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A Response to Goodwin Liu

Robin West

Georgetown University Law Center, west@law.georgetown.edu

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THE YALE LAW JOURNAL POCKET PART

ROBIN WEST

A Response to Goodwin Liu

Professor Liu's article¹ convincingly shows that the Fourteenth Amendment can be read, and has been read in the past, to confer a positive right on all citizens to a high-quality public education and to place a correlative duty on the legislative branches of both state and federal government to provide for that education. Specifically, the United States Congress has an obligation under the Fourteenth Amendment's Citizenship Clause, Liu argues, to ensure that the public education provided by states meets minimal standards so that citizens possess the competencies requisite to meaningful participation in civic life. Liu's argument is not simply that Congress may, within the grant of power of the Fourteenth Amendment, address educational inequality, if it sees fit to do so (thus withstanding federalism challenges). Rather, Liu's claim is that the states, and Congress, jointly *must* do so. The Constitution imposes a *duty* on government to educate, and confers a positive *right* to an education upon the citizenry. A decent education, Liu argues, is part of what it means to be a citizen under the United States Constitution.

I applaud the constitutional and the moral ambition of this piece. Liu's paper is a stellar example of what I hope will prove to be an emerging genre: an exploration of the possible meaning of constitutional phrases in our constitutional text and history, as viewed through the lens of legislative purposes and legislative ends. The article is a study of constitutional politics rather than constitutional law; it is a study of the effect of constitutionalism on legislative decision-making rather than the effect of constitutionalism on adjudicated constitutional law. I hope that this article proves fecund—that it inspires not only criticism but also like-minded efforts to improve other aspects of our public life through a capacious view of our representative branch's constitutional obligations.

1. Goodwin Liu, *Education, Equality and National Citizenship*, 116 YALE L.J. 330 (2006).

Liu's argument has two somewhat undeveloped implications that I believe are worth exploring, one jurisprudential and one practical. Let me begin with the jurisprudential. As Liu acknowledges, his reading of the Constitution's Citizenship Clause goes against the grain of now-conventional Fourteenth Amendment wisdom. First, he reads that Clause to convey positive rights, and finds support for that interpretation in the similar readings of the Clause by authoritative others. Second, he reads the Fourteenth Amendment as directed to Congress as well as to courts, and as imposing duties upon Congress to act.

If Liu is right, then neither the Court's nor most commentators' understandings of the Fourteenth Amendment fully capture the meaning of the constitutional text and history. Liu therefore puts forward his historical analysis as a corrective to contemporary mis-readings. We are wrong, he suggests, to assume so confidently that the Constitution is one of negative rights only, that the Citizenship Clause confers no positive rights on citizens, and that the legal community that produced the Reconstruction Amendments had no sense of the connections between education and citizenship. To the contrary: at least some of the Fourteenth Amendment's Framers understood the centrality of education to citizenship, and some viewed the Fourteenth Amendment as imposing obligations upon Congress and the states to provide education. And we are wrong, Liu claims, to regard the Reconstruction Amendments as a directive to courts to strike errant legislation, rather than as a prod to the legislator to enact law that promotes liberty, equality, and citizenship. At least, Liu argues, we are wrong to think that our contemporary understanding of the Constitution is the only possible understanding, or that it is unequivocally the understanding that was shared by all of the Framers of the Reconstruction Amendments.

Liu does not, however, address the underlying jurisprudence of his historical reconstruction—an omission that may have consequences for the plausibility of his reading of the Fourteenth Amendment. He does not, for example, consider that the Reconstruction Era actors may have had a different jurisprudential understanding of the meaning of constitutional law and of the role of the judiciary in enforcing it. As Larry Kramer,² Mark Tushnet,³ and a number of other historians have argued, it is quite possible that lawyers of the Reconstruction era had a different “constitutional jurisprudence” from that which governs modern judicial understandings of constitutional guarantees. If Kramer and Tushnet are right about that, then interpretations that made sense to the Reconstruction generation may make much less sense to us today. It

2. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 214-15 (2004); Larry D. Kramer, *The Supreme Court, 2000 Term — Foreword: We the Court*, 115 HARV. L. REV. 4, 117-20 (2001).

3. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1990).

may be that if we are to reinvigorate the Reconstruction vision of the Fourteenth Amendment's guarantee of citizenship, and of the role of education in achieving that guarantee, we will need to reinvigorate some forgotten jurisprudential ideas as well.

Let me sketch out the contrast I have in mind, and its implications for contemporary constitutional thought, very briefly. Perhaps it was possible during Reconstruction (and perhaps at the Founding as well) to speak of the Constitution as a document that guided the hand of Congress as well as restrained it, that spoke to congressional obligations to act as well as congressional obligations to refrain from acting, and that expressed a "law" for legislation addressed to the legislator. The Constitution, it could still at least be said then, had a political, as opposed to a purely legal existence: it was addressed to the political branches no less than the judicial. It was possible, given such an understanding of what Tushnet now calls the Constitution's "political law,"⁴ to understand the Fourteenth Amendment as a political directive to the political branches to do certain things with their power, rather than a legal directive to the judicial branch to restrain legislative power through enforcing negative rights. It might have been possible to understand the Constitution as setting forth a moral direction for politics, rather than as a law meant to relentlessly restrain and check legislative power.

It is much harder for us, today, to see the Constitution as such a document. Rather, for reasons I have discussed at length elsewhere,⁵ we tend instead to see the constitution as ordinary law, and hence constitutional questions—such as whether Congress is constitutionally obligated to ensure that the States provide a minimally adequate education to all citizens—as questions of "ordinary law." Constitutional law tells us what the relevant actors—legislators, executives, and so forth—may and may not do, just as commercial law tells us what sellers, buyers, and holders of secured loans or commercial paper may and may not do. We view the Constitution, on this jurisprudential scheme, as a source of ordinary law, rather than as a source of political wisdom, inspiration, or guidance. Further, and importantly, all of us now being legal realists, we view these questions of ordinary law—including constitutional law—as questions for courts to decide. Constitutional questions, then, including those of the sort Liu raises, become by definition questions of law for courts to decide.

How does all of this affect the fragile case for a purported right to a minimally adequate education? If constitutional rights and duties are those

4. Mark Tushnet, *Popular Constitutionalism as Political Law*, 81 CHI.-KENT L. REV. 991 (2006).

5. Robin West, *Unenumerated Duties*, 9 U. PA. J. CONST. L. (forthcoming 2006); Robin West, *Katrina, the Constitution, and the Legal Question Doctrine* 81 CHI.-KENT L. REV. 1127 (2006).

rights and duties which are a part of law, and law is that which is discovered, expressed, and enforced by courts, then it is not at all surprising that constitutional rights have been limited to those that are negative, and correlatively, that legislative duties grounded in constitutionalism have virtually disappeared. As a practical matter, courts cannot enforce positive rights; as a jurisprudential matter, they are disinclined to do so. Courts exist to do legal justice between parties, not to provide social goods, whether or not those goods are constitutionally required. Given our contemporary jurisprudential identification of law with judicial utterance, it will accordingly be exceedingly difficult for modern constitutionalists to read the constitutional text to include a positive right to an education and an affirmative duty of legislators to provide one.

But note what generates this conclusion: it is our jurisprudence, not our constitutional text, history, or law. We have come to view constitutional law as adjudicated law. But this is a limited view. If we understand the Constitution to mean (only) the law enforced and interpreted by courts, then we limit our understanding of justice to those types of justice that are discoverable and enforceable by courts. Distributive and social justice will not survive such an understanding. For a host of familiar reasons, courts will not find positive rights to welfare, education, health, and so on in the Constitution. Because we now so identify our sense of justice with the mandates of the Constitution, our constitutional jurisprudence, in a very tangible way, limits our moral ambitions for a just polity.

It is therefore not surprising that Professor Liu begins his piece with a process-oriented argument to the effect that the Constitution can and should be read as a document directed toward Congress, not the courts, and as a set of duties for legislators. He is right to do so: if we begin with the premise that the Constitution contains a positive right to an education, then we must indeed at least suspend belief in – if not jettison – our constitutional jurisprudence. But here, we have a problem. A full and alternative jurisprudence has yet to be fully articulated by those who wish to read the Constitution both faithfully and capaciously so as to include positive rights, such as a right to education. We do not have a modern jurisprudence that can embrace the concept of a Constitution that is read as a political document, for and by the political branch, yet nevertheless is also in some sense law. Such a jurisprudence may well be a necessary pre-condition for a Constitution that can plausibly be read as containing positive rights of citizens and corresponding duties of legislators, including the right to an education.

My jurisprudential point, then, is simply that if we are going to take seriously the possibility of a “legislated Constitution” – a Constitution directed to, and therefore interpreted and enforced by legislatures – we will have to first develop a robust jurisprudence that can support it. That jurisprudence in turn

will have to rediscover a concept of law that has been lost to us for at least a half-century: an idea of law as a moral prod to better politics rather than an idea of law as merely a tool with which courts may de-legitimize the results of politics.

My second point is entirely practical. A Constitution directed at legislatures, and intended for legislative interpretation and implementation, requires legislators equipped, willing, and desirous to so receive it. We don't currently have anything even remotely resembling such a legislative assembly at either the federal or state level; for a very long time we have not delegated the work of constitutional interpretation to Congress, and it shows. There are a handful of constitutionally savvy senators – Joseph Biden, Orrin Hatch, Barack Obama – but there is no institutional sense in Congress that senators or representatives should be interested and engaged readers, interpreters, and implementers of the constitutional text. Nor do our representatives seek out qualified staff to help them develop constitutionally guided law. While we expect constitutional wisdom, reason, moral astuteness, and moral ambition from judges, we expect horse trading at best from Congress. Courts reason toward justice, with an eye on liberty and equality and citizenship for all, while Congress acts and on the basis of preference, whim, good reasons, bad reasons, or no reasons. For the sort of deliberative, morally ennobling politics we habitually identify with a highly ethical form of practical reason, we go to the courts.

For Liu's normative proposal to get off the ground, we must reverse those expectations. In that task – unlike so much in our current political milieu – we in the law schools might actually have some power to effect change. Law schools routinely send off wonderful graduates to judicial clerkships. Why shouldn't we likewise aspire to send some of our outstanding graduates to senatorial and congressional clerkships? If senators and representatives ought to be reading, interpreting, and implementing the Constitution, perhaps they could hire young lawyers just out of law school to aid the effort. It might prove to be a felicitous association.

A lawmaker, no less than a judge, could benefit from the educated advice that a law graduate could bring to the task. If my vision were ever to come to pass, the conscientious legislator would look to the Constitution not to answer the question, "What is the law?" but rather the question, "What should the law be?" The legislator, like the judge, must be mindful of the past when answering that question; nevertheless, this question is different from the one the judge asks. Law graduates could bring idealism, enthusiasm, intelligence, and tremendous learning to the legislator's task of constitutional interpretation.

And what would be in it for the graduates – most of whom, after all, will not ever be legislators? First, it's worth noting that the vast majority of law

graduates now clerking or aspiring to clerk for judges will never be judges. Surely, a one-year internship in a congressional office, with the responsibility for ensuring that the legislative product is based, in part, on a generous and faithful interpretation of the Constitution, would provide as much and possibly more practical knowledge than a one- or two-year clerkship with a judge. Lawyers should know the ins and outs of the legislative process no less than of the appellate process. It's not unreasonable to suppose that lawyers who have had experience at either the state or federal level assembling a bill, drafting a bill, and discussing its constitutionality would be as welcome an addition to any number of firms and practices as lawyers with one year of experience writing memoranda for appellate court judges.

Finally, our law might benefit. Look just to the "right to an education" that Professor Liu champions. Constitutional lawyers have achieved victories in courts for the occasional learning disabled student, the racially segregated school district, and the economically distressed high school. But legislative victories on these issues, and for these citizens, if informed by the legislated Constitution, might hold out greater promise still. And no matter what happens in the courtroom, senators and representatives themselves could be inspired by the moral aspirations of their law clerks to reach for a generous, capacious, and progressive understanding of constitutionalism, such as that depicted in Goodwin Liu's remarkable article, to guide their labors.

Robin West is Professor of Law, Georgetown University Law Center

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