

THE MEANING OF STATE CONSTITUTIONAL EDUCATION
CLAUSES: EVIDENCE FROM THE CONSTITUTIONAL
CONVENTION DEBATES

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“No court—believe me, and any judge will confirm this and any legislator, too—is ever going to review a legislative determination of what is adequate”¹

I. INTRODUCTION

The meaning of state constitutional education clauses has attracted increasing attention in the last several decades as a result of numerous state court decisions.² On some occasions, state education clauses have served as vehicles for “equity” lawsuits seeking to overturn inter-district disparities in per pupil financing.³ More frequently, and particularly during the post-1989 wave of

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¹ 4 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 393, 394 (1967) [hereinafter NEW YORK CONVENTION OF 1967] (internal quotation marks omitted) (statement of Don Mankiewicz, delegate to the New York Constitutional Convention of 1967). In an effort ultimately defeated by voters, Mr. Mankiewicz proposed to amend the state constitution’s education clause to require that “[t]he Legislature shall annually make adequate provision for the maintenance and support of a system of free public elementary and secondary schools” *Id.*

² The most comprehensive and up-to-date information and summaries of these state court school-finance decisions are compiled by the Campaign for Educational Equity. See National Access Network, Litigation, <http://www.schoolfunding.info/litigation/litigation.php3#resources> (last visited Apr. 14, 2007). Notable book-length analyses of this school-finance litigation, much of which emerged in response to the U.S. Supreme Court’s refusal to recognize a federal right to equal education financing in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 58–59 (1973), include MATTHEW H. BOSWORTH, COURTS AS CATALYSTS: STATE SUPREME COURTS AND PUBLIC SCHOOL FINANCE EQUITY (2001); DOUGLAS S. REED, ON EQUAL TERMS: THE CONSTITUTIONAL POLITICS OF EDUCATIONAL OPPORTUNITY (2001); SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY (Martin R. West & Paul E. Peterson eds., 2007) [hereinafter SCHOOL MONEY TRIALS]; PETER SCHRAG, FINAL TEST: THE BATTLE FOR ADEQUACY IN AMERICA’S SCHOOLS (2003).

³ However, these suits have more often relied on state equal protection clauses. *E.g.*, Bd. of Educ. v. Nyquist, 439 N.E.2d 359, 361 (N.Y. 1982) (holding that New York’s “statutory prescriptions for State aid to local school districts . . . does not violate the equal protection clause of either the Federal or the State Constitution”).

school-finance suits, state education clauses have given rise to “adequacy” lawsuits seeking to compel legislatures to ensure a minimum level of school funding or student achievement.⁴ In *Bush v. Holmes*, the Florida Supreme Court highlighted still another use of these clauses when it interpreted “uniformity” language in the state education clause to invalidate a private-school voucher program.⁵

A significant amount of research has been conducted on the consequences of these judicial interpretations of state education clauses, particularly the “adequacy” rulings, which began in 1989 with the Kentucky Supreme Court’s ruling in *Rose v. Council for Better Education, Inc.*⁶ and have been handed down routinely since then with twenty cases decided in favor of the plaintiffs and twelve others pending.⁷ Although evidence is mixed regarding the effect of these rulings on school spending levels,⁸ there is widespread agreement that they have had significant consequences for legislators who have seen control of key education policy decisions transferred from elected officials to outside experts, administrators, and judges.⁹ In fact, in New York, such an interpretation of the state education clause at one point resulted in a \$5.63 billion judgment for the plaintiffs.¹⁰ Although most adequacy judgments

⁴ For analyses of these equity and adequacy lawsuits and discussion of the move from equity to adequacy, see Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101 (1995); Michael Heise, *State Constitutions, School Finance Litigation, and the “Third Wave”: From Equity to Adequacy*, 68 TEMP. L. REV. 1151 (1995); Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMP. L. REV. 1325 (1992); Robert M. Jensen, *Advancing Education Through Education Clauses of State Constitutions*, 1997 BYU EDUC. & L.J. 1; Paul A. Minorini & Stephen D. Sugarman, *Educational Adequacy and the Courts: The Promise and Problems of Moving to a New Paradigm*, in EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 175 (Helen F. Ladd et al. eds., 1999); Michael A. Rebell, *Educational Adequacy, Democracy, and the Courts*, in ACHIEVING HIGH EDUCATIONAL STANDARDS FOR ALL: CONFERENCE SUMMARY 218 (Timothy Ready et al. eds., 2002).

⁵ 919 So. 2d 392, 412 (Fla. 2006). For a more complete discussion of *Bush v. Holmes*, see Jamie Dycus, *Lost Opportunity: Bush v. Holmes and the Application of State Constitutional Uniformity Clauses to School Voucher Schemes*, 35 J.L. & EDUC. 415 (2006).

⁶ 790 S.W.2d 186, 189–90 (Ky. 1989) (finding that the Kentucky General Assembly had not complied with its constitutionally mandated duty to provide efficient schools throughout the state).

⁷ These figures are taken from a review of post-1989 state court adequacy litigation as of October, 2006. MOLLY A. HUNTER, COLUMBIA UNIV., SCHOOL FUNDING “ADEQUACY” DECISIONS SINCE 1989 (2006), <http://www.schoolfunding.info/litigation/adequacydecisions.pdf>.

⁸ See Christopher Berry, *The Impact of School Finance Judgments on State Fiscal Policy*, in SCHOOL MONEY TRIALS, *supra* note 2, at 213, 213–38 (analyzing the mixed evidence for and against the impact of school finance judgments on state fiscal policy).

⁹ See, e.g., Joshua Dunn & Martha Derthick, *Adequacy Litigation and the Separation of Powers*, in SCHOOL MONEY TRIALS, *supra* note 2, at 322, 324–26.

¹⁰ See Campaign for Fiscal Equity, Inc. v. State, 861 N.E.2d 50, 56 (N.Y. 2006). The

have been nowhere near as grand in scale as the New York litigation, these state court rulings have had significant consequences for state legislatures around the country¹¹ and have dominated the legislative agenda in a number of states.¹²

In view of the important role played by state education clauses in generating these “equity,” “adequacy,” and “uniformity” lawsuits, the question naturally arises as to whether they were intended to be interpreted in such a manner. That is, to what extent were these clauses intended to empower courts to overturn legislative judgments regarding school financing and to what extent were they intended to serve other purposes?

For the most part, scholars who have studied the meaning of state education clauses have been concerned with analyzing and categorizing their current language. The most widely used categorization scheme was first advanced by Erica Black Grubb and divides the current clauses into four groups, ranging from weak clauses that simply establish a school system, to clauses mandating a thorough and efficient school system, to clauses containing language regarding the purpose and/or benefit of a quality education, all the way to clauses proclaiming education to be a paramount duty or mandating other specific duties.¹³ Meanwhile, Molly McUsic identified various problems with this categorization and advanced an alternative scheme that divides state clauses into equity and minimum-standards clauses, and then further subdivides the latter group into four tiers ranging from bare-minimum standards clauses to explicit high-quality standards clauses.¹⁴ However, still other scholars have expressed dissatisfaction with these various efforts to categorize the language of education clauses and have concluded that “disembodied parsing

judgment was later reduced to \$1.93 billion. *Id.* at 57.

¹¹ A state-by-state review of these developments is available at National Access Network, State by State, http://www.schoolfunding.info/states/state_by_state.php3 (last visited Apr. 14, 2007).

¹² For an analysis of the aftermath of several school-finance rulings in state legislatures, see Frederick M. Hess, *Adequacy Judgments and School Reform*, in *SCHOOL MONEY TRIALS*, *supra* note 2, at 159.

¹³ Erica Black Grubb, *Breaking the Language Barrier: The Right to Bilingual Education*, 9 HARV. C.R.-C.L. L. REV. 52, 66–70 (1974). This categorization has been relied on by a number of scholars. See, e.g., Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 814–16 (1985); William E. Thro, Note, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform*, 75 VA. L. REV. 1639, 1661–70 (1989).

¹⁴ Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 326–39 (1991).

of constitutional terminology may be of limited or no value.”¹⁵

Another group of scholars has sought to determine the meaning of these clauses by tracing their origin and development. One way of tracking the development of the language of these clauses is by comparing the various compendia of state education provisions that have been assembled through the years, beginning with Franklin B. Hough’s 1875 publication for the U.S. Bureau of Education¹⁶ and continuing with dissertations by Samuel Brown in 1912,¹⁷ John M. Matzen in 1931,¹⁸ and Frank S. White in 1950.¹⁹ More recently, John C. Eastman sought, in a 1998 article²⁰ and 2007 chapter,²¹ to identify trends in the development of the language of these clauses.

Despite the important work that has been done in analyzing the text of the current clauses and changes in their wording, we do not yet have a sustained analysis of the state constitutional convention debates regarding adoption and revision of these clauses. As a result, we lack an adequate understanding of the intentions of their drafters. State convention debate records have been consulted on occasion by scholars interested in the development of education policy in the United States.²² In a wide-ranging study of state education policy, David Tyack, Thomas James, and Aaron Benavot consulted a number of mid-nineteenth century state convention debates.²³ Rush Welter drew on several other conventions from the

¹⁵ Paul L. Tractenberg, *Education*, in STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM 241, 293 n.137 (G. Alan Tarr & Robert F. Williams eds., 2006).

¹⁶ Franklin B. Hough, *Constitutional Provisions Relating to Education, Literature, and Science in the Several States of the American Union*, in DEP’T OF THE INTERIOR, CIRCULARS OF INFORMATION OF THE BUREAU OF EDUCATION 549–50 (1875).

¹⁷ SAMUEL WINDSOR BROWN, THE SECULARIZATION OF AMERICAN EDUCATION (1912).

¹⁸ JOHN MATHIASON MATZEN, STATE CONSTITUTIONAL PROVISIONS FOR EDUCATION: FUNDAMENTAL ATTITUDE OF THE AMERICAN PEOPLE REGARDING EDUCATION AS REVEALED BY STATE CONSTITUTIONAL PROVISIONS, 1776–1929 (1931).

¹⁹ FRANK S. WHITE, CONSTITUTIONAL PROVISIONS FOR DIFFERENTIATED EDUCATION (1950).

²⁰ John C. Eastman, *When Did Education Become a Civil Right? An Assessment of State Constitutional Provisions for Education 1776–1900*, 42 AM. J. LEGAL HIST. 1 (1998).

²¹ John C. Eastman, *Reinterpreting the Education Clauses in State Constitutions*, in SCHOOL MONEY TRIALS, *supra* note 2, at 55.

²² *E.g.*, LEE ORVILLE GARBER, THE LEGAL IMPLICATIONS OF THE CONCEPT OF EDUCATION AS A FUNCTION OF THE STATE 3–13 (1934) (containing a brief chapter purporting to provide general impressions from the debates in thirty-seven conventions held between 1820 and 1925).

²³ See DAVID TYACK ET AL., LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785–1954, at 29, 48, 57, 77–79, 84–86, 133–34, 146–48 (1987) (referencing the California Convention of 1849, the Michigan Convention of 1850, the Illinois Convention of 1847, the Michigan Convention of 1867, the South Carolina Convention of 1868, the Arkansas Convention of 1868, and the North Carolina Convention of 1868).

same era,²⁴ as did Carl Kaestle.²⁵ Gregory Schmidt looked at several conventions held in eastern states in the early nineteenth century.²⁶ John Hicks examined the debates regarding education in several state conventions in the Northwest in the late nineteenth century,²⁷ and Eastman took note of the debates in one late nineteenth century convention.²⁸

However, none of these scholars has undertaken a comprehensive examination of the state convention debates regarding education clauses with an eye toward assessing the degree of historical support for recent judicial interpretations of their “equity,” “adequacy,” and “uniformity” provisions. The absence of such a comprehensive study is due primarily to the sheer scope of the materials to be examined, given that we have records of the debates—as opposed to merely the journals of proceedings—for a full 114 of the 233 state constitutional conventions held throughout American history. Another obstacle to such a study, as Molly McUsic noted when explaining her decision to rely on the text of the education clauses rather than the pertinent convention debates, is the incompleteness of the records. As she argued, “[c]onstitutional and state history, while more useful than state court opinions, is often difficult to find. Records of state constitutional debates, common educational practices, and the understanding of the ratifiers are often fragmentary or nonexistent, thus obscuring the founders’ intent.”²⁹ Still another reason why some scholars have been hesitant to undertake such a study is a belief that the framers’ intentions have little bearing on the current meaning of these clauses. As McUsic noted, “state judges may ignore historical evidence, believing that the original intent or understanding of the

²⁴ See RUSH WELTER, *POPULAR EDUCATION AND DEMOCRATIC THOUGHT IN AMERICA* 112–16 (1962) (discussing the Pennsylvania Convention of 1837–1838, the New York Convention of 1846, the Illinois Convention of 1847, and the Ohio Convention of 1850–1851).

²⁵ See CARL F. KAESTLE, *PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780–1860*, at 150–51, 156 (Eric Foner ed., 1983) (discussing the Michigan Convention of 1850 and the Illinois Convention of 1847).

²⁶ See Gregory Glen Schmidt, *Republican Visions: Constitutional Thought and Constitutional Revision in the Eastern United States, 1815–1830*, at 351–58 (July 31, 1980) (unpublished Ph.D. thesis, University of Illinois at Urbana-Champaign) (on file with Pritzker Legal Research Center, Northwestern University School of Law) (referencing the Maine Convention of 1819–1820, the Massachusetts Convention of 1820–1821, and the Virginia Convention of 1829–1830).

²⁷ JOHN D. HICKS, *THE CONSTITUTIONS OF THE NORTHWEST STATES* 76–89 (1924) (referencing the North Dakota Convention of 1889, the Idaho Convention of 1889, the South Dakota Convention of 1885, and the Wyoming Convention of 1889).

²⁸ Eastman, *supra* note 20, at 24–25 (discussing the Missouri Convention of 1875).

²⁹ McUsic, *supra* note 14, at 308 n.3.

clause is inappropriate in the context of modern conditions and values.”³⁰

These concerns notwithstanding, my purpose is to undertake a comprehensive inquiry into the meaning of state education clauses by analyzing the speeches surrounding their adoption and revision in the 114 extant state convention debate records.³¹ In particular, I seek to determine the extent to which convention delegates intended, in drafting state education clauses, to create a judicially enforceable right that could be used to overturn legislative judgments regarding an equitable, adequate, and/or uniform education—or in the alternative, intended these clauses to serve other purposes.³²

³⁰ *Id.*

³¹ There have been a total of 233 state constitutional conventions. JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* 7–9 (2006) (providing a complete list by state of the 233 conventions held between 1776 and 2005). I have located the published records of the debates, as distinct from merely the journal of proceedings or newspaper reports of the debates, for the following 114 conventions: Alabama (1861, 1901); Alaska (1955–56); Arizona (1910); Arkansas (1868); California (1849, 1878–79); Connecticut (1818, 1965); Delaware (1831, 1852–53, 1896–97); Georgia (1877); Hawaii (1950, 1968, 1978); Idaho (1889); Illinois (1847, 1869–70, 1920–22, 1969–70); Indiana (1850–51); Iowa (1844, 1846, 1857); Kansas (1859); Kentucky (1849–50, 1890–91); Louisiana (1845, 1864, 1973–74); Maine (1819); Maryland (1850–51, 1864, 1867, 1967–68); Massachusetts (1820–21, 1853, 1917–19); Michigan (1835–36, 1850, 1867, 1907–08, 1961–62); Minnesota (1857); Mississippi (1865); Missouri (1861–63, 1875); Montana (1889, 1971–72); Nebraska (1871, 1919–20); Nevada (1864); New Hampshire (1876, 1889, 1902, 1912, 1918–23, 1930, 1938–41, 1948, 1956–59, 1964, 1974, 1984); New Jersey (1844, 1947); New York (1821, 1846, 1867–68, 1894, 1915, 1938, 1967); North Carolina (1835); North Dakota (1889, 1971–72); Ohio (1850–51, 1873–74, 1912); Oregon (1857); Pennsylvania (1837–38, 1872–73, 1967–68); Rhode Island (1842, 1944, 1951, 1955, 1958, 1964–69, 1973); South Carolina (1868); South Dakota (1885, 1889); Tennessee (1953, 1959, 1965, 1971, 1977); Texas (1845, 1875, 1974); Utah (1895); Virginia (1829–30, 1850–51, 1861, 1867–68, 1901–02, 1945, 1956); West Virginia (1861–63); Wisconsin (1846, 1847–48); Wyoming (1889).

³² The term “education clause” requires some explanation. When I speak of education clauses in state constitutions, I am referring to the clause or clauses in each constitution directing the legislature to establish a school system. In most states, it is found in the opening clause of the education article. In other states, it is found in the middle of the education article or it is found taking up two clauses in the education article. The convention debates regarding these education clauses are found in the following sources:

Alabama: 2 OFFICIAL PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA 2033 (1940) [hereinafter ALABAMA CONVENTION OF 1901]; 4 ALABAMA CONVENTION OF 1901, *supra*, at 4163, 4165.

Alaska: 2 MINUTES OF THE DAILY PROCEEDINGS, ALASKA CONSTITUTIONAL CONVENTION 1955–56, at 1531–32 (1965) [hereinafter ALASKA CONVENTION OF 1955–1956].

Arizona: THE RECORDS OF THE ARIZONA CONSTITUTIONAL CONVENTION OF 1910, at 523, 945 (John S. Goff ed., 1991) [hereinafter ARIZONA CONVENTION OF 1910].

California: J. ROSS BROWN, REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA ON THE FORMATION OF THE STATE CONSTITUTION 203–07, 346–54 (1850) [hereinafter CALIFORNIA CONVENTION OF 1849]; 2 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 1086–91, 1100–01 (1880–81) [hereinafter CALIFORNIA CONVENTION OF 1878–1879]; 3 CALIFORNIA CONVENTION OF 1878–1879, *supra*, at 1396–97,

1473–74.

Connecticut: 1 THE THIRD CONSTITUTIONAL CONVENTION OF THE STATE OF CONNECTICUT 310–14 (1966) [hereinafter CONNECTICUT CONVENTION OF 1965]; 3 CONNECTICUT CONVENTION OF 1965, *supra*, at 1038–41.

Delaware: 2 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF DELAWARE 1205–20, 1239–48 (1958) [hereinafter DELAWARE CONVENTION OF 1896–1897]; 4 DELAWARE CONVENTION OF 1896–1897, *supra*, at 3137.

Georgia: A STENOGRAPHIC REPORT OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION HELD IN ATLANTA, GEORGIA, 1877, at 324–27 (1877) [hereinafter GEORGIA CONVENTION OF 1877].

Hawaii: 2 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII, 1950, at 580, 581–89 (1961) [hereinafter HAWAII CONVENTION OF 1950]; 2 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1968, at 430–32 (1972) [hereinafter HAWAII CONVENTION OF 1968].

Idaho: 1 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF IDAHO, 1889, at 637–44, 827–28 (I. W. Hart ed., 1912) [hereinafter IDAHO CONVENTION OF 1889].

Illinois: THE CONSTITUTIONAL DEBATES OF 1847, at 899 (Arthur Charles Cole ed., 1919) [hereinafter ILLINOIS CONVENTION OF 1847]; 2 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ILLINOIS 1732–35, 1745–46 (1870) [hereinafter ILLINOIS CONVENTION OF 1869–1870]; 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ILLINOIS 491–92, 497–500 (1920–22) [hereinafter ILLINOIS CONVENTION OF 1920–1922]; 2 ILLINOIS CONVENTION OF 1920–1922, *supra*, at 1124–43; 4 ILLINOIS CONVENTION OF 1920–1922, *supra*, at 3906; 2 RECORD OF PROCEEDINGS: SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 763–70, 793–806 (1972) [hereinafter ILLINOIS CONVENTION OF 1969–1970]; 4 ILLINOIS CONVENTION OF 1969–1970, *supra*, at 3536–70; 5 ILLINOIS CONVENTION OF 1969–1970, *supra*, at 4120–21, 4145–48, 4500–06.

Indiana: 2 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA, 1850, at 1078, 1858, 1880 (1850) [hereinafter INDIANA CONVENTION OF 1850–1851].

Iowa: 2 THE DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF IOWA 770, 771, 816–37, 953, 968–72 (1857) [hereinafter IOWA CONVENTION OF 1857].

Kansas: REPRINT OF THE PROCEEDINGS & DEBATES OF THE CONVENTION WHICH FRAMED THE CONSTITUTION OF KANSAS AT WYANDOTTE IN JULY 1859, at 170, 172, 175–82, 191–93, 431 (Kan. State Printing Plant 1920) (1859) [hereinafter KANSAS CONVENTION OF 1859].

Kentucky: REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF KENTUCKY, 1849, at 377, 880–901, 910–13 (1849) [hereinafter KENTUCKY CONVENTION OF 1849]; 3 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES IN THE CONVENTION ASSEMBLED AT FRANKFORT, ON THE EIGHTH DAY OF SEPTEMBER, 1890, TO ADOPT, AMEND OR CHANGE THE CONSTITUTION OF THE STATE OF KENTUCKY 4454–56, 4479–84, 4536–37, 4547–50 (1890) [hereinafter KENTUCKY CONVENTION OF 1890–1891].

Louisiana: PROCEEDINGS AND DEBATES OF THE CONVENTION OF LOUISIANA 902–07 (1845) [hereinafter LOUISIANA CONVENTION OF 1845]; DEBATES IN THE CONVENTION FOR THE REVISION AND AMENDMENT OF THE CONSTITUTION OF THE STATE OF LOUISIANA 161–63, 475–76, 490–99, 522–31 (1864) [hereinafter LOUISIANA CONVENTION OF 1864]; 8 RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973: CONVENTION TRANSCRIPTS 2233–47 (1977) [hereinafter LOUISIANA CONVENTION OF 1973–1974]; 9 LOUISIANA CONVENTION OF 1973–1974, *supra*, at 3280.

Maine: THE DEBATES AND JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MAINE, 1819–20, at 278–91 (Me. Farmers' Almanac Press 1894) (1820) [hereinafter MAINE CONVENTION OF 1819–1820].

Maryland: 1 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION 339 (1851) [hereinafter MARYLAND CONVENTION OF 1850–1851]; 2 MARYLAND CONVENTION OF 1850–1851, *supra*, at 805–13; 2 THE DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND 1229–33 (1864) [hereinafter MARYLAND CONVENTION OF 1864]; 3 MARYLAND CONVENTION OF 1864, *supra*, at 1787;

DEBATES OF THE MARYLAND CONSTITUTIONAL CONVENTION OF 1867, at 198–204 (1923) [hereinafter MARYLAND CONVENTION OF 1867]; DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1967–1968, at 2509, 2512, 2517–18, 2524–33, 2537–47, 3127–30, 3133–36 (1982) [hereinafter MARYLAND CONVENTION OF 1967–1968].

Massachusetts: 2 OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE STATE CONVENTION TO REVISE AND AMEND THE CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS 522, 569–76 (1853) [hereinafter MASSACHUSETTS CONVENTION OF 1853]; 1 DEBATES IN THE MASSACHUSETTS CONSTITUTIONAL CONVENTION, 1917–1918, at 231–363 (1919) [hereinafter MASSACHUSETTS CONVENTION OF 1917–1919].

Michigan: THE MICHIGAN CONSTITUTIONAL CONVENTIONS OF 1835–36: DEBATES AND PROCEEDINGS 338–40 (Harold M. Dorr ed., 1940) [hereinafter MICHIGAN CONVENTION OF 1835]; REPORT OF THE PROCEEDINGS AND DEBATES IN THE CONVENTION TO REVISE THE CONSTITUTION OF THE STATE OF MICHIGAN, 1850, at 263–76, 535–38, 540–55, 774–76, 785–91 (1850) [hereinafter MICHIGAN CONVENTION OF 1850]; 2 THE DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MICHIGAN 300–09, 398–419, 467–72, 516–17 (1867) [hereinafter MICHIGAN CONVENTION OF 1867]; 1 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MICHIGAN 117–19, 244, 291–94 (1907) [hereinafter MICHIGAN CONVENTION OF 1907–1908]; 1 STATE OF MICHIGAN CONSTITUTIONAL CONVENTION 1961, OFFICIAL RECORD 197–207 (Austin C. Knapp ed., 1964) [hereinafter MICHIGAN CONVENTION OF 1961–1962]; 2 MICHIGAN CONVENTION OF 1961–1962, *supra*, at 2554–60.

Minnesota: THE DEBATES AND PROCEEDINGS OF THE MINNESOTA CONSTITUTIONAL CONVENTION 437–38, 454, 460–63 (1857) [hereinafter MINNESOTA (DEMOCRATIC) CONVENTION OF 1857]; DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION FOR THE TERRITORY OF MINNESOTA 231–48 (1858) [hereinafter MINNESOTA (REPUBLICAN) CONVENTION OF 1857].

Missouri: 9 DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1875, at 25, 29–30, 53–100, 122–34 (Isidor Loeb & Floyd C. Shoemaker eds., 1930–44) [hereinafter MISSOURI CONVENTION OF 1875].

Montana: PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION HELD IN THE CITY OF HELENA, MONTANA 520 (1921) [hereinafter MONTANA CONVENTION OF 1889]; 8 MONTANA CONSTITUTIONAL CONVENTION, 1971–1972: TRANSCRIPT OF PROCEEDINGS 5955–6079 (1972) [hereinafter MONTANA CONVENTION OF 1971–1972]; 11 MONTANA CONVENTION OF 1971–1972, *supra*, at 8116–19.

Nebraska: 1 OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE NEBRASKA CONSTITUTIONAL CONVENTION 290–91 (Addison E. Sheldon ed., 1906–13) [hereinafter NEBRASKA CONVENTION OF 1871]; 2 NEBRASKA CONVENTION OF 1871, *supra*, at 262.

Nevada: OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEVADA 568–79, 660–61 (1866) [hereinafter NEVADA CONVENTION OF 1864].

New Hampshire: JOURNAL OF THE CONVENTION TO REVISE THE CONSTITUTION 240–58 (1974) [hereinafter NEW HAMPSHIRE CONVENTION OF 1974].

New Jersey: PROCEEDINGS OF THE NEW JERSEY STATE CONSTITUTIONAL CONVENTION OF 1844, at 400–07, 550–52 (1942) [hereinafter NEW JERSEY CONVENTION OF 1844].

New York: REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF NEW-YORK, 1846, at 388, 1022–26, 1075–76 (1846) [hereinafter NEW YORK CONVENTION OF 1846]; 4 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 2908–24 (1868) [hereinafter NEW YORK CONVENTION OF 1867–1868]; 5 NEW YORK CONVENTION OF 1867–1868, *supra*, at 3803, 3809–14; 3 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 689–96 (1900) [hereinafter NEW YORK CONVENTION OF 1894]; 1 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 928–41, 973–90, 1065–1109 (1916) [hereinafter NEW YORK CONVENTION OF 1915]; 3 NEW YORK CONVENTION OF 1915, *supra*, at 2343–49; 4 NEW YORK CONVENTION OF 1915, *supra*, at 3636–46; 2 NEW YORK CONVENTION OF 1967, *supra* note 1, at 184–85; 3 NEW YORK CONVENTION OF 1967, *supra*, at

413; 4 NEW YORK CONVENTION OF 1967, *supra* note 1, at 369–79, 382–85, 393–96, 460–62.

North Dakota: OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES OF THE FIRST CONSTITUTIONAL CONVENTION OF NORTH DAKOTA 152–54, 603 (1889) [hereinafter NORTH DAKOTA CONVENTION OF 1889]; 2 DEBATES OF THE NORTH DAKOTA CONSTITUTIONAL CONVENTION OF 1972, at 1233–34, 1237–52, 1467 (Dean F. Bard ed., 1972) [hereinafter NORTH DAKOTA CONVENTION OF 1971–1972].

Ohio: 2 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF OHIO, 1850–51, at 10–19, 698–700 (1851) [hereinafter OHIO CONVENTION OF 1850–1851]; 2 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES OF THE THIRD CONSTITUTIONAL CONVENTION OF OHIO 2266–69 (1873–74) [hereinafter OHIO CONVENTION OF 1873–1874].

Oregon: THE OREGON CONSTITUTION AND PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1857, at 331 (Charles H. Carey ed., 1926) [hereinafter OREGON CONVENTION OF 1857].

Pennsylvania: 5 PROCEEDINGS AND DEBATES OF THE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA 183–233, 240–316, 332–62 (1837–39) [hereinafter PENNSYLVANIA CONVENTION OF 1837–1838]; 11 PENNSYLVANIA CONVENTION OF 1837–1838, *supra*, at 131–74; 13 PENNSYLVANIA CONVENTION OF 1837–1838, *supra*, at 75–76; 2 DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA 419–20, 422–39 (1873) [hereinafter PENNSYLVANIA CONVENTION OF 1872–1873]; 6 PENNSYLVANIA CONVENTION OF 1872–1873, *supra*, at 38–39; 7 PENNSYLVANIA CONVENTION OF 1872–1873, *supra*, at 676–80.

South Carolina: 2 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA 655 (1868) [hereinafter SOUTH CAROLINA CONVENTION OF 1868].

South Dakota: 1 DAKOTA CONSTITUTIONAL CONVENTION 499 (Doane Robinson ed., 1907) [hereinafter SOUTH DAKOTA CONVENTIONS OF 1885 AND 1889].

Tennessee: 1 THE STATE OF TENNESSEE: LIMITED CONSTITUTIONAL CONVENTION OF 1977, at 380–412, 461–69 (1977) [hereinafter TENNESSEE CONVENTION OF 1977].

Texas: DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875, at 328, 336 (Seth Shepard McKay ed., 1930) [hereinafter TEXAS CONVENTION OF 1875]; 1 DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875, at 135–40, 150–206 (1974) [hereinafter TEXAS CONVENTION OF 1974]; 2 TEXAS CONVENTION OF 1974, *supra*, at 2197–2212, 2423–27.

Utah: 1 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION ASSEMBLED AT SALT LAKE CITY ON THE FOURTH DAY OF MARCH, 1895, TO ADOPT A CONSTITUTION FOR THE STATE OF UTAH 367 (1898) [hereinafter UTAH CONVENTION OF 1895]; 2 UTAH CONVENTION OF 1895, *supra*, at 1218, 1331, 1806–07.

Virginia: 1 REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION: STATE OF VIRGINIA 1051, 1056–57 (1906) [hereinafter VIRGINIA CONVENTION OF 1901–1902].

West Virginia: 2 DEBATES AND PROCEEDINGS OF THE FIRST CONSTITUTIONAL CONVENTION OF WEST VIRGINIA, (1861–1863), at 1098–1141 (Charles H. Ambler et al. eds., 1939) [hereinafter WEST VIRGINIA CONVENTION OF 1861–1863].

Wisconsin: PUBLICATIONS OF THE STATE HISTORICAL SOCIETY OF WISCONSIN: THE CONVENTION OF 1846, at 538–39 (Milo M. Quaife ed., 1919) [hereinafter WISCONSIN CONVENTION OF 1846].

Wyoming: JOURNAL AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF WYOMING 729–30 (1893) [hereinafter WYOMING CONVENTION OF 1889].

It is important to note that the above citations are a mere fraction of the overall state convention debates over education policy. The debates regarding the entire education articles are found in the following sources:

Alabama: 2 ALABAMA CONVENTION OF 1901, *supra*, at 2033–43; 4 ALABAMA CONVENTION OF 1901, *supra*, at 4162–82, 4202–20, 4250–4315, 4377–4415, 4672, 4895–98.

Alaska: 2 ALASKA CONVENTION OF 1955–1956, *supra*, at 1509–32.

Arizona: ARIZONA CONVENTION OF 1910, *supra*, at 523–38, 945–47, 960.

Arkansas: DEBATES AND PROCEEDINGS OF THE CONVENTION WHICH ASSEMBLED AT LITTLE ROCK 389–91 (1868).

California: CALIFORNIA CONVENTION OF 1849, *supra*, at 202–11, 346–54; 2 CALIFORNIA

CONVENTION OF 1878–1879, *supra*, at 1086–1109; 3 CALIFORNIA CONVENTION OF 1878–1879, *supra*, at 1396–1402, 1409–13, 1473–75, 1499–1501.

Connecticut: 1 CONNECTICUT CONVENTION OF 1965, *supra*, at 310–14; 3 CONNECTICUT CONVENTION OF 1965, *supra*, at 1029–67.

Delaware: 2 DELAWARE CONVENTION OF 1896–1897, *supra*, at 1205–96, 1331–78; 4 DELAWARE CONVENTION OF 1896–1897, *supra*, at 2687–97, 3137–85.

Georgia: GEORGIA CONVENTION OF 1877, *supra*, at 324–40.

Hawaii: 2 HAWAII CONVENTION OF 1950, *supra*, at 580–619; 2 HAWAII CONVENTION OF 1968, *supra*, at 430–53; 2 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 170–245 (1980).

Idaho: 1 IDAHO CONVENTION OF 1889, *supra*, at 637–69, 679–702, 730–77, 779–805, 825–67.

Illinois: ILLINOIS CONVENTION OF 1847, *supra*, at 171–86, 898–926; 2 ILLINOIS CONVENTION OF 1869–1870, *supra*, at 1732–61; 1 ILLINOIS CONVENTION OF 1920–1922, *supra*, at 472–578; 2 ILLINOIS CONVENTION OF 1920–1922, *supra*, at 1070–74, 1123–1223; 4 ILLINOIS CONVENTION OF 1920–1922, *supra*, at 3906–13; 5 ILLINOIS CONVENTION OF 1920–1922, *supra*, at 4802–03; 2 ILLINOIS CONVENTION OF 1969–1970, *supra*, at 762–857, 924–31; 4 ILLINOIS CONVENTION OF 1969–1970, *supra*, at 3536–70; 5 ILLINOIS CONVENTION OF 1969–1970, *supra*, at 4120–49, 4500–06.

Indiana: 1 INDIANA CONVENTION OF 1850–1851, *supra*, at 171, 858–61; 2 INDIANA CONVENTION OF 1850–1851, *supra*, at 1078–79, 1858–71, 1880–93.

Iowa: FRAGMENTS OF THE DEBATES OF THE IOWA CONSTITUTIONAL CONVENTIONS OF 1844 AND 1846, 137–40 (Benjamin F. Shambaugh ed., 1900); 1 IOWA CONVENTION OF 1857, *supra*, at 598–602; 2 IOWA CONVENTION OF 1857, *supra*, at 720–32, 743–58, 766–73, 815–50, 853–58, 871–74, 934–72, 1001–03, 1028–30.

Kansas: KANSAS CONVENTION OF 1859, *supra*, at 170–83, 191–94, 431–32, 434, 548–49.

Kentucky: KENTUCKY CONVENTION OF 1849, *supra*, at 377, 880–901, 910–14; 3 KENTUCKY CONVENTION OF 1890–1891, *supra*, at 4452–4584; 4 KENTUCKY CONVENTION OF 1890–1891, *supra*, at 4585–4607.

Louisiana: LOUISIANA CONVENTION OF 1845, *supra*, at 316–20, 850, 902–11; LOUISIANA CONVENTION OF 1864, *supra*, at 130–35, 148–63, 474–79, 489–500, 522–31; 8 LOUISIANA CONVENTION OF 1973–1974, *supra*, at 2230–2340; 9 LOUISIANA CONVENTION OF 1973–1974, *supra*, at 2341–2465, 3280–84, 3419–21.

Maine: MAINE CONVENTION OF 1819–1820, *supra*, at 278–91.

Maryland: 1 MARYLAND CONVENTION OF 1850–1851, *supra*, at 339; 2 MARYLAND CONVENTION OF 1850–1851, *supra*, at 805–13; 2 MARYLAND CONVENTION OF 1864, *supra*, at 1079–80, 1201–36, 1241–56; 3 MARYLAND CONVENTION OF 1864, *supra*, at 1690–91, 1786–87; MARYLAND CONVENTION OF 1867, *supra*, at 198–204, 243–48, 251–57; MARYLAND CONVENTION OF 1967–1968, *supra*, at 2506–61, 2566–74, 3120–25, 3127–40.

Massachusetts: 2 MASSACHUSETTS CONVENTION OF 1853, *supra*, at 482–84, 522, 543–50, 569–76; 3 MASSACHUSETTS CONVENTION OF 1853, *supra*, at 27–49, 337, 472, 613–26, 699, 714; 1 MASSACHUSETTS CONVENTION OF 1917–1919, *supra*, at 44–363.

Michigan: MICHIGAN CONVENTION OF 1835, *supra*, at 338–43; MICHIGAN CONVENTION OF 1850, *supra*, at 263–76, 535–38, 540–55, 774–91; 2 MICHIGAN CONVENTION OF 1867, *supra*, at 300–09, 398–419, 467–72, 514–17; 1 MICHIGAN CONVENTION OF 1907–1908, *supra*, at 117–19, 244, 291–94; 2 MICHIGAN CONVENTION OF 1907–1908, *supra*, at 1389–90; 1 MICHIGAN CONVENTION OF 1961–1962, *supra*, at 197–207; 2 MICHIGAN CONVENTION OF 1961–1962, *supra*, at 2554–80, 3146–49.

Minnesota: MINNESOTA (DEMOCRATIC) CONVENTION OF 1857, *supra*, at 437–52, 454–66, 580–81; MINNESOTA (REPUBLICAN) CONVENTION OF 1857, *supra*, at 167–68, 230–58.

Missouri: 9 MISSOURI CONVENTION OF 1875, *supra*, at 19–366; 10 MISSOURI CONVENTION OF 1875, *supra*, at 99–279; 11 MISSOURI CONVENTION OF 1875, *supra*, at 230–90.

Montana: MONTANA CONVENTION OF 1889, *supra*, at 88–90, 520–29, 589–92, 878; 8 MONTANA CONVENTION OF 1971–1972, *supra*, at 5955–6123, 6129–6408; 9 MONTANA CONVENTION OF 1971–1972, *supra*, at 6416–6557, 6587–6658; 11 MONTANA CONVENTION OF 1971–1972, *supra*, at 8116–44.

Nebraska: 1 NEBRASKA CONVENTION OF 1871, *supra*, at 92–93, 252–304, 315–40; 2 NEBRASKA CONVENTION OF 1871, *supra*, at 203–10, 218–74, 278–83, 348–50, 466–72; 3 NEBRASKA CONVENTION OF 1871, *supra*, at 332–36, 395; 1 JOURNAL OF THE NEBRASKA CONSTITUTIONAL CONVENTION 434–55, 648–55, 689–708, 1114–27 (1921) [hereinafter NEBRASKA CONVENTION OF 1919]; 2 NEBRASKA CONVENTION OF 1919, *supra*, at 2677–81.

Nevada: NEVADA CONVENTION OF 1864, *supra*, at 447–48, 565–82, 585–95, 659–62, 744–46, 808–09.

New Hampshire: NEW HAMPSHIRE CONVENTION OF 1974, *supra*, at 240–58; JOURNAL OF THE CONVENTION TO REVISE THE CONSTITUTION 230–34 (1984) [hereinafter NEW HAMPSHIRE CONVENTION OF 1984].

New Jersey: NEW JERSEY CONVENTION OF 1844, *supra*, at 345–47, 400–07, 550–52, 566–67.

New York: NEW YORK CONVENTION OF 1846, *supra*, at 388, 1022–26, 1074–76; 4 NEW YORK CONVENTION OF 1867–1868, *supra*, at 2815–2924; 5 NEW YORK CONVENTION OF 1867–1868, *supra*, at 3795–3817; 3 NEW YORK CONVENTION OF 1894, *supra*, at 689–96, 739–62, 766–806, 961–86; 4 NEW YORK CONVENTION OF 1894, *supra*, at 741–72, 777–813, 857–87; 1 NEW YORK CONVENTION OF 1915, *supra*, at 928–41, 973–90, 1065–1109; 3 NEW YORK CONVENTION OF 1915, *supra*, at 2343–49; 4 NEW YORK CONVENTION OF 1915, *supra*, at 3636–46; 2 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 1055–56 (1938); 2 NEW YORK CONVENTION OF 1967, *supra* note 1, at 184–85, 763–910; 3 NEW YORK CONVENTION OF 1967, *supra* note 1, at 412–528; 4 NEW YORK CONVENTION OF 1967, *supra* note 1, at 121–36, 345–408, 460–62, 646–54, 659–61.

North Dakota: NORTH DAKOTA CONVENTION OF 1889, *supra*, at 152–55, 158–82, 288–93, 512–22, 603–10; 2 NORTH DAKOTA CONVENTION OF 1971–1972, *supra*, at 939–56, 1230–54, 1467–70.

Ohio: 2 OHIO CONVENTION OF 1850–1851, *supra*, 10–19, 698–707, 710–11; 2 OHIO CONVENTION OF 1873–1874, *supra*, at 2186–2288, 2306–35; 2 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO 1499–1504, 1732–33, 1811–14, 1914–18, 1928–33 (E. S. Nichols ed., 1912).

Oregon: OREGON CONVENTION OF 1857, *supra*, at 178, 179, 308–09, 311, 331–36.

Pennsylvania: 5 PENNSYLVANIA CONVENTION OF 1837–1838, *supra*, at 183–233, 240–316, 332–413, 430–32; 11 PENNSYLVANIA CONVENTION OF 1837–1838, *supra*, at 131–80; 13 PENNSYLVANIA CONVENTION OF 1837–1838, *supra*, at 75–76; 2 PENNSYLVANIA CONVENTION OF 1872–1873, *supra*, at 419–73; 6 PENNSYLVANIA CONVENTION OF 1872–1873, *supra*, at 38–87; 7 PENNSYLVANIA CONVENTION OF 1872–1873, *supra*, at 676–96.

South Carolina: 2 SOUTH CAROLINA CONVENTION OF 1868, *supra*, at 654–56, 685–739, 743–44, 747–51, 889–94.

South Dakota: 1 SOUTH DAKOTA CONVENTIONS OF 1885 AND 1889, *supra*, at 499–519.

Tennessee: 1 TENNESSEE CONVENTION OF 1977, *supra*, at 380–412, 461–69.

Texas: TEXAS CONVENTION OF 1875, *supra*, at 194–201, 211–34, 326–69, 394–97; 1 TEXAS CONVENTION OF 1974, *supra*, at 131–506; 2 TEXAS CONVENTION OF 1974, *supra*, at 2195–2217, 2423–27.

Utah: 1 UTAH CONVENTION OF 1895, *supra*, at 367–93; 2 UTAH CONVENTION OF 1895, *supra*, at 1218–32, 1237–1312, 1331–74, 1806–08, 1810–12.

Virginia: 1 VIRGINIA CONVENTION OF 1901–1902, *supra*, at 1051–1248, 1662–1704; 2 VIRGINIA CONVENTION OF 1901–1902, *supra*, at 1791–1844, 2005–24; JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE COMMONWEALTH OF VIRGINIA TO REVISE AND AMEND SEC. 141 OF THE CONSTITUTION OF VIRGINIA 36–63 (1956) [hereinafter VIRGINIA CONVENTION OF 1956].

West Virginia: 1 WEST VIRGINIA CONVENTION OF 1861–1863, *supra*, at 69–73, 77, 222; 2 WEST VIRGINIA CONVENTION OF 1861–1863, *supra*, at 753–55, 988–1150; 3 WEST VIRGINIA CONVENTION OF 1861–1863, *supra*, at 365–67, 416–18.

Wisconsin: WISCONSIN CONVENTION OF 1846, *supra*, at 568–75, 615–20; JOURNAL OF THE CONVENTION TO FORM A CONSTITUTION FOR THE STATE OF WISCONSIN 263–65, 321–45, 378, 548–49 (1848).

Wyoming: WYOMING CONVENTION OF 1889, *supra*, at 729–45.

Finally, these state conventions occasionally featured debates about other articles of the

However, there are two caveats. First, it is admittedly the case that this study is not entirely comprehensive. Not only do we lack access to the 119 unrecorded debates throughout American history, but this study also leaves aside debates conducted pursuant to constitutional changes achieved through legislative amendments, the initiative process, or revision commissions.³³ Nevertheless, the 114 recorded convention debates—ranging from the Connecticut Convention of 1818 to the New Hampshire Convention of 1984 and including twenty-two conventions held before 1850, forty-four conventions held from 1851–1900, twenty conventions from 1901–1950, twenty-eight conventions held since 1950, and at least one convention from forty-four of the states—make it possible to trace the meaning of education clauses throughout the United States.³⁴

Second, it should also be noted that this historical study is not necessarily determinative of the current meaning of state education clauses, particularly for scholars and jurists who contend that the framers' intentions are irrelevant to constitutional interpretation.

constitution, such as the tax and finance article, that had important implications for education policy. These additional debates are found in the following sources:

Alabama: 2 ALABAMA CONVENTION OF 1901, *supra*, at 1604–21, 2519–20.

Georgia: GEORGIA CONVENTION OF 1877, *supra*, at 281–83, 301–07.

Illinois: ILLINOIS CONVENTION OF 1847, *supra*, at 238–50; 1 ILLINOIS CONVENTION OF 1869–1870, *supra*, at 679–80, 703; 4 ILLINOIS CONVENTION OF 1920–1922, *supra*, at 3566–3611; 5 ILLINOIS CONVENTION OF 1920–1922, *supra*, at 4081–4115, 4264–76; 3 ILLINOIS CONVENTION OF 1969–1970, *supra*, at 1280–83.

Kentucky: 1 KENTUCKY CONVENTION OF 1890–1891, *supra*, at 1135–46.

Maryland: 1 MARYLAND CONVENTION OF 1850–1851, *supra*, at 430–37, 442–46; 2 MARYLAND CONVENTION OF 1850–1851, *supra*, at 339–47, 621–22.

Michigan: 1 MICHIGAN CONVENTION OF 1907–1908, *supra*, at 208–11; 1 MICHIGAN CONVENTION OF 1961–1962, *supra*, at 473–76, 1135–55, 1175–1232.

New Hampshire: JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW HAMPSHIRE 126–29 (1877); NEW HAMPSHIRE CONVENTION OF 1984, *supra*, at 158–61.

New Jersey: 1 STATE OF NEW JERSEY CONSTITUTIONAL CONVENTION OF 1947, at 704–26 (1949).

New York: 2 NEW YORK CONVENTION OF 1967, *supra* note 1, at 119–21, 130–31.

North Dakota: 1 NORTH DAKOTA CONVENTION OF 1971–1972, *supra*, at 394–408, 415–21.

South Dakota: 2 SOUTH DAKOTA CONVENTIONS OF 1885 AND 1889, *supra*, at 87–98, 107–09.

Texas: TEXAS CONVENTION OF 1875, *supra*, at 100–13; 2 TEXAS CONVENTION OF 1974, *supra*, at 2101–06.

Utah: 1 UTAH CONVENTION OF 1895, *supra*, at 807.

Virginia: VIRGINIA CONVENTION OF 1956, *supra*, at 73–94.

Wyoming: WYOMING CONVENTION OF 1889, *supra*, at 699–717.

³³ Recent amendments to state education clauses proposed by legislatures, popular initiatives, and constitutional revision commissions are discussed in Tractenberg, *supra* note 15, at 248–49, 252–55.

³⁴ All of the states but Colorado, Florida, New Mexico, Oklahoma, Vermont, and Washington are represented in the sample of extant convention debates. On the chronological and geographic representativeness of the extant convention debates, see DINAN, *supra* note 31, at 28.

Nevertheless, an inquiry into the original understanding of these clauses is at least pertinent to, even if not dispositive of, an assessment of the legitimacy of recent state court interpretations of these clauses.

It turns out, as will be shown, that the vast majority of state convention delegates had no intention of drafting education clauses that would empower judges to overturn legislative judgments with regard to the equity, adequacy, and uniformity of school financing. Thus, in some cases, delegates were quite explicit about their intent to draft hortatory clauses that either introduced the substantive provisions of the education article or encouraged legislators to support various goals. In other cases, delegates did intend to draft obligatory provisions requiring certain actions to be taken by legislators or local officials. However, these actions were specifically enumerated in the education clause, and when these requirements were not specified but were couched in general terms, delegates were invariably clear that the interpretation of these general provisions would be the province of the legislature. One finds only a few instances in the state convention debates, nearly all in the late twentieth century, of delegates seeking to craft education clauses that would empower judges to review legislative judgments regarding school-finance mechanisms. Moreover, in all but one of these cases, the proposals were defeated in the convention or by voters.

II. HORTATORY PROVISIONS

A number of state education clauses are clearly intended to be hortatory, whether by serving as a preamble to substantive provisions appearing later in the education article, by merely confirming an existing state of affairs regarding the school system, or by identifying aspirational goals that legislators and citizens are encouraged to attain.

A. Prefatory Provisions

Several state education clauses contain general statements about the purpose or value of education, and therefore are designed to serve as a preface to other substantive provisions. For instance, various state education clauses include language from the Northwest Ordinance of 1787, and convention delegates in these states have been quite clear about the hortatory nature of these

provisions. For example, Vera Andrus argued in the Michigan Convention of 1961–1962, in support of a provision declaring “[r]eligion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged,”³⁵ that

[F]or years I have been teaching that we should have as brief a constitution as possible However, this provision . . . is of great historical and sentimental value to all of the people of Michigan Later we will propose details on education. This is just a statement, a very important and significant statement, which we would like to see retained in our constitution for our children and grandchildren in the future.³⁶

The inclusion of these hortatory clauses, which borrowed at times from the Northwest Ordinance³⁷ and drew at other times from John Adams’s language in the Massachusetts Constitution of 1780,³⁸ did not command universal agreement among the assembled delegates. In fact, when these prefatory clauses were proposed in state conventions, other delegates questioned the utility of such statements and urged that they be eliminated. Along these lines, Oris Hyder, in the Tennessee Convention of 1977, asked:

[W]hat does the committee mean in the wording of the first sentence of the section? “The State of Tennessee recognizes the inherent value of education and encourages its support.” Do you mean the people of the State, the government of the

³⁵ MICH. CONST. art. VIII, § 1.

³⁶ 1 MICHIGAN CONVENTION OF 1961–1962, *supra* note 32, at 206.

³⁷ Article III of the Northwest Ordinance of 1787 began by stating: “Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.” An Act to Provide for the Government of the Territory Northwest of the River Ohio, ch. 8, 1 Stat. 50, 52 n.(a) (1789).

³⁸ The Massachusetts Constitution stated that

Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties ; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislators and magistrates, in all future periods of this Commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them ; especially the university at Cambridge, public schools, and grammar schools in the towns ; to encourage private societies and public institutions, rewards and immunities, for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and a natural history of the country ; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings ; sincerity, good humour [sic], and all social affections, and generous sentiments among the people.

MASS. CONST. pt. 2, ch. V, § 2.

State, or what? What is meant by that sentence? Is it not superfluous to have it in there because then you go on to provide for it, which, of course, indicates that this Constitution believes in it and supports it?³⁹

To which Walter Helms responded—in a manner typical of defenders of these clauses—that the clause was meant to hark back to the Northwest Ordinance and provide a linkage between past and present state constitutions. As he explained:

Education came into the Constitution almost as a memorial. The precedent was set in the ordinances of 1785 and 1787 at the time the Northwest Territory was opened up. . . . So, it came to be written into the Constitutions of that day, some type of memorializing statement, indicating that you would consider education and give education a place in the state. Constitutions following the Northwest Ordinance precedent, put this in their constitutions. The State Constitution of 1796, first one for Tennessee, did not include such memorializing statements simply because we organized under an ordinance other than the Northwest Ordinance. We did, in the next Constitution in 1834, include this short title, Education is to be Cherished. It is a tribute or memorial to education. We have shortened that memorial by saying that there is an inherent value in education. In other words, it is a good that should be supported by the State. That is the reason . . . for including that. It is a historical sort of precedent.⁴⁰

B. Confirmational Provisions

At times, provisions in education clauses were intended to be prefatory. At other times, they were intended to serve the equally hortatory, but slightly different, purpose of recognizing or confirming actions already taken by legislatures. A prime example is the education clause of the Pennsylvania Constitution, which took more or less its current form in the Pennsylvania Convention of 1872–1873 and opened by proclaiming that “[t]he General Assembly shall provide for the maintenance and support of a thorough and efficient system of public schools.”⁴¹ When the head of the

³⁹ 1 TENNESSEE CONVENTION OF 1977, *supra* note 32, at 383.

⁴⁰ *Id.*

⁴¹ PA. CONST. of 1874, art. X, § 1.

convention's education committee, William Darlington, was called upon to explain the purpose of this statement, he stated:

It will be remembered that the only provision in the Constitution, as it now stands, is that the Legislature shall take care that the poor be taught gratuitous, and the arts and sciences flourish in one or more seminaries of learning. We have out-grown that state of things long since. The Legislature, with the entire sanction of the people of this Commonwealth, has gone far in advance of the constitutional injunction placed there in the early history of the Commonwealth. Perhaps the subject might be safely left to the Legislature still. Indeed there cannot be any absolute necessity for the expression of an opinion on this general subject of education by this Convention; but inasmuch as we might be said to be on the backward road if we said nothing on the subject, we felt that it was better for this Convention that it ought so to recognize the existence of that admirable system of public schools which now prevails all over the Commonwealth as the existing state of things require. It will be therefore perceived that, instead of depending upon the Legislature to establish a system of education, the phraseology of the first section, now before us, we think shall provide for the maintenance and support, merely recognizing the fact as it exists⁴²

Meanwhile, Frederick Holls, chairman of the education committee in the New York Convention of 1894, offered a similar explanation for a proposed education clause which stated that "[t]he Legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this State may be educated,"⁴³ and which was adopted verbatim and remains in effect today:⁴⁴

The first section which we have reported, and which is new, explains itself. . . . As has been stated by the committee in their report, imagination cannot possibly picture the State of New York refusing to provide education for all her children; and hence the objection might be made that the section was unnecessary. But this argument has not been held to apply to many other matters which are thought to be

⁴² 2 PENNSYLVANIA CONVENTION OF 1872–1873, *supra* note 32, at 419–20.

⁴³ N.Y. CONST. of 1894, art. IX, § 1.

⁴⁴ See N.Y. CONST. art. XI, § 1.

fundamental, and in view of the policy of the State of New York toward all education, and to which more reference will undoubtedly be made during this debate, we consider it of importance that at the head of the educational article there should be a section announcing in no uncertain terms the interest of the State of New York in the foundation of all its prosperity, the free common schools.⁴⁵

The Connecticut education clause had a similar origin. When delegates assembled for the Connecticut Convention of 1965, a school system had long been in existence, but there had never been any mention of public schools in the constitution. Although the education committee was undisturbed by the absence of an education clause and did not initially propose to add one, Simon Bernstein rose and disagreed, noting that “[o]ur Constitution as it is presently written does not say anything about a provision for public education on any level,”⁴⁶ and therefore urged “th[e] Convention to establish and place in our Constitution [a] provision for free public school education subject to the Legislative Enactments necessary to provide funds for it.”⁴⁷ He was clear, however, that he did not mean for adoption of this clause to signal any change in the current school system. Bernstein noted that

[W]e do have the tradition which goes back to our earliest days of free good public education and we have [had] good public schools so that this again is not anything revolutionary, it is something which we have, it is which is practically all Constitutions in the States of our nation and Connecticut with its great tradition certainly ought to honor this principle.⁴⁸

Due to Mr. Bernstein’s persistence, the convention was led to add the current education clause, which states that “[t]here shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation.”⁴⁹

⁴⁵ 3 NEW YORK CONVENTION OF 1894, *supra* note 32, at 690.

⁴⁶ 1 CONNECTICUT CONVENTION OF 1965, *supra* note 32, at 311.

⁴⁷ *Id.* at 312.

⁴⁸ 3 CONNECTICUT CONVENTION OF 1965, *supra* note 32, at 1039.

⁴⁹ CONN. CONST. art. VIII, § 1.

C. Aspirational Provisions

On still another set of occasions, education clauses were drafted with an eye toward setting goals or principles that legislators and citizens were encouraged to achieve or honor. Although the U.S. Constitution, outside of the Preamble, does not contain aspirational clauses of this sort,⁵⁰ state constitutions are replete with these clauses.⁵¹ State convention delegates frequently disagreed about whether the inclusion of these sorts of aspirational provisions was healthy (in the sense of proclaiming a polity's fundamental concerns and goals) or problematic (in the sense of inspiring hopes that would inevitably go unfulfilled). However, delegates were in agreement that these aspirational clauses were directed toward legislators or the citizenry, and not judges.

Along these lines, several state education clauses encourage legislatures to strive for equal educational opportunity. Thus, in the Louisiana Convention of 1973–1974, Alphonse Jackson Jr. moved that the word “equal” be added to the proposed education clause so as to proclaim that each individual will have “an *equal* opportunity to develop to his full potential.”⁵² As Mr. Jackson explained:

I offer the amendment because I am concerned about the great disparity that exists in this state between parishes and between the ability of local governmental agencies to provide for all of the children of all of the people equal educational experiences. I think that this state has to make a commitment to that proposition.⁵³

However, when questioned about the purpose of this language, Mr. Jackson made clear that it was entirely aspirational. When Mary Zervigon asked “[if] you have any idea whether or not this has the force of law--this statement of goals--or whether it is more a statement of philosophy,”⁵⁴—Mr. Jackson responded, “I would think

⁵⁰ However, they are found in the nation's other founding document—the Declaration of Independence. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“Prudence, indeed, will dictate that Governments long established *should not be* changed for light and transient Causes . . .” (emphasis added)).

⁵¹ These clauses, which deal with a wide range of subjects, are located primarily in the state bills of rights and occasionally in the frames of government.

⁵² 8 LOUISIANA CONVENTION OF 1973–1974, *supra* note 32, at 2235 (internal quotation marks omitted) (emphasis added).

⁵³ *Id.* at 2234–35.

⁵⁴ *Id.* at 2235.

that it's more a statement of philosophy personally."⁵⁵ Walter Lanier Jr. then inquired:

Mr. Jackson, so that the record will be clear on this point, I believe there's recently been some cases in Texas and I believe in California, with reference to whether it was a denial of equal protection that school districts were on different tax bases, with reference to the overall system. Is my understanding correct that by using the language here that you are using, you are not trying to constitutionalize the approach that was taken by the people who brought those suits and those cases?⁵⁶

To which Mr. Jackson ultimately replied: "No, I'm not."⁵⁷

In similar fashion, when Dawn Clark Netsch, in the Illinois Convention of 1969–1970, proposed an ultimately successful amendment designed to encourage more equality of school funding, to the effect that "[t]he State has the primary responsibility for financing the system of public education,"⁵⁸ she disavowed any intent to create a judicially enforceable provision. Mrs. Netsch had earlier avowed that a similarly worded proposal of hers in this area was clearly "hortatory" and did not state "a legally enforceable duty," but rather would "function as a conscience to the General Assembly to assume a greater proportion of the financing of public schools of the state."⁵⁹ She went on to explain, in similar fashion in this case, that the principal effect of this particular proposal would be to influence legislators and the citizenry:

[T]he feeling is that the state should, indeed, assume this primary responsibility for the financing of the public school system. It is not a legally obligatory command to the state legislature. I think it is useful, because I think it is something that can be pointed to every time the question of appropriations from the state to the school districts is at issue. I think this can be cited to them, and it can be explained to them that if this constitution is approved, that the people of this state also share the feeling that the state

⁵⁵ *Id.*

⁵⁶ *Id.* The Texas and California cases referred to by Walter Lanier Jr. were *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), and *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971), respectively.

⁵⁷ 8 LOUISIANA CONVENTION OF 1973–1974, *supra* note 32, at 2236.

⁵⁸ ILL. CONST. art. X, § 1.

⁵⁹ 5 ILLINOIS CONVENTION OF 1969–1970, *supra* note 32, at 4145.

should be paying a larger share of that burden.⁶⁰

Other education clauses encourage legislatures to provide a “quality,” or even a “high quality,” education. Once again, delegates who proposed language of this sort were invariably explicit about the fact that legislators would retain ultimate responsibility for determining what sort of educational programs would satisfy this requirement. Thus, when a provision was proposed and approved by the Illinois Convention of 1969–1970, to the effect that “[t]he State shall provide for an efficient system of high quality public educational institutions and services,”⁶¹ Ray Garrison asked: “Did the committee come to any definite definition or conclusion as to what would constitute quality services with respect to education?”⁶² To which William Fogal responded, on behalf of the committee:

No, we—the word “quality,” I suppose, means different things to different people. We had in mind the highest, the most excellent educational system possible; leave this up to the determination of the legislature and your local districts, and let the citizens keep pushing for higher-quality education. We didn’t attempt to define all of the ramifications of high quality.⁶³

Other education clauses urge legislators to treat education as a “paramount” or “fundamental” goal of the state. Thus, in the Illinois Convention of 1969–1970, delegates considered a proposal to recognize that a “paramount goal of the people of the state shall be the educational development of all persons to the limits of their capacities.”⁶⁴ Supporters and critics of this proposal were in agreement about its hortatory character. The only disagreement was about the wisdom of including such hortatory statements in a constitution. Leonard Foster sought to retain this provision because it would remind legislators during budget deliberations of the importance of education. He argued that “[w]e have here what is generally called a hortatory statement. It establishes certain goals which may or may not be achievable or enforceable. I don’t see any particular reason why we shouldn’t set up a good goal for the educational status of the state.”⁶⁵

On the other hand, Jeffrey Ladd advocated eliminating this

⁶⁰ *Id.* at 4502.

⁶¹ ILL. CONST. art X, § 1.

⁶² 2 ILLINOIS CONVENTION OF 1969–1970, *supra* note 32, at 767.

⁶³ *Id.*

⁶⁴ *Id.* at 794 (internal quotation marks omitted).

⁶⁵ *Id.* at 796.

hortatory language because it would inevitably lead to disappointment on the part of the citizenry when compromises had to be made in regard to budgeting. He explained that “one of the greatest crimes that the state can commit against the people of the state is that of unduly raising false hopes for people, and I think this crushes people into a greater despair than they know any other way.”⁶⁶ Similarly, Stanley Johnson expressed

a personal aversion to governments making statements which seem to promise so much but deliver so little. They raise hopes, but when these hopes fail to materialize in solid progress, the reaction usually sets in and it’s a very bitter one. I think we have had far too much of this kind of language from government officials.⁶⁷

After much debate, the essence of the clause was retained, albeit with the slight change that “paramount goal” was replaced by “fundamental goal.”⁶⁸

III. OBLIGATORY PROVISIONS

A number of state education clauses include obligatory provisions that do more than just encourage, but in fact require legislators or local officials to take certain actions. However, it is significant that, with a few exceptions to be discussed later, these clauses were not drafted for the purpose of enabling judicial scrutiny of legislative judgments regarding school financing. Rather, in drafting these clauses, convention delegates were seeking to accomplish a series of specific tasks, such as establishing a state school system, specifying the level of schooling to be supported by the state, ensuring that such schools were free of charge to attending students, providing that all local districts would operate schools and for a certain period of time each year, and clarifying the relationship between the state and the local districts.

Throughout their discussions of these provisions, delegates were at pains to make clear that although these tasks were required to be performed, elected officials generally bore full responsibility for determining the manner in which they were carried out. To the extent that delegates proposed more expansive or intrusive understandings of these provisions, as some occasionally did, these

⁶⁶ *Id.* at 799.

⁶⁷ *Id.* at 794.

⁶⁸ See ILL. CONST. art. X, § 1.

efforts were invariably rejected.

A. *Establishing a State School System*

Many state education clauses originated in the mid-nineteenth century out of a desire to establish state school systems in place of the patchwork of local systems that existed in a number of places up to that point. These clauses were thus obligatory in that they removed from legislators any discretion as to whether and when to create state systems. However, there was little intent on the part of drafters of these particular clauses to go beyond these limited aims.

1. Encourage Versus Establish?

The Louisiana Convention of 1845 was one of many mid-nineteenth-century conventions to debate whether the legislature should merely “encourage” the institution of schools throughout the state or should actually “establish” such schools. The original proposal of the education committee would have merely encouraged the institution of such schools, but Duncan Kenner introduced an amendment that sought, among other things, to replace “encourage” with “establish.” As he explained, in a motion ultimately approved by the convention:

I can not . . . yield my sanction to the second section of this report, because I consider that the expression that the legislature “shall encourage the institution of common schools,” as totally insufficient. To “encourage” is not the proper word. I would go further; I would make the requisition imperative. Not that the legislature shall “encourage” the institution of common schools, but that the legislature shall establish throughout the State a system of free schools, for the education of all the children of the people of the State. To accomplish this desirable result, I would make it imperative upon the legislature to raise the means for the maintenance and support of free schools.⁶⁹

2. Immediately or at the Discretion of the Legislature?

Meanwhile, a number of nineteenth-century conventions had occasion to debate whether to require the legislature to establish a

⁶⁹ LOUISIANA CONVENTION OF 1845, *supra* note 32, at 904.

state school system immediately (or at least within a certain number of years) or leave the timing completely to the discretion of the legislature. For instance, in the West Virginia Convention of 1861–1863, John Powell sought to require the legislature to provide, “within five years after the adoption of this Constitution”⁷⁰ for “the establishment of a thorough and efficient system of free schools.”⁷¹ Mr. Powell expressed his concern:

[I]f we leave the legislature to choose their own time, it may put it off five, ten or fifteen, or twenty years; and the present rising generation will have passed beyond the age when they could be benefited by the proposed system. I do contend that it is our duty to limit the legislature and compel them to organize a free school system within five years; and if gentlemen think that too soon, let them put it off longer, but let the time be fixed beyond which they shall not postpone.⁷²

In this case, convention delegates opted not to impose any timeframe and instead directed the legislature to establish a system “as soon as practicable,”⁷³ in part on the strength of Ephraim Hall’s concerns that a time limit would imply that legislators “have no sense or no purity”⁷⁴ and that it would be unenforceable in any event.⁷⁵ He asked: “[W]ill you compel them to make brick without straw? Suppose you say the legislature shall do it, and they don’t do it, what will you do with them? Will you hang them?”⁷⁶ In fact, so concerned were West Virginia convention delegates with not trammeling unduly on legislative discretion that they eventually dispensed with a proposed directive that the legislature provide “by all suitable means” for the establishment of a school system.⁷⁷ Although this phrase had originally been included precisely for the purpose of granting maximum discretion to the legislature, Abraham Soper feared that it might actually have just the opposite effect, and therefore it would be safer to eliminate the language. He argued:

[S]uppose if you retain [this phrasing] the legislature should

⁷⁰ 2 WEST VIRGINIA CONVENTION OF 1861–1863, *supra* note 32, at 1131.

⁷¹ W. VA. CONST. of 1863, art. X, § 2.

⁷² 2 WEST VIRGINIA CONVENTION OF 1861–1863, *supra* note 32, at 1131.

⁷³ W. VA. CONST. of 1863, art. X, § 2.

⁷⁴ 2 WEST VIRGINIA CONVENTION OF 1861–1863, *supra* note 32, at 1133.

⁷⁵ *See id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 1099 (internal quotation marks omitted). A motion to strike this phrase was initially rejected. *See id.* However, this wording was not included in the clause that was ultimately approved by the convention. *See* W. VA. CONST. of 1863, art. X, § 2.

undertake to lay a tax and when they come to enforce it an issue should be taken on their action by saying they had not adopted “suitable means[.]” I think a difficulty might arise by captious objections from that source. But if we omit this, it is clear and direct giving the whole power to the legislature to do as they please in relation to the matter. I think it would be better to strike the words out.⁷⁸

The Maryland Convention of 1864, meanwhile, took the opposite tack. The proposal of the education committee in that convention began by stating that “[t]he general assembly, *at its first session after the adoption of this constitution*, shall provide a uniform system of free public schools.”⁷⁹ Richard Edelen objected to this requirement and sought its removal, as had been done in West Virginia, arguing that it

proceeds upon the ground of a general distrust of the legislature of the State. We thereby say in so many words that we are not willing to commit this subject to the legislature of the State, fresh from the people, and supposed at all times to represent and reflect their views on the question of public school instruction or whatever other subject comes within the scope of their legitimate action.⁸⁰

However, this requirement was retained by the convention, and remains in the Maryland Constitution to this day, largely because delegates were persuaded that although legislatures could be entrusted with the “details” of a school system, they could not necessarily be counted on to “establish” a system in a timely fashion. As George Sands explained:

[W]e are not distrusting them. . . . In the first place, we say the general assembly shall provide the details of the system. Is that distrusting them? We say, that is your duty; do it. Is that distrusting them? But in order to make sure of the matter we go further. I am sure my friend is a friend of public education, and his people, from his own statement, are friends of public education and will want to make it sure—we go further and provide that their wants in this respect shall be met.⁸¹

He concluded: “I want a public school system established, and I

⁷⁸ 2 WEST VIRGINIA CONVENTION OF 1861–1863, *supra* note 32, at 1099.

⁷⁹ 2 MARYLAND CONVENTION OF 1864, *supra* note 32, at 1229 (emphasis added).

⁸⁰ *Id.* at 1231.

⁸¹ *Id.* at 1232.

want here in my place to do my share towards making it absolutely impossible that the people of Maryland shall be deprived of it.”⁸²

B. Specifying the Level of Schooling to be Supported by the State

Another concern for state convention delegates, after obligating legislators to establish a state school system, was specifying the level of schooling to be supported by the state. Extensive discussions were held about whether to stipulate in the education clause that the legislature should establish a system of “common” schools, which were understood to be limited to basic elementary instruction, or whether to leave out any mention of “common” schools and thereby permit the establishment of academic secondary schools. Discussions also focused on whether to mention the benefits of promoting intellectual, scientific, and other improvements, which were viewed as sanctioning a classical education and collegiate academies.

1. An Advanced Level of Schooling

In one group of states, delegates succeeded in crafting education clause language signaling support for schooling above a basic level. In some cases, this took the form of *including* provisions to the effect that “the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral and agricultural improvement,”⁸³ over the objections of delegates who believed that this language would permit a much higher level of schooling than the people were interested in supporting. Thus, when a provision of this sort—mentioning “the promotion of intellectual, scientific, moral, and agricultural improvement”—was reported out of the education committee in the California Convention of 1878–1879, Samuel Holmes, a critic of advanced education, moved to eliminate this language.⁸⁴ He wanted to provide instead for “a thorough and efficient system of free schools, whereby all the children of this State may receive a good common school education.”⁸⁵ It fell to C.W. Cross to make clear the difference between the two positions:

There are two marked ideas of public education One idea is that no portion of the public funds of this State should

⁸² *Id.* at 1233.

⁸³ CAL. CONST. art. IX, § 1.

⁸⁴ See 2 CALIFORNIA CONVENTION OF 1878–1879, *supra* note 32, at 1087.

⁸⁵ *Id.* (internal quotation marks omitted).

be appropriated to the education of the people of the State beyond a certain point, that certain point being an education in what is usually termed the common English branches. Now, sir, that is the view of one portion of the people of the State, and I believe a very large portion. There is another class of people in this State who believe that there is little danger of educating the people of the State too much, and that the education of a few to a high grade at the expense of the State finally proves a benefit to the State, far exceeding the expense of that much education. . . . Now, sir, if I understand the proposition, the question must now come directly before this Convention. The section as here proposed by the committee certainly does involve the expenditure of public funds for encouraging education not limited to reading, writing, spelling, arithmetic, grammar, and geography, but this to encouraging the promotion of intellectual, scientific, moral, and agricultural improvement. The section as presented by the committee takes the position of the latter class, while the amendment represents the sentiment that education at public expense should be limited to the common English branches. This amendment proposes the education merely of children.⁸⁶

In this case, Mr. Cross—and, as it turned out, a majority of the convention—preferred to retain the committee’s language regarding “promotion of intellectual, scientific, moral and agricultural improvement,”⁸⁷ and it survives in the California education clause to this day.⁸⁸ As Mr. Cross explained:

For my own part I am in favor of leaving this provision in, so that whenever the people of this State shall feel like encouraging a higher intellectual development, they shall have the power to do so. But if, at any future time in the history of the State, the people wish to say that the expenditure should be limited[,] . . . the State should have the power to so limit it. But, I believe that we should not go farther than to provide that the State may say so and so, and leave the people to determine in their legislative body how far they will go in these matters. Do not let us say that they shall spend money for these purposes, but leave the door

⁸⁶ *Id.*

⁸⁷ CAL. CONST. art IX, § 1.

⁸⁸ *See id.*

open for the great intellectual march of progress in this State.⁸⁹

In other cases, delegates succeeded in permitting legislatures to support a post-elementary level of schooling by *eliminating* any mention of “common” schools—in the face of delegates who insisted that the state system be limited to such schools. To take a leading example, delegates to the Pennsylvania Convention of 1837–1838 were able to defeat Charles Ingersoll’s effort to add the word “common” to an existing education clause that simply called for “establishment of schools throughout the state.”⁹⁰ As James Porter explained:

He was for leaving out the word “common” which occurred in the amendment, for if we had *uncommonly* good schools as he trusted we should, he at least hoped that we should have those in which the higher as well as the common branches of education were taught. We had already commenced the establishment of academies, wherein the classical branches were taught, and he hoped they would be cherished under the new system. One academy was to be established in each county, as preparatory schools for the colleges. He would like to see such a system in operation, as would afford the means of classical education to every child that desired it, without going beyond his own neighborhood. He wished to provide means for the education of teachers, and for elevating the rank of that profession in society. That must be the groundwork of any system that we adopted, for at present the teachers of the common schools were generally uneducated, and a sort of odium rested upon the whole profession.⁹¹

2. A Basic Level of Schooling

In other states, by contrast, delegates prevailed in their efforts to craft education clauses that limited state support to only a basic education. At times, this took the form of *eliminating* the “intellectual, scientific, . . . and agricultural improvement” language

⁸⁹ 2 CALIFORNIA CONVENTION OF 1878–1879, *supra* note 32, at 1088.

⁹⁰ 5 PENNSYLVANIA CONVENTION OF 1837–1838, *supra* note 32, at 185. This motion, which also sought to make various other changes in the proposed education clause aside from adding the word “common,” was introduced on page 187 of the debates. *Id.* at 187.

⁹¹ *Id.* at 290–91.

of the kind retained in the California Constitution,⁹² and substituting in its place a provision regarding establishment of an “efficient system,” which was ostensibly understood as signaling state support for only a basic education. Thus, in the Delaware Convention of 1896–1897, William Spruance argued:

I do not like this language “shall encourage by all suitable means, the promotion of intellectual, scientific and agricultural improvement”. I do not know of any particular encouragement that I care about, except the establishment of schools. . . .

. . . .

. . . [D]o we really want to do anything more than to say that “the Legislature shall provide for the establishment and maintenance of an efficient system of free schools”? What shall be taught in them I would have nothing to do with; I would leave that to the Legislature. Surely we do not want to make them technical schools, either for the teaching of agriculture or for the teaching of any branch of science.⁹³

These concerns, which ultimately prevailed in this convention, were echoed by his colleague William Saulsbury, who found the proposed language “very objectionable. . . . [and] imagine[d] all the instructions that any Member of this Convention would wish to give to the Legislature would be to establish some efficient free school system in this State.”⁹⁴

At other times, delegates who sought to limit the level of state-supported schooling achieved their goal by *retaining* specific mention of “common” schools. Thus, when an amendment was proposed in the Illinois Convention of 1869–1870 to eliminate any mention of “common” schooling,⁹⁵ William Underwood explained his objections, which ultimately proved compelling to the assembled delegates:

I hope the amendment will not be adopted. There are three different kinds of education, for only one of which the State provides; for the other two parties are supposed to pay. “Common school education” is well understood all over the country. The first part of the second line indicates that it shall be a thorough and efficient system of common school

⁹² CAL. CONST. art. IX, § 1.

⁹³ 2 DELAWARE CONVENTION OF 1896–1897, *supra* note 32, at 1212–13.

⁹⁴ *Id.* at 1214.

⁹⁵ See 2 ILLINOIS CONVENTION OF 1869–1870, *supra* note 32, at 1733.

education, and it is provided that that education shall be common, and free to all persons.

The common school system of late years has improved and is improving, but it is not contemplated that an academic education shall be taught in the common schools, or a collegiate education. Those higher branches are only studied by a few, by the ambitious, and the sons of the wealthy, but the common school is designed for the many, and affords a knowledge of those indispensable branches to all ranks of society. The academic course is calculated to prepare one for some particular pursuit in life, and so with the collegiate course. Only the common school we propose to make free by general taxation.⁹⁶

Along these lines, delegates to the Georgia Convention of 1877 went even further in cementing their opposition to supporting anything other than an elementary education when Augustus Reese moved, successfully, to amend the education clause so that it read in part that “[t]here shall be a thorough system of common schools *for the education of children in the elementary branches of an English education only . . .*”⁹⁷ He was

utterly opposed, on any view of the subject, to taxing our people to educate the children of the state in any other than common schools, and in the elementary branches of an English education. When we have done that, we have done all that is required of us, and that is needed to make them good citizens. It goes to the extent of fitting them to transact the ordinary business of life, and I repeat that when we have done that, we have done all that government ought to do.⁹⁸

C. Ensuring That Schools Are Free of Charge

An additional purpose of many state education clauses is to ensure that schools are “free” for attending students—at least up to a certain level. During the nineteenth century, the establishment of free schools was still a disputed question in many states, and the battle was frequently joined as to whether to include mention of the word “free” in the education clauses. By the twentieth century, provision for free schools at the primary and secondary level was a

⁹⁶ *Id.*

⁹⁷ GA. CONST. of 1877, art. VIII, § 1 (emphasis added).

⁹⁸ GEORGIA CONVENTION OF 1877, *supra* note 32, at 324.

settled question. Convention debates now focused on narrower questions such as whether schools could charge fees for activities or textbooks, as well as whether colleges should be tuition-free.

1. Nineteenth-century Debates

Nineteenth-century convention delegates perceived a difference between merely establishing a public school system and operating a system of “free” schools, with some delegates supporting the former while opposing the latter. Thus, in the Louisiana Convention of 1845, G. Mayo “moved that the word ‘free’ be struck out . . . so that the section would read, ‘the legislature shall establish public schools.’”⁹⁹ In the Iowa Convention of 1857, Albert Marvin objected to an amendment stating that “tuition shall be without charge”¹⁰⁰ at the common schools, not because of any opposition to the principle, but out of a reluctance to constitutionalize the matter and thereby constrain elected officials. He argued:

We should not, in my opinion, be bound by a constitutional provision to make our common schools free to all, but should let the several districts regulate this matter for themselves. If we do that, I will warrant you that poor children will never be turned out of our common schools.¹⁰¹

At times, such as in the Iowa Convention of 1857, these objections proved persuasive, and no provision was made for “free” schools in the education clause.¹⁰² But in most cases, these objections were eventually overcome by delegates who contended, like A. M. Dunn in the Louisiana Convention of 1845, that “the word ‘free’ was the best word in the whole provision.”¹⁰³ His colleague, Judah Benjamin, argued:

It is idle to speak of schools, where people [p]ay [sic]. Who wants them? There are an abundance of such schools, and those who can afford to pay are never at a loss. But we want public schools, for those who cannot afford to pay The only safety for our liberties, I repeat, is public education.¹⁰⁴

Throughout these nineteenth century debates, however, delegates made clear that the specific requirement of “free” schools was not,

⁹⁹ LOUISIANA CONVENTION OF 1845, *supra* note 32, at 906.

¹⁰⁰ 2 IOWA CONVENTION OF 1857, *supra* note 32, at 968.

¹⁰¹ *Id.* at 969.

¹⁰² See IOWA CONST. art. IX.

¹⁰³ LOUISIANA CONVENTION OF 1845, *supra* note 32, at 906.

¹⁰⁴ *Id.*

by itself, intended to impose additional duties on the legislature regarding the manner of operating schools. A. H. Hanscom argued in the Michigan Convention of 1850 that “I am in favor of obliging the Legislature to provide for a system of free schools, and leaving to them the details. If we fix a system in the constitution, it may inflict a serious injury—it may not work well.”¹⁰⁵ The purpose of the “free” school requirement, as his colleague Jacob Van Valkenburgh explained, was “[t]o render education accessible to all the children of the land.”¹⁰⁶ He continued:

I am not wedded to any particular system; a system that will carry out the views of my constituents, and embrace the objects proposed, will receive my support. But let us not submit a subject of this importance to any future Legislature; they may, perhaps, understand it better than we do, but it is our duty so to fix it, that this right shall never be delayed or wrested from the people. Multitudes are prevented by poverty and the force of circumstances from paying for a school education; and it is the object of the article to open the schools to all. I am willing to let the Legislature manage the details, but am unwilling that it shall be left optional with them to provide free schools or not, as they may choose.¹⁰⁷

2. Twentieth-century Debates

By the twentieth century, debates over the inclusion and meaning of the word “free” in education clauses were generally of a different character. For example, in the Illinois Convention of 1969–1970, the education committee proposed, and the convention delegates approved, a provision mandating that education is free through secondary schools and empowering the legislature to go further if it desired.¹⁰⁸ On behalf of the committee, William Fogal explained:

Our present constitution does not provide for free education beyond the common schools. The committee feels that the General Assembly should have the authority to provide for free education beyond the secondary level. We may see a time in the not too distant future where two years

¹⁰⁵ MICHIGAN CONVENTION OF 1850, *supra* note 32, at 265.

¹⁰⁶ *Id.* at 266.

¹⁰⁷ *Id.*

¹⁰⁸ The Illinois Constitution states that “[t]here may be such other free education as the General Assembly provides by law.” ILL. CONST. art. X, § 1.

of college may be compulsory. If this be so, we feel that the flexibility in this section should provide for that. However, we do not propose making all education free at this time.¹⁰⁹

Meanwhile, delegates to the North Dakota Convention of 1971–1972 debated whether the existing requirement of “free” public education would preclude schools from charging fees for workbooks, typewriters, driver’s education courses, and the like; and if not, the delegates debated whether an amendment was in order to prevent the charging of any such fees.¹¹⁰ After much debate, the convention opted against making any changes, in part because of the strength of arguments such as delegate Bea Peterson’s that “we have been saying time and time again in this Convention that we do not have to spell out everything; we could leave it to the Legislature. Well, now this is one we can put right in the lap of the Legislature.”¹¹¹

D. Compelling Districts to Operate Schools and for a Certain Length of Time

In drafting education clauses, convention delegates were concerned not only with specifying the level of public schooling to be supported and the absence of tuition at these schools, but also with ensuring that all districts operated schools for a certain length of time each year. This final set of issues was often contentious and led to extended debate, whether in the context of proposals to include in the education clause specific minimum requirements for local districts, or in the context of general requirements of uniformity that were understood as bringing about specific standards of this sort.

1. Mandatory Provisions Regarding the Operation of Schools

At times delegates sought to craft provisions in education clauses with an eye toward requiring all localities to operate schools of some sort. Thus, in the early nineteenth century, before a state system was in effect in many states, efforts were occasionally made to compel all local governments to undertake the task of providing schooling. For instance, the Maine Convention of 1819–1820 adopted a provision, which remains in effect today, declaring in

¹⁰⁹ 2 ILLINOIS CONVENTION OF 1969–1970, *supra* note 32, at 765.

¹¹⁰ *See* 2 NORTH DAKOTA CONVENTION OF 1971–1972, *supra* note 32, at 1239.

¹¹¹ *Id.* at 1243.

part, that “the Legislature are authorized, and it shall be their duty to require, the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools.”¹¹² Judah Dana explained that “[i]f we engraft this article into the constitution, we shall commence this work at the foundation. The duty will be imperative on towns to maintain *free schools*, at their own expense.”¹¹³

Provisions of this sort were also adopted in several states in the late twentieth century after some districts reacted to the Supreme Court’s desegregation decisions by closing their schools in the late 1950s and early 1960s. In fact, the Prince Edward County, Virginia schools remained closed for five years during this period. The intent of some delegates in seeking revision of state education clauses in the aftermath of these events was to prevent future school closings of this kind. Therefore, the Virginia Constitution of 1971 stipulated that “[t]he General Assembly shall provide for a system of free public elementary and secondary schools for all children of school age throughout the Commonwealth, and shall seek to ensure that an educational program of high quality is established and continually maintained.”¹¹⁴

For the most part, convention delegates were content to assume that all districts would operate schools; the key question, particularly throughout much of the nineteenth century, was whether to require districts to meet certain minimum requirements in the operation of their schools, particularly regarding the length of school sessions.

2. Specific Requirements of Session Length

One approach taken by many delegates regarding minimum standards of session length was to specify in the education clause a certain number of months that a district would have to operate schools each year in order to claim a portion of the school fund. Three months was a common requirement, but delegates often sought to increase the requirement to four or six months on the grounds that an effective system required at least this much instruction in each district. Thus, Lewis Todhunter argued in the

¹¹² ME. CONST. art. VIII, pt. 1, § 1.

¹¹³ MAINE CONVENTION OF 1819–1820, *supra* note 32, at 281.

¹¹⁴ VA. CONST. art. VIII, § 1. On the motivation for the revision of this clause, see JOHN DINAN, *THE VIRGINIA STATE CONSTITUTION: A REFERENCE GUIDE* 168–69 (G. Alan Tarr ed., 2006).

Iowa Convention of 1857 that

If there is any one change which our present school system needs, it is to provide the means to secure a school in each district for a greater length of time in each year. That is the great lack in our present school system; the only serious lack that can be complained of, is the want of schools in the several districts. Means should be supplied by this board, or by the legislature, to keep a school in each district, constantly, if possible.¹¹⁵

He preferred to increase the current three month requirement to six months, as did his colleague, Hiram Gibson, who maintained that any district in this State that will fail or neglect to keep a school for six months in the year does not deserve to have the benefit of any of the school fund. That is the reason why this provision is made here, as an inducement to the districts to keep their schools for at least six months in the year. We think it is due to the youth of our land to insure a school for at least that time.¹¹⁶

Meanwhile, Albert Hawley, in the Nevada Convention of 1864, also argued in favor of an education clause stating, in part, that “[t]he legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school-district at least six months in every year,” and that “any school-district neglecting to establish and maintain such a school . . . may be deprived of its proportion . . . of the public-school fund during such neglect.”¹¹⁷ He thought that this would

create a stimulus which would incite the different school districts to maintain their schools for longer periods than they otherwise would. But let the several districts have it in their power to put their hands upon the public funds, whenever a school has been taught in them for one, two, or three months, when they have taken up some strolling applicant for the position of teacher, and placed him in charge, to neglect his duties, as I know to have been sometimes the case in my own county, and it will bring forth no good results.¹¹⁸

Few delegates denied that a longer school year was generally

¹¹⁵ 2 IOWA CONVENTION OF 1857, *supra* note 32, at 816.

¹¹⁶ *Id.* at 817.

¹¹⁷ NEV. CONST. art. XI, § 2.

¹¹⁸ NEVADA CONVENTION OF 1864, *supra* note 32, at 577.

preferable to a shorter one from an educational vantage point, but a number of delegates were concerned that imposing specific requirements on local districts would be inadvisable—these concerns at times proved persuasive. Thus, George Willard, in the Michigan Convention of 1867, thought that “there were some portions of the State, where it would be a hardship to require the districts to have schools for more than four months in the year.”¹¹⁹ Moreover, such a requirement, as his colleague DeWitt Chapin argued, would particularly “operate to the disadvantage of the schools in the newer portions of the State.”¹²⁰ Still other delegates objected, in theory, to centralizing such a decision at the state level and thereby reducing the discretion of the localities. For instance, Amos Harris, in the Iowa Convention of 1857, thought that “government should leave all these things, such as the number of months a school shall be kept . . . as far as possible to the districts concerned. They are little republics themselves, and have a right to control these matters.”¹²¹ Meanwhile, Ezra Hayhurst, in the Pennsylvania Convention of 1837–1838, objected to any minimum requirement, even three months, because it might sap public support for schooling. He argued:

The legislature would be able to judge better of this than we could, but the school directors in the different districts would be still better judges. Education must be made popular with the guardians as well as the children. It would be repudiated altogether unless it was made agreeable. . . . If we make the clause obligatory, so as to compel the legislature to form establishments farther than circumstances would justify, the system would be made obnoxious to public censure.¹²²

Ultimately, no such requirement was included in the education clause that emerged from that convention.¹²³

3. Uniformity Requirements

Another approach occasionally taken by delegates who supported minimum standards regarding session length was to push for inclusion of a general statement to this effect, without delving into

¹¹⁹ 2 MICHIGAN CONVENTION OF 1867, *supra* note 32, at 300.

¹²⁰ *Id.* at 301.

¹²¹ 2 IOWA CONVENTION OF 1857, *supra* note 32, at 817.

¹²² 5 PENNSYLVANIA CONVENTION OF 1837–1838, *supra* note 32, at 220.

¹²³ *See* PA. CONST. of 1838, art. VII.

details. Thus, in the Kentucky Convention of 1890–1891, J. G. Forrester spoke in favor of an ultimately unsuccessful¹²⁴ amendment to the education clause providing that “school sessions shall be equal and uniform throughout the Commonwealth,” because he was “in favor of having a system of common schools in which every child in this Commonwealth, between the age of six and twenty years, shall be entitled to the same number of months’ instruction in each school-year.”¹²⁵ Meanwhile, in a speech in the New York Convention of 1894, that comes the closest of any in the extant nineteenth-century debates to lending support to the recent phenomenon of judicial superintendence of legislative judgments regarding education policy, Henry Hill took note of a provision in the proposed education clause requiring the establishment of schools “wherein all the children of this State may be educated.”¹²⁶ In the view of Mr. Hill, this clause “makes it imperative on the State to provide adequate free common schools for the education of all the children of the State, if the children or their parents or guardians desire to avail themselves of such schools.”¹²⁷ As he explained:

[T]he reason of this first section is, that there are places in the State of New York where the common schools are not adequate and not numerous enough to provide education for all the children who desire to avail themselves of them. This provision, if it be adopted, will remove that objection, and it follows as matter of course that if the schools be provided they will be open during reasonable seasons.¹²⁸

Hill continued by stating that “[h]itherto our organic law has contained no such provision, and our common school system rests simply on statutory law, easily abrogated by any capricious Legislature.”¹²⁹

In crafting education clause provisions, some delegates occasionally sought to go beyond this limited concept of uniformity (requiring districts to operate schools and for a minimum period of time each year) by mandating uniformity in other areas. However, these more expansive understandings of uniformity were repeatedly rejected. For example, in the Pennsylvania Convention of 1872–1873, Samuel Minor proposed inserting the word “uniform” in the

¹²⁴ See 3 KENTUCKY CONVENTION OF 1890–1891, *supra* note 32, at 4550.

¹²⁵ *Id.* at 4536.

¹²⁶ N.Y. CONST. of 1894, art. IX, § 1.

¹²⁷ 3 NEW YORK CONVENTION OF 1894, *supra* note 32, at 695.

¹²⁸ *Id.*

¹²⁹ *Id.*

education clause so that the constitution would require “support of a uniform, thorough and efficient system.”¹³⁰ He made clear that his expectations were quite different from delegates in other conventions who merely sought uniform standards for the length of school sessions each year. As Minor explained:

Are we prepared to say that one county, one city, or one town, shall have one system, and another shall have another, and so on, all over the State? If we are prepared for that, then we are prepared to vote for this section as it stands, otherwise not. A “thorough and efficient system,” I repeat, is entirely unlimited.¹³¹

He therefore wanted to add the

word “uniform,” so that the system shall be the same all over the State, so far as it is carried out. Every citizen, no matter where he lives, shall be under the same system as to education in the public schools, as every other citizen, no matter where he lives.¹³²

However, Mr. Minor’s amendment was widely panned and quickly defeated by the Pennsylvania Convention of 1872–1873.¹³³ Augustus Landis, for instance, objected that

The word uniform was considered in the committee, and the majority of its members thought the introduction of the word, if not fraught with some danger, would, at least be attended with considerable inconvenience. The word “system,” of itself, suggests sufficient symmetry, and a sufficient measure of uniformity, without annexing to it so rigid a word as “uniform,” because if the Legislature provides for the State a thorough and efficient system of education they will certainly have accomplished all that a constitutional requirement should ask of them. Now, sir, when we affix to that the word “uniform,” you require the Legislature to so legislate that they shall create a system which shall be unbending in all its features; and . . . no matter, in short, what may be the different local requirements throughout the State, by the use of the word

¹³⁰ 2 PENNSYLVANIA CONVENTION OF 1872–1873, *supra* note 32, at 422 (internal quotation marks omitted).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *See id.* at 426.

“uniform” you compel the enactment of an iron law.¹³⁴ As his colleague M. Hall Stanton made clear, these concerns about the harmful consequences of a uniformity provision were not merely theoretical:

If, then, the word “uniform” is inserted, one of two results must follow—every school district in the State must have its system of primary, intermediate, grammar and high schools by mandate of law, whether such system can be established and rendered operative or not, or, on the other hand, those districts like Philadelphia, in which this system already obtains, must abolish so much of it as will reduce the system and the grades of the various schools and departments as will make them come within the provision of the article and place them upon a “uniform” although a lower basis.¹³⁵

A similar proposal in the Nebraska Convention of 1871 that required district schools to “be as nearly uniform as practicable”¹³⁶ enjoyed some initial success but was also ultimately not included in the education clause that appeared in the Nebraska Constitution of 1875.¹³⁷ Opponents of a uniformity clause, such as D. J. McCann, noted that “in our large towns it has been found necessary to make the schools differ very materially from those in more sparsely settled districts.”¹³⁸ On the other hand, supporters such as Experience Estabrook, intended

that the schools shall be uniform as to the books, the form adopted for teaching, etc., as nearly as possible throughout the State. If you had a school of low grade at one point of the country, it provides that you could not establish schools of a high grade in another part of the country.¹³⁹

E. Clarifying the Relationship Between the State and the Local Districts

A final goal of several delegates in crafting language in state education clauses was to clarify the relationship between the state and the local school districts. This was not as prominent a concern as other goals such as establishing schools, specifying the level that

¹³⁴ *Id.* at 423.

¹³⁵ *Id.* at 425.

¹³⁶ 1 NEBRASKA CONVENTION OF 1871, *supra* note 32, at 290.

¹³⁷ See NEB. CONST. of 1875, art. VIII, § 6.

¹³⁸ 1 NEBRASKA CONVENTION OF 1871, *supra* note 32, at 290.

¹³⁹ *Id.* at 291.

would be supported by the state, making them free of charge, and ensuring their operation for a certain number of months each year. But in a few states, most importantly Hawaii, delegates tried to insert language in the state education *clause*—as opposed to other sections of the education *article* that generally dealt with this subject—for the purpose of specifying some aspect of the state-local relationship.

1. State Control of Local Schools

Hawaii is an exceptional case, in that its education clause requires that “[t]he State shall provide for the establishment, support and control of a statewide system of public schools.”¹⁴⁰ Moreover, as Richard Ando explained in the Hawaii Convention of 1968, this requirement of state “control” of a “statewide” system is far from mere boilerplate language insofar as “Hawaii is unique in having a statewide school system” that is a “single unified system” whereby the “State assume[s] the obligation[] to provide equal educational opportunities for our children regardless of whether they live in the rich or poor areas of our State.”¹⁴¹ In fact, as his colleague James Yamamoto explained:

In Hawaii there are no independent local districts or local school boards or independent district superintendents. All other states have highly decentralized public school systems with considerable degree of authority delegated to the local school board. Mr. Chairman, here in Hawaii, because we have a statewide system of public schools operating under the board of education much of the far-reaching policy-making decisions affecting education are conducted in Honolulu¹⁴²

2. State Supervision of Local Schools

Regarding other states where efforts were made to amend education clauses to specify the nature of the state-local relationship, the New York Convention of 1915 debated an amendment that would have provided that “[t]he state shall continue its supervision and control of the education of children as a

¹⁴⁰ HAW. CONST. art. X, § 1.

¹⁴¹ 2 HAWAII CONVENTION OF 1968, *supra* note 32, at 430.

¹⁴² *Id.* at 450.

State function, and no powers in derogation thereof shall be conferred upon the local authorities of any civil division thereof.”¹⁴³ As Andrew Shipman explained, the purpose of this ultimately unsuccessful proposal was “to render more definite and certain facts which had been somewhat in dispute before, to draw the boundary line between contentious parties” rather than “to introduce any innovation.”¹⁴⁴ He noted:

The question primarily arose because certain communities in this State had taken the position that the control and direction of the schools within their jurisdiction was primarily a political power which rested in those communities. They absolutely defied the State powers in many cases to carry on the work of education. These questions even under the present Constitution were brought into court and were definitely and completely settled in favor of the State. But although those particular questions were settled there remained a large range of matters which are brought forward as not being embraced within the purview of those decisions. It was in order to settle this point that this amendment was placed among those submitted to this Convention.¹⁴⁵

Still another (also unsuccessful) effort to amend a state education clause to clarify the state-local relationship was made in the Massachusetts Convention of 1917–1919 and would have added a provision stipulating:

[T]he Legislature shall have power to make such provision by taxation or otherwise as will, in conjunction with the local agencies and institutions above enumerated, insure a complete and efficient system of education which will afford to every one opportunity for full mental, physical, and moral development, and will aid and encourage all to become unselfish and loyal citizens.¹⁴⁶

The particular concern among Massachusetts convention delegates was with the growing disparities among rich and poor districts. Samuel Powers explained as follows:

[T]he time has come when Massachusetts as a

¹⁴³ 1 NEW YORK CONVENTION OF 1915, *supra* note 32, at 928 (internal quotation marks omitted).

¹⁴⁴ *Id.* at 973.

¹⁴⁵ *Id.*

¹⁴⁶ 1 MASSACHUSETTS CONVENTION OF 1917–1919, *supra* note 32, at 231–32.

Commonwealth is called upon to aid these struggling communities in the education of the youth, and I am quite sure, Mr. President, that every one will agree with me there is no reason why the children of one town or one city should not have the same facilities for common school and public education as the children of any other city or town. That is to be the policy of the Commonwealth of Massachusetts if those most interested in education are permitted to carry it out.

This resolution, as I understand it, Mr. President, gives to the Legislature authority to promote public education, to give aid if it chooses to do so to different localities¹⁴⁷

However, as Mr. Powers' comments make clear, it is noteworthy that this (failed) proposal was not intended as a mandate or a constraint on the legislature, but rather was seen as a means of *empowering* the legislature, if it so desired, to take actions whose constitutionality was disputed. Arthur Wellman explained:

It is a fact known to every educator that there are many localities in this Commonwealth where the people are poor and where the educational system is not what it ought to be, and it has been proposed by the Board of Education to help that situation and they have been met in the Legislature by the suggestion, — there is a difference of opinion among lawyers about it, but they have been met by the suggestion, — that it would be unconstitutional to enact a mill tax, that it would be unconstitutional to consider that there is a system of education in the sense in which it is now used; and they desire this amendment in order that they may help the poorer localities to a good education.¹⁴⁸

Therefore, as Mr. Wellman made clear, “this language will do away with certain doubts which now exist as to such power.”¹⁴⁹

IV. JUDICIALLY ENFORCEABLE PROVISIONS

On a few occasions, state convention delegates did seek to craft language in education clauses in order to constrain legislatures regarding school financing and permit judicial superintendence of legislative judgments in this area. It is important to close by

¹⁴⁷ *Id.* at 283.

¹⁴⁸ *Id.* at 316.

¹⁴⁹ *Id.* at 346.

examining the evidence from state convention debates that could in any way lend support to recent state court rulings relying on state education clauses to overturn legislative policy judgments regarding the equity, adequacy, or uniformity of school financing.

By way of previewing this analysis, it is worth noting how rarely one encounters evidence of this kind in the extant convention debates regarding education. It is not that state convention delegates shied away, in general, from proclaiming their intent to create judicially enforceable provisions, given that such comments can be found in regard to constitutional provisions in areas other than education. For example, in the Illinois Convention of 1969–1970, in the midst of a debate about a constitutional provision committing the legislature to the maintenance of a “healthful environment,” Thomas McCracken was quite frank about his expectation that this environmental clause would be judicially enforceable. As he explained:

This language, if adopted as part of our constitution, would give an individual the right to challenge the legislature’s definition of the word “healthful,” very definitely.

A person could go into court . . . and if his complaint stated that the statute was inconsistent with the common understanding of the word “healthful” as used in the constitution, then the court would have the power to declare that particular legislation unconstitutional . . .¹⁵⁰

The evidence supporting an expectation of judicial enforcement of education clauses is, however, scant and consists solely of a provision approved by the Montana Convention of 1971–1972, as well as unsuccessful efforts to enact such provisions in the Texas Convention of 1974, New Hampshire Convention of 1974, and New York Convention of 1967.

Before turning to these twentieth-century expressions of support for open-ended phrasing in education clauses permitting judicial supervision of legislative judgments regarding school financing, it is worth noting the main instance in the nineteenth century where specific language was included for the purpose of requiring a minimum level of legislative support for schools. In an unusual move, the Pennsylvania Convention of 1872–1873 stipulated, in a portion of the education clause of the 1874 constitution, that “[t]he general assembly . . . shall appropriate at least one million dollars

¹⁵⁰ 4 ILLINOIS CONVENTION OF 1969–1970, *supra* note 32, at 3003.

each year” in support of the school system.¹⁵¹ Some delegates objected to adopting any such constraint on the legislature, on the grounds, as George Woodward argued, that “if we can commit anything with safety to the Legislature, we can commit this question of annual appropriation” and that this “is a matter which rests exclusively with the Legislature.”¹⁵² So unusual was a constitutional requirement of a minimum educational expenditure that Mr. Woodward viewed the language as

not in the nature of a constitutional provision at all. It is a gross assumption of the power that belongs to the Legislature, and I feel so entirely willing to entrust this matter to the new Legislature . . . that I sincerely hope the provision will be stricken out.¹⁵³

Despite these protestations, this provision was included in the Pennsylvania Constitution of 1874 on the strength of arguments such as that from Manly Beebe, who responded that although previous legislatures in Pennsylvania had established a system of public schools, “so far as its maintenance at the public expense equally by public appropriations is concerned, it has been a farce.”¹⁵⁴ He continued:

The appropriations made by the Legislature heretofore in many instances have never exceeded from seven to ten or eleven dollars to a sub-school district

. . . The failure of the Legislature to make such appropriations as would equalize the burthens of supporting the system is therefore, I take it, a reason why this proposition is inserted.¹⁵⁵

A. Montana Convention of 1971–1972

As for post-nineteenth-century consideration of open-ended education clause provisions inviting judicial supervision of the kind seen in recent court rulings, the Montana Convention of 1971–1972 provides the one clear instance where delegates drafted language for the purpose of permitting judicial supervision of legislative judgments regarding school financing. Yet, even here, delegates

¹⁵¹ PA. CONST. of 1874, art. X, § 1. This language has not survived in the current constitution. See PA. CONST. art. III, § 14.

¹⁵² 7 PENNSYLVANIA CONVENTION OF 1872–1873, *supra* note 32, at 678.

¹⁵³ *Id.* at 678–79.

¹⁵⁴ *Id.* at 679.

¹⁵⁵ *Id.*

rejected the most aggressive proposals, leaving but a single provision expected to give rise to judicial enforcement.

The initial proposal of the education committee was to provide a two-pronged education clause. Subsection one would have stated that “[i]t shall be the goal of the people of Montana to provide for the establishment of a system of education which will develop the full educational potential of each person. Equality of educational opportunity shall be guaranteed to each person of the state.”¹⁵⁶ Subsection two would have declared:

The legislature shall provide for a system of high quality free public elementary and secondary schools. . . . It shall be the duty of the legislature to provide by taxation or other means and to distribute in an equitable manner funds sufficient to insure full funding of the public elementary and secondary school system.¹⁵⁷

Critics immediately raised doubts about the wisdom of several of these provisions, arguing that they would inevitably give rise to judicial decisions overturning legislative policy judgments regarding school financing. The critics cited speeches of education committee members as supporting evidence. Russell McDonough, for instance, objected to three provisions, including the “high quality,” distribute in an “equitable manner,” and “full funding” passages.¹⁵⁸ He argued that each could empower courts to overturn legislative judgments in dangerous ways:

I object to a number of words in this paragraph. I object to the words high quality. I object to the words equitable manner. I object to the words full funding. To get back to a basic point I've made before, this is a mandate to the legislature. We're no longer on goals. We're no longer on preamble. We're on a mandate to the legislature to a certain thing When you use these type of adjectives, in an equitable manner, you're actually -- you may be leaving it to the supreme court to decide what is high quality. What is distribution in an equitable manner? What is full funding of the educational program? Now, that should be left to the legislature and the legislature only and nobody else. They're the representatives of the people up here to decide fiscal matters, not the Supreme Court of Montana and not anybody

¹⁵⁶ 8 MONTANA CONVENTION OF 1971–1972, *supra* note 32, at 5955.

¹⁵⁷ *Id.* at 5990.

¹⁵⁸ *Id.* at 5998.

else. It's the legislature that has this power and the legislature should have it.¹⁵⁹

Although supporters of the original committee proposals might have taken the opportunity to refute McDonough's concerns about the intent of these clauses, their comments demonstrated that they largely agreed with McDonough's *expectation* that judicial supervision would follow from passage of these clauses and disagreed only about the *wisdom* of enabling such judicial supervision. Thus, in regard to the "high quality" language, Gene Harbaugh, a leading supporter of the provisions, argued:

This subsection is the mandate for implementing the establishment of our educational system within the state. . . . This section states that the legislature shall provide for a system of high quality free public elementary and secondary schools. What do we mean by the words high quality? They have been used as an instruction here to the legislature to provide not just a minimum education system, a substandard system, but one that meets a contemporary need and is capable of producing well informed citizens.¹⁶⁰

And in regard to the "distribute in an equitable manner" language, Mr. Harbaugh explained:

The last sentence of subsection two is directed toward the financing of the school system. Now, a great deal has been said about the Cerrano-Priest [sic] case and other decisions across the land affecting the financing of the public school system. In analyzing our Montana finance structure, the committee found that there is great disparity [sic] between the level of school financing among the various districts of the state. . . . It's our feeling that the state should make every effort to insure that insofar as it is possible, equality of financial expenditures for school children of our state is implemented. Now, in the last sentence of subsection two, we simply provide the means whereby this may be done. The legislature is to provide by taxation or other means, and to distribute in an equitable manner funds for the funding of our school system.¹⁶¹

Finally, regarding the "full funding" language, Mr. Harbaugh defended the provision by arguing:

¹⁵⁹ *Id.* at 5998–99.

¹⁶⁰ *Id.* at 5990–91.

¹⁶¹ *Id.* at 5992–93.

If we look at history, I wonder how Mr. McDonough can say that he has confidence in the work of the legislature in the past, when we think in terms of what has happened to the funding of education and, in particular, in the funding of the school foundation program by the legislature over the past years. I don't share that confidence. Education has taken a back seat long enough in this state. Always when we come down to the end of the session, education takes what's left over after all of the other programs have been funded. I think by putting in the constitution a mandate which says that we will establish a basic program and that the state will fund that program, is very essential.¹⁶²

In the end, Montana convention delegates were apparently persuaded to some degree by arguments from critics such as Mr. McDonough insofar as they eliminated any reference to "high quality" and "full funding" in the final version of the education clause.¹⁶³ However, in one important respect, the committee's original proposal prevailed. Despite Mr. McDonough's fear that the "distribute in an equitable manner" requirement would amount to "mandating Cerrano vs. Priest [sic] into the constitution of the state of Montana"¹⁶⁴—an interpretation that supporters did not disavow—this language was approved by the convention and remains in the Montana Constitution to this day.¹⁶⁵ The final, and current, provision in the Montana education clause reads as follows:

(1) It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state.

....

(3) The legislature shall provide a basic system of free quality public elementary and secondary schools. . . . It shall fund and distribute in an equitable manner to the school districts the state's share of the cost of the basic elementary and secondary school system.¹⁶⁶

¹⁶² *Id.* at 6000–01.

¹⁶³ *See* MONT. CONST. art X, § 1(3).

¹⁶⁴ 8 MONTANA CONVENTION OF 1971–1972, *supra* note 32, at 6016.

¹⁶⁵ MONT. CONST. art X, § 1(3).

¹⁶⁶ *Id.* § 1(1), (3).

B. Texas Convention of 1974

The Texas Convention of 1974 also considered and approved the insertion in the education clause of “equity” language, viewed by supporters and critics alike as empowering courts to review legislative judgments. However, the entire constitutional revision was rejected by voters and the language never took effect.

Jack Hightower, on behalf of the education committee, explained the logic of the two proposed changes regarding equity. One new provision would have stated that “[i]t shall be the duty of the legislature to provide for a system of public schools that will give to each individual equal educational opportunity.”¹⁶⁷ A second section would have stipulated, in part, that “[i]n distributing state support of the free public schools, the legislature shall insure that the quality of education made available not be based on wealth other than the wealth of the state as a whole.”¹⁶⁸ Mr. Hightower made it clear that the purpose of these proposals was to respond to the plaintiffs’ arguments in the recently decided *Rodriguez* case regarding inter-district disparities in per-pupil spending. Although the Supreme Court had not sided with the plaintiffs’ federal equal protection claims in its 5–4 *Rodriguez* decision,¹⁶⁹ Mr. Hightower noted that justices in the majority had nevertheless expressed concern about existing inter-district disparities. As he noted, “Justice Powell, I believe, said that the states ought to seek uniformity.”¹⁷⁰ Therefore, he thought it was the duty of Texas convention delegates to amend the education clause to address these concerns and bring an end to such disparities. Mr. Hightower explained:

I’m not wanting to put anything into this constitution that will result in a lot of lawsuits. We want to avoid that. We want to state it in the simplest terms. But what we want to state is--the principle enunciated in the *Rodriguez* case--that we do not depend for that formula for the support of education on the wealth of an individual district, but on the wealth of the state as a whole.¹⁷¹

Delegates who opposed inserting these “equity” provisions in the

¹⁶⁷ 1 TEXAS CONVENTION OF 1974, *supra* note 32, at 137.

¹⁶⁸ *Id.*

¹⁶⁹ *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54–55 (1973).

¹⁷⁰ 1 TEXAS CONVENTION OF 1974, *supra* note 32, at 138.

¹⁷¹ *Id.* at 137.

education clause maintained, despite Mr. Hightower's assurances to the contrary, that lawsuits would be the inevitable consequence of adding such language. Ray Barnhart, for instance, argued:

I want the legislature here to resolve the problems of education without interference by the courts. I repeat, I think Section 1, as presently written by the Education Committee and submitted to you, will invite disaster to this state. If adopted, it will ruin our chances to adequately resolve the problems of funding for public education here in the legislature. It will instead turn this problem over to the courts for their own interpretation.¹⁷²

In particular, Mr. Barnhart feared that

the addition of the phrase "equal educational opportunity" and the ambiguity of the clause "with regard to state support" in the second paragraph, represents an open invitation to litigation which will significantly affect and limit all possible solutions here in the legislature to resolve a multitude of financial problems and other problems in education in this state.¹⁷³

Opponents were partly successful in securing revisions to this proposed language during the convention itself. In particular, they were able to make minor changes in the first clause and dispense with much of the second clause.¹⁷⁴ However, their overall goal of blocking these new "equity" provisions was achieved when the entire constitutional revision was rejected at the polls.¹⁷⁵

C. *New Hampshire Convention of 1974*

The New Hampshire Convention of 1974 featured a similar effort to insert in the education clause "equity" language that critics, and some supporters, believed would permit judicial supervision of school financing. In this case, however, the proposal was not approved by the convention.

Supporters of the proposal offered mixed assessments of the

¹⁷² *Id.* at 152.

¹⁷³ *Id.* at 153.

¹⁷⁴ *See id.* at 150–206; 2 TEXAS CONVENTION OF 1974, *supra* note 32, at 2197–212.

¹⁷⁵ The Texas Convention of 1974 was unusual in that it was comprised of legislators who convened as a constitutional convention but were ultimately unable to reach agreement on constitutional revision during the convention session. JANICE C. MAY, THE TEXAS STATE CONSTITUTION: A REFERENCE GUIDE 26 (G. Alan Tarr ed., 1996). The legislature, however, revived and made some modifications to the work of the convention and submitted the product to the voters, who defeated it soundly in 1975. *Id.* at 27.

intent of the proposed new language, which would have read: “Whereas, each child in New Hampshire has a fundamental right to an education, the state shall assist the public schools to provide equal educational opportunity according to the needs of the individual.”¹⁷⁶ For instance, one supporter, Ms. Ruth Griffin, speaking on behalf of the education committee, argued that the clause was largely hortatory: “I feel that this resolution is a statement of principle and how situations of education are resolved would have to come later through legislation.”¹⁷⁷

However, other supporters anticipated that this section would be more consequential in that it would give rise to judicial interpretation. Thus, Mr. Arthur Nighswander cited the *Serrano* and *Rodriguez* cases, which had “dramatically demonstrated the great disparity that exists between school districts” and “the failure of the states to even attempt to correct the situation.”¹⁷⁸ He noted that the cases had also demonstrated, particularly in the *Serrano* ruling, that constitutional clauses such as “equal opportunity, quality of education — these are not terms that are bandied around. They have been interpreted by the courts and they really mean something.”¹⁷⁹ Nighswander continued by noting that “[n]owhere is the disparity more evident than it is in New Hampshire,” which ranked “absolutely dead last” in the state percentage contribution to education costs.¹⁸⁰ Arguing that “the result is that the quality of education becomes dependent almost entirely on the wealth based upon the value of real property in the school district,” he noted that “[t]he opportunity for an adequate education will vary depending upon the happenstance of where a child happens to be born.”¹⁸¹ Therefore, Nighswander thought that

the people in . . . New Hampshire should have the opportunity, at this time, to pass upon this resolution and determine whether or not they have a right in the local communities to have a minimum of education for their children and that the State should live up to its responsibility to help them do that.¹⁸²

If supporters were divided about whether this language would

¹⁷⁶ NEW HAMPSHIRE CONVENTION OF 1974, *supra* note 32, at 240.

¹⁷⁷ *Id.* at 241.

¹⁷⁸ *Id.* at 253.

¹⁷⁹ *Id.* at 254.

¹⁸⁰ *Id.* at 253.

¹⁸¹ *Id.* at 254.

¹⁸² *Id.* at 255–56.

give rise to judicial enforcement, critics were convinced that judicial intervention would ensue and thus they sought to block the language to prevent such an outcome. Mr. George Gordon pleaded with the delegates to

defeat this resolution. “Shall assist” — it is plain when you say “shall assist” that definitely you are going to assist. “Needs of the individual” — who cites the needs of the individual? Is it the local community? Is it the State? I feel certain that, if this was sent to the Supreme Court for a decision, the Supreme Court certainly would decide that the State would be the dominating factor in this instance. I can’t see how they would decide any way else. . . . I would like to say I think this is another can opener which is used on many occasions to open up this devilish can of broad based taxes and I hope you will help to put the cover back on the can once and for all.¹⁸³

In this case, a clear majority of New Hampshire convention delegates were unwilling to take a chance that this language would give rise to judicial intervention of the sort feared by critics such as Mr. Gordon, and favored by supporters such as Mr. Nighswander, as the entire clause was rejected by the convention.¹⁸⁴

D. New York Convention of 1967

Finally, the New York Convention of 1967 not only proposed a new “equity” provision similar to those considered by other conventions—“[e]quality of educational opportunity shall be guaranteed to all the people of the state and programs as may be necessary to develop the educational potential of each person shall be provided by statute”¹⁸⁵—but delegates also debated an “adequacy” provision that would have revised an existing section to stipulate that “[t]he Legislature shall *annually make adequate provision* for the maintenance and support of a system of free public elementary and secondary schools wherein all the people of the State may be educated.”¹⁸⁶

The key aspect of this second proposal, as its mover Don

¹⁸³ *Id.* at 253.

¹⁸⁴ *See id.* at 258.

¹⁸⁵ 3 NEW YORK CONVENTION OF 1967, *supra* note 1, at 413 (internal quotation marks omitted).

¹⁸⁶ 4 NEW YORK CONVENTION OF 1967, *supra* note 1, at 393 (emphasis added) (internal quotation marks omitted).

Mankiewicz explained, was that it would “strike the word ‘provide’ and substitute therefor [sic] the words ‘annually make adequate provision.’”¹⁸⁷ He stated that “[t]he fact of the matter is that these few words may be of extreme importance.”¹⁸⁸ In particular, Mankiewicz wanted

to be able to say that we have written into the Constitution this principle—that education is not merely a first charge on the State but a charge of particular and peculiar importance—of such importance that we have said of it not merely that the Legislature shall provide but that the Legislature shall annually make adequate provision.¹⁸⁹

Additionally, Mankiewicz declared: “Now, what do we intend by that and what is the meaning of it? The plain meaning of it is, of course, that the Legislature must annually review the state of education in the State and make what it considers adequate provision therefore [sic].”¹⁹⁰ Finally, in what could be deemed the single most inaccurate prediction in the entire corpus of state convention debates regarding education, Mr. Mankiewicz argued that such a clause *would* invite judicial supervision of legislative judgments regarding school-finance, but would assuredly *not* give rise to judicial second-guessing of the *adequacy* of school spending. Rather, the key provision, in his view, was the requirement that the legislature consider the question of school funding on an *annual* basis. As he made clear: “No court—believe me, and any judge will confirm this and any legislator, too—is ever going to review a legislative determination of what is adequate, but they are prepared, I would think, to insist that ‘annual’ means what it says.”¹⁹¹

Although the wisdom of this amendment was questioned by several delegates, the motion received substantial support from other delegates and was approved by the convention.¹⁹² Critics, such as Gordon Howe, were concerned that the proposed language was “more restrictive than the present language of ‘provide.’ ‘Provide’ means that they do come up with adequate appropriations to carry on the educational system, and I think this is restrictive

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 394.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *See id.* at 396.

and I think it should be defeated.”¹⁹³ Ultimately, these concerns were insufficient to overcome the arguments of more numerous supporters such as Edwin Fehrenbach, who noted:

While it is obvious to all of us that the legislature does consider each and every year its responsibility in the financing of public education, we find that particularly in suburban areas, people interested in improving schools were concerned that the legislature only determined it is [sic] even-numbered years; and you will recall, Mr. President, that that is a fact.

Going back a decade or so, I cannot recall ever having had a substantial increase in aid to education in odd-numbered years. By submitting this verbiage in the Constitution, it will be a clear mandate to subsequent legislative bodies that they must review each and every year¹⁹⁴

Despite the convention’s approval of this revision of the education clause, the new provision never took effect. As was the case with several other constitutional revision efforts in the late 1960s and 1970s, the entire package of constitutional changes agreed upon by the New York Convention of 1967 was defeated at the polls.¹⁹⁵

V. CONCLUSION

State courts have been quite active in recent decades in interpreting “equity,” “adequacy,” and “uniformity” language in state education clauses. These rulings have frequently overturned legislative judgments regarding school financing and have had significant consequences in state politics. My purpose has been to analyze the 114 extant state convention debates surrounding the drafting and revision of these education clauses with an eye toward determining whether these clauses were intended to create judicially enforceable rights or whether they were intended to serve other purposes. The clear lesson to emerge from this study is that the extant state convention debates provide scant support for the notion that these clauses were drafted to create judicially enforceable provisions to be used in overturning legislative judgments regarding school financing. Rather, these clauses were,

¹⁹³ *Id.* at 395.

¹⁹⁴ *Id.* at 394.

¹⁹⁵ On the work of the New York Convention of 1967 and its rejection by voters that year, see PETER J. GALIE, *THE NEW YORK STATE CONSTITUTION: A REFERENCE GUIDE* 28–29 (G. Alan Tarr ed., 1991).

in many cases, intended to be hortatory, and were in other cases intended to oblige legislators to perform specific tasks with legislators retaining discretion over the manner in which these tasks were performed. The only statements to the contrary come from proposals advanced in several late twentieth-century conventions with an eye toward empowering courts to review legislative judgments regarding school financing. However, these proposals were invariably rejected, save for in the Montana Convention of 1971–1972 when one of three such proposals survived.¹⁹⁶

It should be emphasized that this conclusion—that the extant state convention debates do not lend support to the view that state education clauses were intended to empower courts to overturn legislative judgments regarding school financing—does not offer the final word on the legitimacy of recent state court rulings regarding the equity, adequacy, and uniformity of particular state finance mechanisms. Two points are worthy of particular emphasis.

First, it bears repeating that this conclusion is based on a review of the 114 state convention debates for which records have been retained, and does not examine the 119 unrecorded convention debates or the changes in state education clauses achieved in piecemeal fashion through legislative amendments, the initiative process, or revision commissions. Further research in the unrecorded debates is, by definition, not a viable option. However, there is more to be done in tracing changes that were proposed, and at times achieved, through legislative amendments, the initiative process, and revision commissions—several of which could well have been motivated in part by a desire to empower courts to superintend legislative judgments regarding school financing.¹⁹⁷

Thus, this study does not examine amendments to the Florida education clause proposed by the 1998 Florida Constitution Revision Commission and approved by voters later that year.¹⁹⁸

¹⁹⁶ See *supra* notes 163–66 and accompanying text.

¹⁹⁷ Various scholars have examined changes made to state education clauses through these other mechanisms. For instance, a detailed study of the changes proposed by the New Jersey Constitutional Commission of 1873 and adopted in 1875 is Harriet Lipman Sepinwall, *The History of the 1875 “Thorough and Efficient” Amendment to the New Jersey Constitution in the Context of Nineteenth Century Social Thought on Education: The Civil War to the Centennial* (May 1986) (unpublished Ph.D. dissertation, Rutgers University) (on file with New Jersey State Library, Department of Education).

¹⁹⁸ This Florida amendment is discussed in Jon Mills & Timothy McLendon, *Setting a New Standard for Public Education: Revision 6 Increases the Duty of the State to Make “Adequate Provision” for Florida Schools*, 52 FLA. L. REV. 329 (2000). Mills and McLendon note that

The changes achieved through the Florida commission added the following language to the education clause:

The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education¹⁹⁹

This study also does not account for a 2000 amendment to the Oregon Constitution that was initiated and approved by voters requiring that “[t]he Legislative Assembly shall appropriate in each biennium a sum of money sufficient to ensure that the state’s system of public education meets quality goals established by law.”²⁰⁰ Also of note is a 2006 “education first” amendment to the Nevada Constitution that was initiated and approved by voters and stipulates:

[B]efore any other appropriation is enacted to fund a portion of the state budget for the next ensuing biennium, the Legislature shall enact one or more appropriations to provide the money the Legislature deems to be sufficient, when combined with the local money reasonably available for this purpose, to fund the operation of the public schools in the State²⁰¹

Nor does this study take account of a proposed, but failed, change in an education clause that was believed, at least by critics, to be

“both proponents and opponents argued that the change will provide a standard for litigation.” *Id.* at 331.

¹⁹⁹ FLA. CONST. art. IX, § 1(a).

²⁰⁰ OR. CONST. art. VIII, § 8(1). In the case of this amendment, the supporting and opposing ballot materials contain no explicit mention of an expectation that the measure would empower the judiciary to overturn legislative judgments regarding school financing. See ORE. SEC’Y OF STATE, OFFICIAL 2000 GENERAL ELECTION ONLINE VOTER’S GUIDE, <http://www.sos.state.or.us/elections/nov72000/guide/mea/m1/m1.htm> (last visited Apr. 14, 2007).

²⁰¹ NEV. CONST. art. 11, § 6(2). There is no indication that this amendment was intended to encourage judicial supervision of legislative judgments regarding school financing. In fact, supporters were in a fundamental sense reacting *against* a Nevada Supreme Court decision holding that the state education article took precedence over a constitutional two-thirds supermajority requirement for tax increases. See *Guinn v. Legislature of Nev.*, 71 P.3d 1269, 1276 (Nev. 2003), *overruled by* *Nevadans for Nev. v. Beers*, 142 P.3d 339, 348 (Nev. 2006). Supporters of the amendment were thus seeking to ensure that the legislature would retain control over school financing decisions. See, e.g., Ed Vogel, *Question 1: Education First*, LAS VEGAS REV.-J., Oct. 19, 2006, at 43DD.

intended to empower courts. Specifically, a failed 1996 initiative proposal would have amended the Nebraska education clause by granting each individual a constitutional right to a “quality education” and stating that provision of a “thorough and efficient education” was a “paramount duty” of the state.²⁰²

Second, it is again important to emphasize that this study is concerned solely with determining the intent of the framers of state education clauses; scholars and jurists not inclined to view the original intentions governing the drafting of constitutional clauses as determinative will likely look to other evidence and take account of other considerations in rendering a judgment on the merits of the recent judicial rulings. However, for scholars who consider the intent of the drafters of constitutional clauses to be relevant, at least in some way, to an understanding of their meaning, there is much to learn from an analysis of the extant state convention debates regarding state education clauses.

²⁰² NEB. COUNCIL OF SCH. ADM’RS, THE COMPLETE HISTORY OF THE NEBRASKA TAX EQUITY AND EDUCATIONAL OPPORTUNITIES SUPPORT ACT (TEEOSA), <http://schoolfinance.ncsa.org/policy/fullhistory/1995-1996/e4.htm> (last visited Apr. 14, 2007) (internal quotation marks omitted). Critics were clear about their expectation that the failed Nebraska measure would empower courts to overturn legislative judgments regarding school financing, as illustrated by the comments of one opponent, Phil Young, who argued: “When you put it in the Constitution, the Legislature is not going to define what that is . . . [t]he court is going to define it.” *Id.* (internal quotation marks omitted).