefore now comes forward, to what other objects shall these surpluses be appropriated . . . during those intervals when the purposes of war shall not call for them? Id. at 1:409.

40. Noting the fact of surplus revenues, the condition of peace and the satisfaction of military purposes, Jefferson also stated:

Education is here placed among the articles of public care, not that it would be proposed to take its ordinary branches out of the hands of private enterprise, which manages so much better all the concerns to which it is equal . . . . Richardson, Presidents, supra note 16, at 1:409.

41. Richardson, Presidents, supra note 16, at 1:409-10, Sixth Annual Message, December 2, 1806.

42. Richardson, Presidents, supra note 16, at 1:410, Sixth Annual Message, December 2, 1806. Jefferson also added "that if Congress, approving the proposition, shall yet think it more eligible to found (a national establishment for education) on a donation of lands, they have it now in their power . . . " See text accompanying note 79 infra.

43. His loyalty to the Constitution as a fixed and uniform document was President to utilize improperly and unconstitutionally the power of made evident by the fact that Jefferson took no opportunity as the Federal Government to achieve these educational objectives for the sake of political popularity. This is demonstrated by recurrence to his 1779 and his 1816 proposals to the Commonwealth of Virginia. In 1779 he proposed to establish a university in Virginia which was rejected. In 1816 he again proposed to establish a university within Virginia's exclusive jurisdiction, by upgrading "The Central College" already in existence at Charlottesville, Virginia. The 1816 proposal was accepted and the University of Virginia eventually began operation in 1825. Thus, Jefferson's educational objective, having been rejected by the Commonwealth in 1779 could have easily influenced him to misuse his office of President from 1801-1809, in order to establish a university of greater magnitude and with greater resources than any state government could bring to bear. He resisted, however, this political appeal to undermine the Constitution, preferring instead to preserve, protect and defend that document. Henry S. Randall, The Life of Thomas Jefferson, 3 vols., (New York: Derby & Jackson, 1858, Library of American Civilization 20279-80), 3:461-71.

44. See text accompanying notes 18-21 supra.

45. See text accompanying notes 30-35 supra.

46. See Gaillard Hunt, ed., The Journal of the Debates in the Convention which Framed the Constitution of the United States as Recorded by James Madison, 2 vols., (New York: G.P. Putnam's Sons, 1908, Library of American Civilization 23016).

47. Richardson, Presidents, supra note 16, at 1:468, First Inaugural Address, March 4, 1809.

48. Richardson, Presidents, supra note 16, at 1:468, First Inaugural Address, March 4, 1809.

49. Richardson, Presidents, supra note 16, at 1:567-68, Seventh Annual Message, December 5, 1815.

50. Richardson, Presidents, supra note 16, at 1:568P Seventh Annual Message, December 5, 1815. Just three months earlier, Madison had proposed to add

> to the means of education provided by the several States a seminary of learning instituted by the National Legislature within the limits of their exclusive jurisdiction, the expense of which might be defrayed or reimbursed out of the vacant grounds which have accrued to the nation within those limits.

Richardson, Presidents, supra note 16, at 1:485, Special Session Message, September 1, 1815.

In 1796, Madison noted that a university at the seat of government would hinge on "whether Congress will encourage

an establishment which is to be supported entirely independent of them." He made it clear that it would not "ask a single farthing from (Congress), nor that it would pledge Congress to endow the establishment with any support," and believed that sale of federal lands within the District might properly support such a local university. Annals of Congress, supra note 30, at 6:1702. Therefore, when Madison proposed a national seminary of learning, he meant that Congress may act pursuant to its exclusive jurisdiction over the District of Columbia granted in Article I, Section 8, Clause 17. This in no way involved education of the people in the several states as in the earlier "national university" plan. As it turned out, this later proposal drew no attention from the House whatsoever.

51. U.S., Congress, House, Representative Mitchill delivered the report on President Madison's March 4, 1809 proposal for the establishment of a seminary of learning, 11th Cong., 3rd sess., 18 February 1811, Annals of the Congress of the United States, contained in Joseph Gales, comp., The Debates and Proceedings of the Congress of the United States, 42 vols., (Washington: Gales and Seaton, 1834, Library of American Civilization 21624), 22:976-77. U.S., Congress, House, Representative Wilde delivered the report on President Madison's September 1 and December 5, 1815 proposal which relates to the subject of a national seminary of learning, 14th Cong., 2nd sess., 11 December 1816, Annals of the Congress of the United States, contained in Joseph Gales, comp., The Debates and Proceedings of the Congress of the United States, 42 vols., (Washington: Gales and Seaton, 1834, Library of American Civilization 21633), 30:257-60.

See also U.S., Congress, House, Representative Atherton, offered for consideration an amendment to the Constitution granting Congress power to establish a national university which was rejected, 12 December 1816, Id. at 30:268. U.S., Congress, House, Representative Wilde moved successfully to discharge indefinitely the Committee considering the bill for establishing a national university on the basis that such a bill was not intended for Congress but only for the people, 3 March 1817, Id. at 30:1063-64.

52. Annals of Congress, supra note 51, at 22:976.

53. Annals of Congress, supra note 51, at 22:977.

54. Richardson, Presidents, supra note 16, at 2:18, First Annual Message, December 2, 1817.

55. Richardson, Presidents, supra note 16, at 2:18, First Annual Message, December 2, 1817.

56. Richardson, Presidents, supra note 16, at 2:18, First Annual Message, December 7, 1817.

57. U.S., Congress, House, Representative Hill submitted for consideration a resolution (which was rejected) to establish a national university within the District of Columbia, but if that was thought objectionable, to then apply to the people to be constitutionally vested with said authority, 16th Cong., 1st sess., 23 December 1819, Annals of the Congress of the United States, contained in Joseph Gales, comp., The Debates and Proceedings of the Congress of the United States, 42 vols., (Washington: Gales and Seaton, 1834, Library of American Civilization 21638), 35:780-81.

58. Richardson, Presidents, supra note 16, at 2:311P First Annual Message, December 6, 1825.

59. Richardson, Presidents, supra note 16, at 2:311, First Annual Message, December 6, 1825. President John Quincy Adams approached the establishment of a university on somewhat a different basis. He noted that the

> establishment of an uniform standard of weights and measures was one of the specific objects contemplated in the formation of our Constitution, and to fix that standard was one of the powers delegated by express terms in that instrument to Congress.

From this he reasoned, that connected

with the establishment of an university, or separate from it, might be undertaken the erection of an astronomical observatory, with provision for the support of an astronomer, to be in constant attendance of observations upon the phenomena of heavens, and for the periodical publication of his observations.

Id. at 2:313. It may be that "the cause of science" was so closely allied in his mind with a university and astronomical observatory that he considered them proper objects pursuant to Congress' authority to fix the standard of weights and measures, once scientifically ascertained. But see text accompanying note 18 supra.

60. President Madison had vetoed a similar bill which pledged certain funds for internal improvement such as constructing roads and canals, as unconstitutional and beyond the power of Congress to regulate commerce among the several states, or provide for the common defense and general welfare. Richardson, Presidents, supra note 16, at 1:584-85, Veto Messages, March 3, 1817.

61. Richardson, Presidents, supra note 16, at 2:491-92. Veto Message, May 27, 1830. President Monroe's objections were also noted by Jackson in his Veto Message. Id. at 2:486.

62. Richardson, Presidents, supra notes 16, at 2!491. Veto Messages, May 27, 1830. Jackson also noted: "In no government are appeals to the source of power in cases of real doubt more suitable than in ours. No good motive can be assigned for the exercise of power by the constituted authorities, while those for whose benefit it is to be exercised have not conferred it and may not be willing to confer it." Id. at 2:492. See text accompanying note 111 infra.

63. Richardson, Presidents, supra note 16, at 5:544, Veto Messages, February 24, 1859.

64. Richardson, Presidents, supra note 16, at 5:544, Veto Messages, February 24, 1859.

65. Richardson, Presidents, supra note 16, at 5:545, Veto Messages, February 24, 1859.

66. Richardson, Presidents, supra note 16, at 5:545, Veto Messages, February 24, 1859.

> Should the time ever arrive when State governments shall look to the Federal Treasury for the means of supporting themselves and maintaining their systems of education and internal policy, the character of both Governments will be greatly deteriorated. The representatives of the States and of the people, feeling a more immediate interest in obtaining money to lighten the burden of their constituents than for the promotion of the more distant objects intrusted to the Federal Government, will naturally incline to obtain means from the Federal Government for State purposes. If a question shall arise between an appropriation of land or money to carry into effect the objects of the Federal Government and those of the States, their feelings will be enlisted in favor of the latter. This is human nature; and hence the necessity of keeping the two Governments entirely distinct. The preponderance of this home feeling has been manifested by the passage of the present bill. The establishment of these colleges has prevailed over the pressing wants of the common Treasury. Id.

Buchanan correctly articulated the tendency to unconstitutionally balance federal funds between that which was enumerated and that which was expedient. A present day application is clearly visible as defense purposes are played off against the Department of Education 'needs.' See also text accompanying note 74 infra.

67. Richardson, Presidents, supra, note 16, at 5:546, Veto Messages, February 24, 1859.

68. Richardson, Presidents, supra note 16, at 5:547, Veto Messages, February 24, 1859. The President added; "Should Congress exercise such a power, this would be to break down the barriers which have been so carefully constructed in the Constitution to separate Federal from State authority." Id.

69. Morrill Land Grant Act, 12 Stat. at Large 503 (1862). President Lincoln signed this Act into law on July 2, 1862.

70. Harry Kursh, The United States Office of Education (Philadelphia: Chilton Company, 1965), 27. Even the limited purpose of the Act, to provide funds for colleges and universities from the sale of federal lands, has been expanded beyond its original purpose. By 1965, every state had "at least one college or university which received direct cash grants from the Federal Government, in lieu of land sales." Id.

71. Justin Morrill, An Address in Behalf of the University of Vermont and State Agricultural College, at Montpelier, October 10, 1888 (Montpelier: Argus and Patriot Printing House, 1888, Library of American Civilization 40011), 1.

72. U.S., Constitution, art. 4, sec. 3, cl. 2 supra note 11.

73. Richardson, Presidents, supra note 16, at 5:548-50, Veto Message, February 24, 1859.

74. Richardson, Presidents, supra note 16, at 5:548, Veto Messages, February 24, 1859. See note 66 supra. See also Hinsdale, U.S. Education, supra note 25, at 2:1275-87.

75. See Hinsdale, U.S. Education, supra note 25, at 2:1268-75.

76. See Hinsdale, U.S. Education, supra note 25, at 2:1298.

77. Hinsdale, U.S. Education, supra note 25, at 2:1305.

78. Hinsdale, U.S. Education, supra note 25, at 2:1305.

79. Richardson, Presidents, supra note 16, at 1:409. Sixth Annual Message, December 2, 1806. See text accompanying notes 41-42 supra.

80. Another instance of federal surpluses should also be considered. A Report issued by the Commissioner of Education recalled quite correctly that "by the year 1836 a considerable surplus over and above the wants of the Government had accumulated in the National Treasury, the disposal of which became a political question." Hinsdale, U.S. Education, supra note 25, at 2:1286-87.

The surplus as of January 1, 1837 was $41,468,859. The eventual distribution of this money found its way to the states on a pro-rata basis. The states in turn executed various instruments promising repayment "whenever they should be required by the Secretary of the Treasury for the purpose of defraying any wants of the public Treasury." Id. at 2:1287. The Commissioner of Education observed that as of 1895, "the States receiving the deposits have never repaid them, and have never been called upon to do so." Id. Congress acknowledged it could not control the purpose to which the disposition of these funds would be applied. As it turned out many states applied them to their own educational programs.

Former President Jackson considered distribution of national surpluses to be prohibited by the Constitution. Originally Jackson had suggested an amendment to the Constitution to permit such a distribution from the Federal Treasury. Richardson, Presidents, supra note 16, at 2:484. He later opposed this suggestion, noting that such a distribution would be ruinous to the Union, constitutional provisions and all. See Edward G. Bourne, The History of the Surplus Revenue of 1837, (New York: G. P. Putnam's Sons, 1885, Library of American Civilization 10050), 20. The figure of 41,468,859.97 was quoted by Bourne. Id. at 16. Bourne also notes that Jackson was opposed to the whole matter of distribution on grounds of constitutionality and common sense. Id. at 20.

81. Richardson, Presidents, supra note 16, at 6:391-92, Special Session Message, June 22, 1866.

82. Hinsdale, U.S. Education, supra note 25, at 2:1290.

83. See Hinsdale, U.S. Education, supra note 25, at 2:1290.

84. Hinsdale, U.S. Education, supra note 25, at 2:1290-91.

85. U.S., Congress, House, Representative Garfield urged the passage of the Bill to establish the Federal Department of Education, Congressional Globe, supra note 1, at 2966.

86. Congressional Globe, supra note 1, at 2966.

87. U.S., Congress, House, Representative Donnelly noted the results of the census literacy figures and recent war, concluding that the lack of compulsory education was to blame, Congressional Globe, supra note 1, at 2966-67.

88. Congressional Globe, supra note 1, at 2968.

89. Congressional Globe, supra note 1, at 2968.

90. The facts which he pointed out supporting his proposition were derived from the United States census figures of 1850 and 1860. Mr.

Donnelly relished, with great delight, pointing out the antithetical educational philosophies of a northern state, Massachusetts, and its southern counterpart, Virginia. Noting that Massachusetts required compulsory state education as early as 1642, while Virginia had left education to parents, he turns to the census figures and concludes that as a result of this development, a very small percent of Massachusetts citizens could not read or write but nearly three quarters of white Virginians were illiterate. He draws the same inferences with respect to dollars spent on education within the states. He concludes the discussion by requesting Congress to pass the bill on the basis of these statistics, suggesting that compulsory attendance and dollars spent on education are significantly related to literacy and loyalty. Congressional Globe, supra note 1, at 2967-68.

Fifteen years later, however, Mr. Montgomery, an Assistant Attorney- General with the United States also reviewed these very same statistics in the context of education. He noted that illiteracy rates in Massachusetts and other compulsory attendance states were indeed low, approximately one illiterate to every 312 white inhabitants, while Virginia, for example, stood at one illiterate for every 12 white inhabitants. He does not stop here, however. If compulsory state education was the cornerstone of the civilized American Republic as it was (and is) commonly believed, then its greatness should be reflected in all the statistics of the census. Mr. Montgomery's findings are as follows:

> Those educated under the New England (compulsory) system had one native-born white criminal to every 1,084 native white inhabitants, while those who had generally rejected that system had but one prisoner to every 6,670, being a disproportion, according to the whole number of native whites, of more than six criminals in New England to one in the other community. A glance at the same table will show that the natives educated under the New England system (compulsory) had one pauper to every 178, while those who managed to live without that luxury had one pauper to every 345.
>
> Of those who in one year died by suicide, New England had one to every 13,285 of the entire population, while Virginia and her five sister (states) had but one suicide to every 56,584, and of those who perished, the victims of their criminal lusts, New England had one to every 84,737, while her neighbors, that had never enjoyed her educational advantages, had but one such victim to every 128,729.

Zach Montgomery, comp., The School Question from a Parental and Non Sectarian Stand-Point, 4th ed. (Washington: Gibson Bros., 1889; reprint ed., New York: Arno Press, 1972), 12.

Mr. Montgomery is not so brash as to set up a cause and effect relationship as did Mr. Donnelly. He merely concluded that the loss of parental authority and home influence over children, by a state controlled system of education, alongside the public neglect of moral and religious education and training, contributed to the decline of the Republic, even though its citizens may be literate. Id. at 30.

91. U.S., Congress, House, Representative Rogers, noted the historical and constitutional impediments precluding direct and indirect federal involvement in education, Congressional Globe, supra note 1, at 2968.

92. Congressional Globe, supra note 1, at 2968.

93. Congressional Globe, supra note 1, at 2968.

94. When challenged on the grounds that Congress had established a Bureau of Agriculture to collect statistics and this was not objected to, he replied correctly that the "object for which the Agricultural Bureau was established is one almost coeval with the formation of the Government itself." He then observed, "It is one which is necessary in order to hold complete and intimate connection with foreign countries and get the necessary information for the Federal Government. It is necessary for the diffusion of knowledge of a national character all over the country, and has no analogy to this interference with the simple right of the States in regard to the education of their own people." U.S., Congress, House, Representative Rogers' reply to Mr. Grinnell's inquiry regarding the constitutionality of the statistical function of the Department of Agriculture, Congressional Globe, supra note 1, at 2969.

95. Congressional Globe, supra note 1, at 2969.

96. Congressional Globe, supra note 1, at 2969. See text accompanying note 115 infra.

97. U.S., Congress, House, Representative Moulton extolled the virtues of a centralized, government-controlled educational system under the head of the federal government, 39th Cong., 2nd sess., 8 June 1866, The Congressional Globe, 3044.

98. Congressional Globe, supra note 97, at 3044.

99. Congressional Globe, supra note 97, at 3044.

100. Congressional Globe, supra note 97, at 3045.

101. Congressional Globe, supra note 97, at 3054.

102. Congressional Globe, supra note 97, at 3045. The provision, which does not grant Congress power over education, directly or indirectly, to which the Representative referred states: "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States;" U.S., Constitution, art. I, sec. 8, cl. 1. This clause neither imposes a duty on Congress, or grants Congress educational authority.

103. Congressional Globe, supra note 97, at 3045.

104. U.S., Congress, House, Representative Randall proposed an amendment to the education Bill to place it within the Department of Interior as an appendage of the national census as far as consistent with its purpose and constitutional limitations, Congressional Globe, supra note 97, at 3047.

105. Congressional Globe, supra note 97, at 3047.

106. Congressional Globe, supra note 97, at 3048.

107. U.S., Congress, House, Representative Upton of Michigan moved for reconsideration of the Bill previously defeated respecting the educational involvement of the federal government, 39th Cong., 2nd sess., 19 June 1866. The Congressional Globe, 3270.

108. B. A. Hinsdale, President Garfield and Education, (Boston: Osgood & Co., 1882, Library of American Civilization 15659), 165.

109. Theodore C. Smith, The Life and Letters of James Abram Garfield, 2 vols. (New Haven: Yale Univ. Press, 1925, Library of American Civilization 23799-800), 2:781.

110. See Smith, Garfield, supra note 109, at 2:781.

111. Richardson, Presidents, supra note 16, at 2:491. See notes 61-62 & accompanying text supra.

112. See Hinsdale, Garfield, supra note 108, at 204. Garfield noted that the "learned and brilliant Guizot, . . . regarded his work in the Office of Minister of Public Instruction , in the government of France, the noblest and most valuable work in his life . . ." Id.

113. Charles Brooks, Some Reasons for the Immediate Establishment of a National System of Education for the United States, 2nd ed., (Boston: John Wilson & Sons, 1869, Library of American Civilization 40011), 19-22.

114. For a listing of these and other Acts, see Kursh, Office, supra note 70 at Appendix A & B. For a copy of the House Findings in 1811, see text accompanying note 52-53 supra. For an inside look at the Office of Education within the Department of Health, Education and Welfare and the same predictable rationales of expediency utilized by the federal government to set the educational policy and agendas of the people and states, see, Francis Keppel, The Necessary Revolution in American Education (New York: Harper & Row, 1966). Joseph Califano exhibited greater awareness of the dangers of federal control than did Francis Keppel, though both failed to clearly understand any substantive jurisdictional claims. Califano warned that "in its most extreme form, national control of curriculum is a form of national control of ideas." Joseph A. Califano, Jr., Governing America (New York: Simon & Schuster, 1981), 297.

115. Congressional Globe, supra note 1, at 2969. See text accompanying note 96 supra.

116. See U.S., Congress, Senate, Committee on Governmental Affairs, Legislative History of Public Law 96-98, Department of Education Organization Act, pts. 1-2, 96th Cong., 2d sess., (Washington, D.C.: Government Printing Office, 1980), 1:3. See also 20 USC 3402. For a discussion of Garfield's proliferation of the census, see Smith, Garfield, supra note 109, at 2:793-96.

117. U.S., Constitution, preamble.

118. Legislative History, supra note 116, at 1:3.

119. See U.S., Constitution, art. VI, sec. 3 which states, "The Senators and representatives . . . and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution;" (emphasis added).

120. U.S., Constitution, art. I, sec. 8, cl. 1. See note 11 supra.

121. 301 U.S. 548 (1937).

122. 301 U.S. at 587 & 589. See also United States v. Butler, 297 U.S. 1 (1936) (Article I, Section 8, Clause 1, case invalidating the Agricultural Adjustment Act of 1933.)

123. Documents Illustrative, supra note 17, at 129.

124. Documents Illustrative, supra note 17, at 130.

125. Documents Illustrative, supra, note 17, at 471-75.

126. Documents Illustrative, supra note 17, at 552-57.

127. Documents Illustrative, supra note 17, at 659-660.

128. James Kent, Commentaries on American Law 4 vols. (New York 0. Halsted, 1826; reprint ed., New York: Da Capo Press, 1971), 1:222.

129. See text accompanying notes 17-25 supra.

130. Legislative History, supra note 116, at 1:518. (Report No. 96-49, Calendar No. 54, 96th Cong., 1st sess., p. 1).

131. Legislative History, supra note 116, at 1:519. (Report No. 96-49, Calendar No. 54 96th Cong., 1st sess., p. 2).

132. Legislative History, supra note 116, at 1:532. (Report No. 96-49, Calendar No. 54 96th Cong., 1st sess., p. 15).

133. See generally, U.S., Constitution, Art. I, sec. 16; Art. IV, and Art. V for some examples of express concurrent authority of federal and state governments.

134. Legislative History, supra note 116, at 1:3. See also 20 USC 3403.

135. Zach Montgomery, comp., The School Question from a Parental and Non- Sectarian Stand Point, 4th ed. (Washington: Gibson Bros., 1889; reprint ed.; New York Arno Press, 1972), 50.

136. Kent, Commentaries, supra note 128, at 2:159. He states: The next domestic relation which we are to consider, is that of parent and child. The duties that reciprocally result from this connection, are prescribed, as well as those feelings of parental, home and fetal reverence which Providence has implanted in the human breast, as by the positive precepts of religion and of our municipal law. . . . The wants and weaknesses of children render it necessary that some person maintain them, and the voice of nature has pointed out the parent as the most fit and proper person. the laws and customs of all nations have enforced this plain precept of Universal law. Id.

137. Kent, Commentaries, supra note 128, at 2:169.

138. Kent, Commentaries, supra note 128, at 2:169.

139. Francis Wayland, The Elements of Moral Science, 4th ed. (Boston: Gould, Kendall and Lincoln, 1841), 318.

140. Wayland, Elements supra note 139, at 318.

141. Wayland, Elements, supra note 139, at 324.

142. Montgomery, Question, supra note 135, at 52.

143. Wayland, Elements, supra note 139, at 315.

144. U.S., Constitution, amend. IX.

145. U.S., Constitution, amend. X, supra note 10.

146. Legislative History, supra note 116, at 1:2. See also 20 USC 3401.

147. Legislative History, supra note 116, at 1:2. (emphasis added). See also 20 USC 3401.

148. Legislative History, supra note 116, at 2:1150-1156. Honorable L.H. Fountain stated,

> One important proponent (of the Federal Department of Education) is the National Education Association, which testified that "the Federal Government ought to be paying as much as one-third of the cost of public education." The NEA's goal of a one-third share stands in sharp contrast with the approximately 8 percent the Federal Government presently contributes, through all its programs, to public education. Id. at 1151.

149. See National Commission on Excellence in Education, "A Nation at Risk The Imperative for Education Reform,"

(Washington, D.C.: U.S. Government Printing Office, No.065-000-00177-2, 1983).

150. For contemporary examples of how federal jurisdiction over education is justified on the basis of expediency reflecting a liberal executive agenda, see Keppel, Revolution, supra note 114. See also Califano, Governing, supra note 114. For a contemporary example of how federal jurisdiction over education is justified on the basis of expediency reflecting a conservative executive agenda, see Stuart M. Butler, ed., Mandate for Leadership II (Washington, D.C.: The Heritage Foundation, 1984), 49-62. The Foundation's recommendations explain the 'necessity' of federal funding, statistical record keeping and moral pressure in "reasonably accommodating the nation's interest in education." Inc. at 54-56. A conservative agenda is no different, however, than a liberal one if law and the Constitution are suppressed in the process. See also text accompanying notes 3-10 supra.

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