

“OF GREATER VALUE THAN THE GOLD OF OUR MOUNTAINS”: THE RIGHT TO EDUCATION IN COLORADO’S NINETEENTH-CENTURY CONSTITUTION

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As the contemporary battle for educational opportunity has moved to state courts, the education clauses of a state’s constitution have played prominent roles in the litigation. Of particular concern has been the role that history should play in interpreting the scope and meaning of various provisions of a clause. This Article advances this debate by examining the development of article IX (the education clause) in Colorado’s 1876 “Centennial” Constitution. The Article first details the efforts to provide free public education in the United States in the decades leading to the drafting of the Colorado state constitution in 1876. Colorado, as part of a nationwide movement to ensure public education as a state constitutional right, reflected a much larger conversation over the scope and meaning of education to citizenship and civic engagement, economic opportunity, public versus private right, and, in some cases, civil rights. The Article accordingly turns to how these issues emerged quite pointedly in Colorado: from the discovery of gold on the banks of the Platte River and the opening of the first schoolhouse in 1859, to its formation as a territory and the subsequent passage of a comprehensive School Law in 1861, to internal and external debates over the education clause

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that eventually came to be drafted and adopted by the Framers to the state's constitution. While Colorado's pioneers struggled to reconcile competing visions over the precise role that a statewide system of education should play, they nevertheless were in agreement that it be "thorough and uniform" for all of the state's students now and into the future. As the final part of the Article documents, however, it was readily apparent that systemic and structural inequities were already dividing the state's emerging school districts in the immediate years after statehood. Part of a much larger nineteenth-century commitment to public education, Colorado's early legal experiences reflected the hopes, aspirations, and maddening limits of a substantive and meaningful constitutional right to education that would be available for all of its habitants.

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INTRODUCTION

On February 28, 1861, the United States Congress created the territory of Colorado.¹ As one of the last states to be organized into a territory prior to the Civil War,² Colorado's petition for statehood nearly fifteen years later would play an instrumental role in bringing the Civil War and its Reconstruction era of hostilities to a psychological end.³ Given that Colorado's existence was a function of the sectional crisis that included such issues as slavery, the territorial ambitions of the federal government, and natural resource extraction to fuel an industrial United States, it is perhaps surprising that the future course and direction of public education would be among those issues dividing the nation.

For many, however, public education captured perfectly all that was at stake in the Civil War between North and South. Indeed, in explaining the importance of the Act to Establish the Common School System passed by the first territorial Legislative Assembly of Colorado in 1861,⁴ the territory's

1. Act of Feb. 28, 1861, ch. 59, 12 Stat. 172.

2. Congress created the Nevada Territory and the Dakota Territory days later on March 2, 1861. See Act of Mar. 2, 1861, ch. 83, 12 Stat. 209 (creating Nevada); Act of Mar. 2, 1861, ch. 86, 12 Stat. 239 (creating Dakota).

3. Recognizing that the 1876 national presidential election between Rutherford B. Hayes and Samuel Tilden would be close, national Republican leaders pushed through a proposal for Colorado statehood in 1875. See generally Tom I. Romero, II, *Wringing Rights out of the Mountains: Colorado's Centennial Constitution and the Ambivalent Promise of Human Rights and Social Equality*, 69 ALB. L. REV. 569 (2006). See also ROBERT G. ATHEARN, THE COLORADANS 102 (1976); Colin B. Goodykoontz, *Some Controversial Questions Before the Colorado Constitutional Convention of 1876*, COLO. MAG., Jan. 1940, at 1, 2, 4 (discussing the role of party politics at the Colorado Constitutional Convention of 1876); Donald Wayne Hensel, *A History of the Colorado Constitution in the Nineteenth Century* 82–83 (1957) (unpublished Ph.D. thesis, University of Colorado) (describing the circumstances under which congressional Republicans passed the bill granting Colorado statehood). Critically, without Colorado's three electoral votes, Republican Rutherford B. Hayes may not have become President of the United States. ATHEARN, *supra*, at 102; see also KEITH IAN POLAKOFF, THE POLITICS OF INERTIA: THE ELECTION OF 1876 AND THE END OF RECONSTRUCTION 149–50 (1973) (providing background on Colorado's support for Hayes). As Professors Dale Oesterle and Richard Collins point out, “the 1874 election of a Democratic delegate from the Colorado Territory to Congress, Thomas Patterson, jeopardized Republican sponsorship. Colorado Republicans convinced congressional Republicans that Patterson’s election was a unique protest vote against the corrupt governor, Edward M. McCook, a Republican appointed by [President Ulysses S.] Grant.” DALE A. OESTERLE & RICHARD B. COLLINS, THE COLORADO STATE CONSTITUTION: A REFERENCE GUIDE 22 n.24 (2002).

4. GENERAL LAWS, JOINT RESOLUTIONS, MEMORIALS, AND PRIVATE ACTS, PASSED AT THE FIRST SESSION OF THE LEGISLATIVE ASSEMBLY OF THE TERRITORY

Superintendent of the Common Schools, William J. Curtice, expounded upon a “lesson” taught by “good and wise” statesmen in “a majority of States loyal to the Government and constitution of the country”:

When the heads and hearts of men are generally cultivated and improved, virtue and wisdom must reign, and vice and ignorance cease to prevail This lesson . . . having been carried into practice in the establishment of schools for the education of the children of the mass of the people in a majority of our States, has produced results in the extension of prosperity, intelligence, and happiness⁵

In contrast, Curtice painted a very different picture for “a minority of the States” that, “while educating the few, have neglected the many; while alive to the pecuniary and political advantages of the few, have been dead to the interests of the common schools and the instruction thereby of the children of the masses.”⁶

To be sure, Curtice’s thinly veiled assault on the lack of public education in the Confederacy carried some risk. Colorado’s first territorial governor, William Gilpin, appointed Curtice to serve as the first superintendent of the common schools and territorial librarian.⁷ Governor Gilpin, who was appointed by President Abraham Lincoln, was asked to govern a “territory in which a third of the population openly supported the Confederacy and three-fifths of the voters were Democrats.”⁸ To further complicate matters was the fact that

OF COLORADO 154 (Denver, Rocky Mountain News Publ’g Co. 1861) [hereinafter FIRST LEGISLATIVE ASSEMBLY OF COLORADO TERRITORY].

5. HORACE MORRISON HALE, STATE TEACHERS’ ASS’N, EDUCATION IN COLORADO: A BRIEF HISTORY OF THE EARLY EDUCATIONAL INTERESTS OF COLORADO 14–15 (Denver, News Prtg. Co. 1885) (quoting W.J. Curtice).

6. *Id.* at 15 (quoting W.J. Curtice).

7. Harry M. Barrett, *Education in Colorado, in COLORADO: SHORT STUDIES OF ITS PAST AND PRESENT*, 122, 126 (Junius Henderson ed., 1971). Colorado’s first territorial legislature required that the territorial superintendent of common schools “shall be, and is hereby declared, *ex officio* Librarian for the Territory of Colorado.” FIRST LEGISLATIVE ASSEMBLY OF COLORADO TERRITORY, *supra* note 4, at 110. The territorial librarian had a scholarly function and was charged with “custody of all books, maps, papers, charts, engravings, [and] paintings . . . and shall also keep a regular file of all newspapers published in the Territory.” *Id.* at 111.

8. ATHEARN, *supra* note 3, at 66. Lincoln’s selection of Gilpin as Governor of Colorado Territory seemed to be an obvious choice. A longtime explorer and subsequent developer of what became the American West, Gilpin had traveled with legendary explorer John Fremont in 1843 and on the return east traveled

the territory had so few children. Whereas a settlement of Catholic Spanish-speaking families had found a foothold in the area's southern mountain valleys nearly ten years earlier, the gold rush of 1859 suddenly brought a lot of fortune-seeking men, few women, and even fewer children to settle in the high plains of Eastern Colorado and emerging industrial sectors in the mountains.⁹

Nevertheless, Curtice's introduction is a bold statement about the role that public education would play in the development of Colorado, first as a territory and later as a state. Despite the political divisions and social differences that already racked the fledgling territory and the fact that there were so few children in Colorado's resource-rich lands, Curtice was laying out a vision of something upon which all could agree. According to Curtice, "developing an educational system among us, *for the future*, [is] of greater value than the gold of our mountains, and a better safeguard to society than the elective franchise or standing armies."¹⁰

As a result, he commended the territory's First Legislative Assembly for prioritizing the establishment of a statewide system of public schools among its many tasks of establishing law and infrastructure for the new government. It "now remains for the people and their duly chosen school officers, to imitate the commendable zeal of the Legislative Assembly in behalf of education, by carrying into effect the school law and inaugurating a public school system in every county of the Territory."¹¹ In spite of the fact that the new territory was being torn asunder by the Civil War, Curtice and his fellow Coloradans found common ground in principles that identified a statewide system of public schools as one of the essential building blocks to the territory's growth.¹²

through the mountain valleys and plains of what became Colorado. He was especially taken with the San Luis Valley and wrote a series of articles on the entire region just after the discoveries of gold on the Front Range that was published in 1860 as *The Central Gold Region*. See WILLIAM GILPIN, THE CENTRAL GOLD REGION: THE GRAIN, PASTORAL, AND GOLD REGIONS OF NORTH AMERICA (Phila., Sower, Barnes & Co. 1860).

9. The migrants to Colorado were mostly Protestant and hailed from states such as Illinois, Pennsylvania, and Missouri and the countries of Canada, Ireland, and Germany. See ATHEARN, *supra* note 3, at 17, 104; OESTERLE & COLLINS, *supra* note 3, at 1 & n.5.

10. HALE, *supra* note 5, at 13 (emphasis added) (quoting W.J. Curtice).

11. *Id.* (quoting W.J. Curtice).

12. See generally *infra* Part II.

Not surprisingly, Coloradans enshrined such sentiment in article IX of the state constitution, which eligible voters overwhelmingly ratified on July 1, 1876.¹³ Known as the education clause in the Colorado Constitution, article IX, as originally ratified, contained sixteen sections that mandated that the General Assembly “provide for the establishment and maintenance of a thorough and uniform system of free public schools”¹⁴ through such measures as the creation of both statewide¹⁵ and local boards of education;¹⁶ the creation and maintenance of a school fund¹⁷ solely for public, non-sectarian schools;¹⁸ and the establishment of a state university.¹⁹ Congress’s grant of authority to Coloradans to write a state constitution and petition for statehood recognized the basic expectation that the state would establish a system of common or public schools.²⁰ However, Colorado’s pioneers had long

13. OESTERLE & COLLINS, *supra* note 3, at 1.

14. COLO. CONST. art. IX, § 2 (“The General Assembly shall, as soon as practicable, provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the State, wherein all residents of the State between the ages of six and twenty-one years may be educated gratuitously.”).

15. *Id.* § 1 (“The general supervision of the public schools of the State shall be vested in a Board of Education, whose powers and duties shall be prescribed by law; the Superintendent of Public Instruction, the Secretary of State and Attorney General, shall constitute the Board, of which the Superintendent of Public Instruction shall be President.”).

16. *Id.* § 15 (“The General Assembly shall, by law, provide for organization of school districts of convenient size, in each of which shall be established a Board of Education . . .”).

17. *Id.* § 3 (“The public school fund of the State shall forever remain inviolate and intact . . .”); *id.* § 4 (“Each County Treasurer shall collect all school funds belonging to his county, and the several school districts therein . . .”); *id.* § 5 (“The public school fund of the State shall consist of the proceeds of such lands as have heretofore been, or may hereafter be granted to the State by the General Government for educational purposes . . .”); *id.* §§ 9–10 (providing for the creation of a Board of Land Commissioners to govern and, if necessary, alienate the public lands used for either the general fund or educational purposes).

18. *Id.* § 7 (“Neither the General Assembly, nor any county, city, town, township, school district or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever . . .”).

19. *Id.* §§ 12–14 (establishing a Board of Regents to create and govern a state university).

20. In 1875, the U.S. House of Representatives passed the Enabling Act for the State of Colorado and invited the citizens of the territory to write a constitution and form a state government that conformed to certain federal mandates. Enabling Act, *reprinted in* PROCEEDINGS OF THE CONSTITUTIONAL

placed public education as a central principle of good government and economic opportunity since Colorado's inception as a territory in 1861.²¹

This Article accordingly examines the meaning of education among the Framers and their contemporaries in and around the time that Colorado became a state. As I have written elsewhere, Colorado's state constitution reflects not only local but nationally enduring tensions between individual freedom and social equity.²² Perhaps nowhere in the document is this reflected more clearly than in article IX and in two recent concurrent, but unrelated, cases examining its scope, meaning, and applicability to the state's current system of public education. The plaintiffs in the first case, *Lobato v. State*,²³ asked the court to consider whether state standards and mandates are "rationally related" to article IX's requirement that the legislature maintain "a *thorough and uniform* system of public schools throughout the state"²⁴ while at the same time empowering local school boards to control the

CONVENTION HELD IN DENVER, DECEMBER 20, 1875, TO FRAME A CONSTITUTION FOR THE STATE OF COLORADO 9–13 (1907) [hereinafter PROCEEDINGS OF THE COLORADO CONSTITUTIONAL CONVENTION]. In section 7, the Enabling Act granted sections 16 and 36 of every township for the support of common schools. *Id.* at 11. Section 14 required that the land in sections 16 and 36 could not be sold for less than \$2.50 per acre and that the proceeds thereof would constitute a permanent school fund. *Id.* at 13; *see also infra* note 79.

21. *See generally infra* Part II.

22. Romero, *supra* note 3, at 569–70.

23. *Lobato v. State*, No. 05 CV 4794, 2006 WL 4037485 (Colo. Dist. Ct. Mar. 2, 2006), *aff'd*, 216 P.3d 29 (Colo. App. 2008), *rev'd*, 218 P.3d 358 (Colo. 2009). In *Lobato*, school districts and parents of schoolchildren from around the state—in particular the San Luis Valley—brought an action against the State challenging the adequacy of the school finance system under the education clause of the Colorado Constitution. Initially, District Judge Michael A. Martinez dismissed the plaintiffs' claims for lack of standing and also dismissed the complaint for failure to state a claim. *Lobato*, 2006 WL 4037485. In reversing, the Colorado Supreme Court held (1) it was unnecessary to address the school districts' standing because the districts were bringing the same claims as the parents, and the parents had sufficient standing, *Lobato v. State*, 218 P.3d 358, 368; (2) whether the public school financing system is in conflict with Colorado's constitutional mandate for a "thorough and uniform" system of public education was a justiciable issue, *id.* at 374; (3) the constitutionality of the public school financing system would be subject to review under the rational-basis standard, *id.*; and (4) Amendment 23 of the Colorado Constitution, which set forth minimum increases in the state funding of education, did not render the issue of the adequacy of the current school finance system nonjusticiable, *id.* at 376. Justice Rice dissented, arguing that the case presented a nonjusticiable political question that should be resolved by the legislature. *Id.* (Rice, J., dissenting).

24. COLO. CONST. art. IX, § 2 (emphasis added).

content of classroom instruction within their school districts.²⁵ Central to this claim is the power of Colorado courts, unlike many other states who have considered the issue,²⁶ to examine whether the state is adequately meeting its substantive mandates under article IX, sections 2 and 15.²⁷ At the crux of the legal question is whether it is possible “to create a judicial standard or rule that can define, accommodate, and limit the enormity of preparing students for meaningful ‘civic, political, economic, [and] social’ engagement in the world.”²⁸

25. “We hold that the judiciary must similarly evaluate whether the current state’s public school financing system is funded and allocated in a manner rationally related to the constitutional mandate that the General Assembly provide a ‘thorough and uniform’ public school system.” *Lobato*, 218 P.3d at 374. As a matter of full disclosure, I produced much of the research for this Article after the plaintiffs asked me to serve as an expert witness regarding the intent of the delegates to the Colorado Constitutional Convention who drafted article IX, sections 2 and 15.

26. Many other states have examined the justiciability of education adequacy claims, and, in so doing, many have relied on a variety of factors, including but not limited to their own education clauses—as well as state constitutional principles concerning separation of powers and judicial review—to determine whether a system is justiciable. *See, e.g.*, *Lake View Sch. Dist. No. 25 of Phillips Cnty. v. Huckabee*, 91 S.W.3d 472 (Ark. 2002); *Idaho Sch. for Equal Educ. Opportunity, Inc. v. Evans*, 850 P.2d 724 (Idaho 1993); *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178 (Ill. 1996); *Unified Sch. Dist. No. 229 v. State*, 885 P.2d 1170 (Kan. 1994); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989); *McDuffy v. Sec’y of Exec. Office of Educ.*, 615 N.E.2d 516 (Mass. 1993); *Neb. Coal. for Educ. Equity & Adequacy v. Heineman*, 731 N.W.2d 164 (Neb. 2007); *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375 (N.H. 1993); *Abbott v. Burke*, 693 A.2d 417 (N.J. 1997); *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661 (N.Y. 1995); *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997); *DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997); *Abbeville Cnty. Sch. Dist. v. State*, 515 S.E.2d 535 (S.C. 1999); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71 (Wash. 1978); *Pauley v. Kelly*, 255 S.E.2d 859 (W. Va. 1979); *Vincent v. Voight*, 614 N.W.2d 388 (Wis. 2000); *State v. Campbell Cnty. Sch. Dist.*, 32 P.3d 325 (Wyo. 2001).

27. The Colorado Supreme Court made clear that article IX “contains a substantive mandate to the state subject to review by the courts.” *Lobato*, 218 P.3d at 371. Of particular importance for the court was its decision in *Lujan v. Colorado State Board of Education*, 649 P.2d 1005 (Colo. 1982). Though the *Lujan* court rejected the plaintiffs’ claims that absolute equality in per-pupil funding was not required under the equal protection clause of either the Federal or state constitution, it argued nevertheless that article IX, section 2 “is a mandate to the State through the legislature to establish a complete and uniform system of public education for Colorado elementary and secondary school students.” *Id.* at 1027. In a subsequent case, Justice Kourlis cited *Lujan* to note that the “actions of the general assembly must be judged against its charge to provide a free and uniform system of public schools within each school district, and against whatever level of control is needed by the local school district to implement the state’s mandate.” *Owens v. Colo. Cong. of Parents, Teachers & Students*, 92 P.3d 933, 947–48 (Colo. 2004) (Kourlis, J., dissenting).

28. *Lobato*, 218 P.3d at 380 (Rice, J., dissenting). Answering her own question, Justice Rice asserted that “[i]t is impossible.” *Id.*

The *Lobato* case began when Anthony Lobato filed suit against the State of Colorado after he noticed that his daughter was competing in high school state history competitions against other students who had far better economic resources in their classrooms, schools, and school districts.²⁹ Five years later, twenty-one additional families and twenty-one school districts joined Lobato to address whether the State was meeting its obligations under sections 2 and 15 of the education clause.³⁰ According to Jefferson County Public School Superintendent Cindy Stevenson, the district joined the lawsuit because “school funding was at a crisis point” due to recent budget cuts that slashed funds for public education.³¹ When she made her statement, the district had lost approximately \$58 million in funding in the preceding two years.³²

A primary argument of the *Lobato* plaintiffs is that the state’s current school-funding system makes achieving a constitutionally proscribed “thorough and uniform” system of education impossible to achieve.³³ Objectors to the litigation argue that the money to remedy this failure would have to come from somewhere, and the State currently spends \$3 billion annually, or greater than forty percent of its general fund on education.³⁴ Accordingly, they are concerned that a plaintiff’s verdict in the *Lobato* suit could mean a \$2 billion to \$4 billion increase in school funding from the state budget.³⁵ One of the plaintiffs’ attorneys, Kathy Gebhardt, dismissed arguments that the suit would require the State to spend too much of its budget on education. Instead, Gebhardt stated, “[w]e’re asking for a declaration that the system is unconstitutional, and then the legislature has to respond.”³⁶ Compelling is the fact that Colorado, although “one of the nation’s wealthiest states, is among the lowest-spending states”

29. Karen Auge, *Suit Seeks School Funds: A Case Set for Monday in Denver Pivots on Colorado’s Obligations*, DENVER POST, July 31, 2011, at B1.

30. *Id.*

31. *Id.*

32. *Id.*

33. See Tim Hoover, *Hick AG Assail Lawsuit: The School-Funding Suit, They Say, Could Cost the State Billions*, DENVER POST, July 29, 2011, at B1.

34. *Id.*

35. *Id.* Colorado Governor John Hickenlooper and Attorney General John Suthers took a bipartisan stand against the *Lobato* suit, claiming that it could cost the state billions of dollars if it loses in court and stating that education funding should be determined by the legislature and the voters, not the courts. *Id.*

36. *Id.*

in funding for primary and higher education.³⁷ Particularly as the General Assembly continues to slash its general education budget, the outcome of the *Lobato* suit promises to shape how Colorado will meet its constitutional mandate to provide “thorough and uniform” schools while at the same time respecting local control by a school district.³⁸

After a five-week trial in late summer of 2011, the Denver District Court on remand held that (1) the school finance system and the education system are not rationally related to each other; (2) the public education system is significantly underfunded; and (3) local school districts’ authority to “control instruction” is undermined because they are financially unable to provide necessary services, programs, materials, and facilities.³⁹ The State and its Board of Education have appealed this most recent ruling.⁴⁰ A historical inquiry into the development of the education clause in the Colorado Constitution in the nineteenth century, therefore, can help illuminate the contours of the constitutional mandate that the Framers had in mind.

While the Denver District Court was hearing testimony in the *Lobato* case, testimony was being heard in an adjacent courtroom about whether the school board for Douglas County public schools should be permanently enjoined from enacting a

37. MARK FERMANICH, BUECHNER INST. FOR GOVERNANCE, COLORADO’S FISCAL FUTURE: WE’LL GET WHAT WE PAY FOR, at ii (2011), available at <http://www.ucdenver.edu/academics/colleges/SPA/Documents/Fermanichreport2-16-11.pdf>. For a summary of the state’s declining fiscal commitment to public education since the late 1980s and early 1990s, see *id.* at 5–6.

38. The 2011–12 budget proposal by Governor Hickenlooper is illustrative of this point. Governor Hickenlooper proposed to cut the education budget by an additional \$332 million for the 2011–12 fiscal year. Brian Kurz, Op-Ed., *Education Cuts Will Be Devastating*, DENVER POST, Mar. 12, 2011, at B11. This proposal came after the State had already lost \$175 million in education funds by failing to earn federal “Race to the Top” funds. *Id.* A Cherry Creek school teacher, Brian Kurz, sums up the challenge: Including the lost federal money, “Colorado school districts are being asked to function with more than half of a billion dollars less than the amount believed to be available last June. . . . Now, all schools are being asked to do more with much less.” *Id.* These policies are drowning the state’s educators “in a sea of unfunded mandates and budget cuts.” *Id.* Recently, Colorado was finally awarded a multi-million-dollar “Race to the Top” grant. Yesenia Robles, *Colorado Receives \$17.9 Million Race to the Top Education Grant*, DENVER POST (Dec. 23, 2011), http://www.denverpost.com/news/ci_19605742.

39. *Lobato v. State*, No. 2005CV4794, at 178–82 (D. Colo. Dec. 9, 2011) (on file with author).

40. Todd Engdahl, *State Board of Education Appeals Lobato*, EDUC. NEWS COLO. (Dec. 26, 2011), <http://www.ednewscolorado.org/2011/12/26/30409-the-churn-try-one-more-time>.

pilot project voucher program that would allow approximately 500 district students to use public monies to attend private—and, in many cases, religious—schools.⁴¹ The plaintiffs in that case argued that such a program was a direct violation of article IX's commitment to “free public schools,” a provision that directly forbids educational “aid of any church or sectarian society . . . for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever.”⁴² The Douglas County program was to provide up to \$4575 for each of the eligible students (its approximate costs would total up to \$2,287,500) to help cover private-school tuition.⁴³

The local school board, in contrast, attempted not only to defend the private school vouchers as constitutional under article IX but also argued that a prohibition against the use of a voucher at a religiously affiliated school would violate the Colorado Constitution's religious freedom clause.⁴⁴ Importantly, Douglas County's arguments tapped into two concurrent trends in “school-choice” litigation. The first was an inversion of the local control argument. Although the Colorado Supreme Court in 2004 found that a statewide voucher program targeted at low-performing school districts violated the provision of article IX, section 15 for “local control,”⁴⁵ it

41. See *Larue v. Colo. Bd. of Educ.*, Nos. 11cv4424, 11CV4427, ¶¶ 35, 37 (Aug. 12, 2011) (on file with author); Editorial, *The Latest Hurdle for School Choice: We Hope the Recent Ruling Against Douglas County's Voucher Plan Won't Derail the Push for Innovative Education Reforms*, DENVER POST, Aug. 21, 2011, at D3.

42. COLO. CONST. art. IX, § 7; see also Carlos Illescas, *Voucher Students to Stay Put: Private Schools Agree to Keep the Kids in Douglas County's Program During a Court Fight*, DENVER POST, Aug. 18, 2011, at B1.

43. Carlos Illescas, *Douglas County District Asks for Return of Voucher Cash*, DENVER POST, Aug. 20, 2011, at B1. At the time that it approved the program, the Douglas County School Board claimed that the district actually might net approximately \$400,000 as mandatory state-wide test costs and other expenses were deducted from the nearly \$3 million in vouchers. Karen Auge, *Douglas County School Board Unanimously OKs Voucher Plan to Help Pay for Private-School Tuition*, DENVER POST (Mar. 16, 2011), http://www.denverpost.com/news/ci_17623486.

44. COLO. CONST. art. II, § 4 (“The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed; and no person shall be denied any civil or political right, privilege or capacity, on account of his opinions concerning religion . . .”).

45. In 2004, the Colorado General Assembly enacted the Colorado Opportunity Contract Pilot Program, which targeted school districts with at least eight schools rated as low or unsatisfactory under the state's accountability system for the preceding year. Students in such schools would then be given

nevertheless left open the possibility for individual school district choice and experimentation with voucher programs. As one of the few states with a “local control” section in its education clause, Colorado is poised to have a prominent voice in the national debate regarding the extent to which public funds should be used to support private school education.⁴⁶ The second issue is a debate concerning the extent to which article IX, sections 2 and 7 in the Colorado Constitution absolutely bar public monies to religiously affiliated educational institutions. Emboldened by state courts that held that public monies could be used by individual families for religiously affiliated private schools despite the existence of “no-aid provisions” in state constitutions,⁴⁷ voucher advocates have moved to enact such programs at a local level.⁴⁸ And, despite the U.S. Supreme Court finding that a state constitution’s “no-aid provisions” may be more stringent than the federal Establishment Clause that bars governmental aid to nonpublic schools, the Court left open the possibility that a clear and unambiguous history of religious animus in the establishment clause’s drafting and application might compel a different result.⁴⁹ Douglas County’s

vouchers to attend private schools. COLO. REV. STAT. § 22-56-104 (2004). The Colorado Supreme Court held that the pilot voucher program violated article IX, section 15 by removing local school district discretion over spending funds for instruction and taking financial control away from local school boards. *Owens v. Colo. Cong. of Parents, Teachers & Students*, 92 P.3d 933, 944 (Colo. 2004).

46. Allison Fetter-Harrott & Martha McCarthy, *A Perplexing Step Backward for the Establishment Clause and a Winn for School Privatization*, 270 EDUC. L. REP. 1, 16–19 (2011) (detailing the U.S. Supreme Court’s recent decision in *Arizona Christian School Tuition Organization v. Winn* on April 4, 2011, and the potential role of state constitutional education clauses, including Colorado’s, in the financing of private schools); see also Preston C. Green III & Peter L. Moran, *The State Constitutionality of Voucher Programs: Religion Is Not the Sole Determinant*, 2010 BYU EDUC. & L.J. 275, 288–93 (examining in particular litigation surrounding the “local control” provision of Colorado’s education clause).

47. See, e.g., *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999); *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998); see also Frank R. Kemerer, *School Vouchers: Constitutional Questions Remain*, EDUC. COMMISSION STS. (Aug. 2002), <http://www.ecs.org/clearinghouse/38/98/3898.htm>.

48. See, e.g., *Larue v. Colo. Bd. of Educ.*, Nos. 11cv4424, 11CV4427 (Aug. 12, 2011) (on file with author).

49. *Locke v. Davey*, 540 U.S. 712, 722–25 (2004). The *Locke* Court upheld the State of Washington’s decision to bar the use of state-supported scholarships for students to pursue theology degrees, declaring that a state’s more stringent antiestablishment provision did not implicate the Free Exercise Clause’s prohibition on practices impairing religious beliefs without a compelling governmental interest or the Establishment Clause’s prohibition on government action representing hostility toward religion. *Id.* The Court in *Locke* explicitly noted that it did not find anti-Catholic sentiment or other religious hostility in Washington’s “no-support” provision, reasoning that there were

voucher program was intended to “increase choice and competition” for school students,⁵⁰ but, like the *Lobato* case, its total costs in a time of state mandates and devastating budget cuts call into question both the scope and intent of the education clause of the Colorado Constitution.⁵¹ The stakes are even higher if one considers that Colorado, despite its education clause, ranks near or at the bottom among the fifty states in such indicators as per-pupil spending, student-teacher ratio, updated technology, teacher salaries, resources committed by state and local government, and the poverty gap.⁵² Adding insult to injury is that many of Colorado’s

nondiscriminatory reasons for the provision’s inclusion in the state constitution. *Id.* at 728–29. In so doing, the Court left open the possibility that evidence of solely religious animus may be pertinent to a provision’s constitutionality.

50. *The Latest Hurdle for School Choice*, *supra* note 41.

51. As of this writing, the judge in *Larue* has issued a permanent injunction against the school district. *Larue*, *supra* note 48, at 68. Denver District Judge Michael A. Martinez issued a permanent injunction against the Douglas County Choice Scholarship Program because the program would use taxpayer money to pay tuition to private and religious schools in violation of the Colorado Constitution. The court found:

Sixteen of the twenty-three private partner schools approved to participate in the Scholarship Program are sectarian or religious, as those terms are used in Article II, Section 4; Article V, Section 34; and Article IX, Section 7, of the Colorado Constitution. They teach “sectarian tenets or doctrines” as that term is used in Article IX, Section 8 of the Colorado Constitution.

As of the time of the injunction hearing, approximately 93% of the confirmed private school enrollment was attending religious schools.

Id. Judge Martinez wrote, “[t]he prospect of having millions of dollars of public school funding diverted to private schools, many of which are religious and lie outside of the Douglas County School District, creates a sufficient basis to establish standing for taxpayers seeking to ensure lawful spending of these funds.” *Id.* at 21. However, the permanent injunction issued by Judge Martinez has halted the program, and there isn’t much room for optimism. Adding to the confusion, Martinez’s opinion did not offer any guidance as to what becomes of the \$300,000 of preliminary payments that the program had already paid out. Illescas, *supra* note 43. Douglas County School District stated that it expects private schools to repay about \$300,000 in tuition costs that the district had already paid out through its school voucher program. The district had sent out 265 first-quarter payments that totaled about \$300,000 before the program was enjoined by Judge Martinez’s ruling. *Id.*

52. *Statistics*, GREAT EDUC. COLO., <http://www.greateducation.org/statistics-faqs/statistics> (last visited Nov. 13, 2011). Adjusted for regional variations, Colorado ranks fortieth for per-pupil spending and student-teacher ratio, forty-first for updated technology, forty-eighth for resources committed by state and local government, and dead last for both teacher salaries and the gap between school lunch-eligible and non-eligible children (the “poverty gap”). *Id.* Lurking in the background of the funding discussion is the Taxpayers’ Bill of Rights (TABOR), added to the state constitution in 1992 as COLO. CONST. art. X, § 20.

schools are considered some of the most racially unequal in the nation despite various policy and legal attempts to overcome such discrepancies.⁵³

This Article puts these two cases in historical perspective by examining what “thorough and uniform” as well as “public and private” education meant to Colorado’s pioneers. Part I of the Article details the efforts to provide free public education in the United States in the decades leading up to the drafting of the Colorado state constitution in 1876. Colorado, as part of a nationwide movement to ensure public education as a state constitutional right, reflected a much larger conversation over the scope and meaning of education to citizenship and civic engagement, economic opportunity, and, in some cases, civil rights. Part II then turns to how these issues emerged in the early years of Colorado’s political formation. Looking in particular at territorial antecedents to article IX in the Colorado Constitution, the Article assesses how and in what ways access to public education surfaced as a stunted piece of territorial statecraft.

Part III focuses on the Constitutional Convention in 1875 and 1876. While consensus was achieved fairly rapidly on much of article IX, the issue of public funding of religious and sectarian education became one of the most contentious issues of the entire Constitutional Convention. The debate over state support of private schools, moreover, obscured other important developments in the crafting of the education clause, including a commitment to nondiscrimination and an attempt to balance state and local control of the public schools. This Article accordingly details the debate and the Framers’ fairly clear resolution of all of these issues. Finally, Part IV assesses how

The core of this constitutional requirement is that Colorado citizens must ratify any tax rate increase or new tax, as well as requiring state and local governments to spend no more in real dollars than they spent the previous year. *Id.* § 20(7)(b)–(c). As TABOR contributed to a serious decline in education revenues, efforts to stabilize funding for education culminated with the passage of Amendment 23 in 2000, which was designed to gradually restore K-12 funding back to 1988 levels by 2011 and to grow funding by at least the rate of inflation thereafter. COLO. CONST. art. IX, § 17. As one study noted, however, “even with the funding floor provided by Amendment 23, PK-12 funding has remained far behind the rest of the nation.” FERMANICH, *supra* note 37, at 5.

53. See, e.g., CHUNGMEI LEE, DENVER PUBLIC SCHOOLS: RESEGREGATION, LATINO STYLE (2006). For an analysis of attempts to overcome racial inequality in the Denver Public Schools, see Tom I. Romero II, *Our Selma Is Here: The Political and Legal Struggle for Educational Equality in Denver, Colorado, and Multiracial Conundrums in American Jurisprudence*, 3 SEA. J. FOR SOC. JUST. 73, 77–90, 97–120 (2004).

the General Assembly and state educators attempted to implement article IX at the primary educational level. Though article IX was imbued with the “spirit” of providing a “thorough and uniform” education for all of the state’s students then and into the future, it was readily apparent that systemic and structural inequities were already dividing the state’s emerging school districts. The pursuit of public education in Colorado from its earliest inception, therefore, was about law’s ability to bridge these gaps. In this sense, the culmination of all the efforts was the inscription of education as a constitutional right in 1876. This right reflected the primary role that early Coloradans believed the education clause would have in creating the substantive conditions and content, no matter how improbable, “of preparing students for meaningful ‘civic, political, economic, [and] social’ engagement” in a world that was changing rapidly before their eyes.⁵⁴

I. THE NINETEENTH-CENTURY MOVEMENT FOR PUBLIC SCHOOLS

No sooner had gold been discovered on the banks of the Platte River in what would become Denver, Colorado, than local boosters were clamoring for schoolhouses.⁵⁵ By all accounts, the first school was started by O.J. Goldrick, “a dapper little Irishman who drove into town wielding a long bull-whackers’ whip over a team of weary oxen. . . . [H]e was reputed to have exhibited his erudition by roundly cursing the lumbering beasts in Latin.”⁵⁶ With degrees from the University of Dublin and Columbia University, he was “invited” to start a fee-paying school that, by October 1859, included among the students “some fifteen young scholars, two or three of whom were part Indian, three or four more what Goldrick described as ‘Mexican half-breeds,’ and most of the remainder

54. *Lobato v. State*, 218 P.3d 358, 380 (Colo. 2009) (Rice, J., dissenting). I would suggest that, for Colorado’s earliest pioneers who identified a public education system as essential to the state’s present and future growth despite the lack of children and institutions of education, the word “impossible” was antithetical to the limitless possibilities they encountered as they struggled to form, build, and grow the state.

55. ATHEARN, *supra* note 3, at 52 (describing how one of the local newspapers, *The Rocky Mountain News*, complained about the lack of schools and churches in the emerging city).

56. *Id.*

Missourians.”⁵⁷ While Goldrick would later be elected the first superintendent of the Arapahoe County Schools (which then included Denver) in 1862, a handful of other private schools would open in Denver, Boulder, Pueblo, Golden, and Nevada City.⁵⁸ In 1860, the City Council debated a move for “Free Schools” in Denver, but the state would not have its first public school until District Number 2 in Denver was established on December 1, 1862, in response to the Territorial Legislature’s enactment of a comprehensive school law in late 1861.⁵⁹

The fact that Colorado’s pioneers would immediately erect schools, be they public or private, was not unique. Indeed, throughout the United States during the late eighteenth and early nineteenth centuries, education emerged as an explicit constitutional guarantee. This development was a noticeable feature of nineteenth-century state constitutional innovations. Whereas many of the original states, as well as those newly admitted to the Union, scarcely mentioned education in their constitutional documents,⁶⁰ between 1800 and the adoption of the Colorado constitution in 1876, thirty-two out of thirty-seven state constitutions (excluding Colorado) contained detailed provisions for education.⁶¹ This Part examines the rise to prominence of education in state constitutional documents during the nineteenth century. As Section A details, education emerged as an essential issue in responding to important changes in social, political, and economic life for many Americans. State constitutions, and their corresponding

57. *Id.*; see also Barrett, *supra* note 7, at 123 (noting that, on the first day of school, “there were thirteen children, including nine whites, two Mexicans and two half-breeds”). This school and its student population is described by Goldrick himself in O.J. Goldrick, *The First School in Denver*, 6 COLO. MAG. 72 (1929); see also FRANK HALL, HISTORY OF THE STATE OF COLORADO 218 (Chicago, Blakely Prtg. Co. 1889); A.J. Fynn & L.R. Hafen, *Early Education in Colorado*, 12 COLO. MAG. 13 (1935).

58. ATHEARN, *supra* note 3, at 53.

59. Fynn & Hafen, *supra* note 57, at 23; Lynn I. Perrigo, *The First Decade of Public Schools at Central City*, 12 COLO. MAG. 81, 82 (1935). For a discussion of the school law, see *infra* notes 168–82 and accompanying text.

60. Professor John Eastman notes that, of the twenty-five constitutions adopted or revised between 1776 and 1800, only twelve contain education provisions. 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, 3 (1998).

61. See BUREAU OF EDUC., CIRCULARS OF INFORMATION OF THE BUREAU OF EDUCATION: CONSTITUTIONAL PROVISIONS IN REGARD TO EDUCATION IN THE SEVERAL STATES OF THE AMERICAN UNION (D.C., 1875); David Tyack & Thomas James, *State Government and American Public Education: Exploring the “Primeval Forest,”* 26 HIST. EDUC. Q. 39, 56 (1986).

conventions examined in Section B, accordingly reflected this fact, as nineteenth-century Framers in a variety of states struggled to make education a state constitutional guarantee. What a constitutional right to education would mean and to whom it would apply, however, was by no means universal. This Part ends by outlining some of the ways that Framers in representative states differently sought to define both the substantive scope and the precise content of their education clauses.

A. *“Necessary to Good Government and the Happiness of Mankind”*

The prominence of education in state constitutional documents during the nineteenth century was the result of a variety of interconnected developments in the demography, economy, and ideology in the maturing republic. One cause revolved around shifts both in population and economy, leading to greater urbanization, industrialization, and movement of people across what would become the United States.⁶² Education, accordingly, emerged as a site where these demographic transformations and resulting economic, social, and political anxieties were reflected and could be resolved. For some, education was the means to soften tensions generated from urbanization and immigration by integrating these new workers into a wage-labor system.⁶³ For others, education reflected growing concern that the nation needed a more educated and skilled labor force capable of adapting to the technological changes taking place at all levels of the economy.⁶⁴ Collectively, such concerns created tremendous support for formal, age-grade schooling that would, in turn, foster economic productivity and social mobility.⁶⁵ The consequence is striking. As one study notes, “[t]wenty years

62. MARIS A. VINOVSKIS, HISTORY AND EDUCATIONAL POLICYMAKING 149–52 (1999).

63. See generally SAMUEL BOWLES & HERBERT GINTIS, SCHOOLING IN CAPITALIST AMERICA: EDUCATIONAL REFORM AND THE CONTRADICTIONS OF ECONOMIC LIFE (1976); MICHAEL B. KATZ, RECONSTRUCTING AMERICAN EDUCATION (1987).

64. See VINOVSKIS, *supra* note 62, at 160.

65. See *id.* at 170. See generally CARL F. KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780–1860 (1983); IRA KATZNELSON & MARGARET WEIR, SCHOOLING FOR ALL: CLASS, RACE, AND THE DECLINE OF THE DEMOCRATIC IDEAL (1985).

before the Civil War, just under 38 percent of white children aged five–nineteen were attending schools. By 1860, the figure had risen to 59 percent.⁶⁶ Whereas families, particularly mothers, had been primarily responsible for teaching children how to read and write until the late eighteenth century—and whereas apprenticeships had long served to educate students to learn a vocational skill or trade—both private and public schools during the nineteenth century became the primary site to teach children and young adults the skills that they would need for an emerging industrial economy.⁶⁷

Another and equally important feature in the rise of mass public education was the role that schools played in teaching the tools of good government and good citizenship and in perpetuating the prevailing ideology of the Republic. For instance, the terms that Congress created for the sale of the public lands and for the creation of new states, otherwise known as the Northwest Ordinances of 1785 and 1787, stated forcefully that “knowledge” was “necessary to good government and the happiness of mankind.”⁶⁸ For this reason, the ordinance declared that “schools and the means of education shall forever be encouraged.”⁶⁹ It is thus not a surprise that Colorado’s First Territorial Superintendent of Education, William Curtice, identified education as the difference between the wise and good government of the Union and the corrupt and treasonous governments of the Confederate states.⁷⁰ As one study points out, “[s]o settled became this notion of public education as essential to republican government that in the late nineteenth century Congress required several territories to create free, nonsectarian public schools as a precondition for statehood.”⁷¹ Simply put, schools—particularly public schools—would be the place where the principle of democracy (and, to a lesser extent, equality), would be nurtured.

As a matter of legal and political history, the consensus revolving around mass education created an important variance in the ways that Americans structured or reformed

66. BOWLES & GINTIS, *supra* note 63, at 154.

67. VINOVSKIS, *supra* note 62, at 153.

68. The Northwest Territorial Government Ordinance of 1787, § 14, Art. III, in THE ORGANIC LAWS OF THE UNITED STATES OF AMERICA, *reprinted in* 1 United States Code, at LVII (Office of the Law Revision Counsel of the House of Representatives ed., 2006).

69. *Id.*

70. HALE, *supra* note 5, at 14–15.

71. Tyack & James, *supra* note 61, at 59.

their state and local governments during the nineteenth century. Whereas Americans during this time used state constitutions “as a way to correct abuses or to protect against the power of special interests” by providing distinct and innumerable limits on state authority, the right to education was the anomaly.⁷² Colorado’s experience is illustrative. In the convention delegates’ address to the people, the delegates explicitly noted that in direct response to “anxiety and concern,” the Colorado Constitution would place “positive restrictions on the powers of the Legislature.”⁷³ Particularly important, from the delegates’ perspective, were various provisions designed to deny the general assembly the ability to create and sustain “dormant and sham corporations claiming special and exclusive privileges.”⁷⁴ Aside from concern with the public funding of “religious or sectarian dogmas,” however, education did not raise such anxieties.⁷⁵ The delegates’ understanding about the primary function of Colorado’s constitution to limit corporate and private influence but promote public schools, accordingly, reflected a larger national trend where education had become the one area of government in which a “strong and evolving sense of governmental responsibility gradually emerged.”⁷⁶

On one level, the commitment to mass education was made easier by the increase in population concentration and the growth of aggregate wealth caused by industrialization.⁷⁷ On another level, however, state constitutions themselves recognized the direct link between the common schools and the use of governmental authority to redistribute wealth. Although Americans “were often reluctant to tax themselves, . . . almost all welcomed federal subsidies for common schools.”⁷⁸ Excluding all of the original states, almost all of the remaining state educational clauses contained provisions for the sale of certain federal lands that would in turn stimulate the creation

72. *Id.* at 48.

73. PROCEEDINGS OF THE COLORADO CONSTITUTIONAL CONVENTION, *supra* note 20, at 728.

74. *Id.*

75. See *id.* at 727. For a discussion of the delegates’ concern over the place that religion would have in the public education system, see *infra* notes 226–42 and accompanying text.

76. Tyack & James, *supra* note 61, at 53.

77. VINOVSKIS, *supra* note 62, at 153.

78. Tyack & James, *supra* note 61, at 55.

of a general school fund to provide for the common schools.⁷⁹ Equally important was the role that state and local government would play in school financing. By the time Colorado gained statehood in 1876, almost all states, either in their constitutions or in their legislative enactments, had provisions for the creation and state stewardship of a school fund (to be initially financed by federal land grants) while empowering the appropriate state or local government entities to levy taxes for schools.⁸⁰ This was no small feat. According to one contemporary, the varied local, state, and federal funding schemes found in federal acts and codified in state constitutions “recognize[d] the principle . . . that every citizen is entitled to receive educational aid from the government.”⁸¹

It should come as no surprise, then, that one of the most salient features in the rise of the consensus regarding mass education during the nineteenth century was the sharpening line between public and private education. If education was to serve the dual goals of fostering republican ideology and providing broad-based skills for a changing economy, and if this system was to be stimulated by public wealth, it followed that private schools would be legally proscribed from receiving the educational monies of state and local governments. A common feature of education clauses in state constitutions in the middle-to-second half of the nineteenth century was an explicit provision forbidding the public funding of private

79. See *id.* at 55–56. Colorado’s own history provides an example. The Enabling Act for Colorado Statehood granted two sections of every township for the support of the common schools. See PROCEEDINGS OF THE COLORADO CONSTITUTIONAL CONVENTION, *supra* note 20, at 11, 13. There had been some question about the constitutionality of federal support for public education until Congress passed the Morrill Land Grant Act in 1862, in which sections 16 and 36 in each township were automatically granted to the State for support of public education. Act of July 2, 1862, ch. 130, 12 Stat. 503. For a discussion of the constitutional issues, see Eastman, *supra* note 60, at 22. To be sure, Eastman argues that the passage of the Morill Act in 1862 suggested the possibility of an “entrance onto the national stage of the view, periodically expressed in early nineteenth century state constitutional debates, that a free, common-school education is a natural right, perhaps even a ‘privilege or immunity’ of citizenship protected by the Fourteenth Amendment to the Federal Constitution.” *Id.* at 33. A compelling analysis of the role of the federal government in public education remains HAROLD M. HYMAN, AMERICAN SINGULARITY: THE 1787 NORTHWEST ORDINANCE, THE 1862 HOMESTEAD AND MORRILL ACTS, AND THE 1944 G.I. BILL (1986).

80. Tyack & James, *supra* note 61, at 60.

81. 2 SAMUEL ELIOT MORISON & HENRY STEELE COMMAGER, THE GROWTH OF THE AMERICAN REPUBLIC 310 (1937) (quoting agriculturist L.H. Bailey).

(especially sectarian or religious) schools.⁸² The result was a profound drop in the number of children who attended private schools and a concomitant rise in the ratio of public expenditures devoted to public education.⁸³ By the end of the nineteenth century, the United States spent “more per pupil for schooling than other industrialized nations, including England, France, and Germany,” leading, in turn to a greater proportion of its school-aged population attending free public schools.⁸⁴ In an era marked by a sharp skepticism of government, education of the masses by public schools became the largest—and relatively least controversial—part of the public sector.⁸⁵

While there was general consensus about the importance of public education, there were also considerable differences among states about the scope of the educational right.⁸⁶ To some degree, this was a matter of experimentation, and throughout the nineteenth century, a state constitution’s education clause reflected very different concerns about

82. For mid-to-late nineteenth-century non-sectarian education clauses, see ARK. CONST. art. II, § 24 (1874); COLO. CONST. art. V, § 34, art. IX, § 7 (1876); IDAHO CONST. art. IX, § 5 (1890); KAN. CONST. art. VI, § 6(c) (1859); MISS. CONST. art. IV, § 66, art. VIII, § 208 (1890); MONT. CONST. art. IX, § 4, art. X, § 6 (1889); NEB. CONST. art. VII, § 11 (1875); N.D. CONST. art. VIII, § 5 (1889); S.C. CONST. art. XI, § 4 (1868); S.D. CONST. art. VI, § 3 (1889); UTAH CONST. art. I, § 4, art. X, § 9 (1895); WASH. CONST. art. I, § 11 (1889); WIS. CONST. art. I, § 18 (1848); WYO. CONST. art. I, § 19, art. III, § 36, art. VII, § 8 (1890). Recent school voucher litigation has raised the possibility of anti-Catholic bias driving the no-funding provisions of a state constitution’s education clause. See Jill Goldenziel, *Blaine’s Name in Vain? State Constitutions, School Choice, and Charitable Choice*, 83 DENV. U. L. REV. 57, 65–66 (2005). The historical record, however, “reveals little to support” this argument. *Id.* at 68. Rather, the no-funding provisions reflected a larger nineteenth-century American trend to support a rigid church-state distinction in spite of the biases that dominated the era. See PHILLIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 192 (2002); Noah Feldman, *Non-sectarianism Reconsidered*, 18 J.L. & POL. 65, 96 (2002). Of particular note is the failed federal constitutional amendment proposed by Congressman James G. Blaine of Maine that would have prohibited the public funding of religious institutions. While many of Blaine’s supporters harbored anti-Catholic sentiments, the evidence indicates that Blaine was motivated by the much larger church-state question. See generally Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38 (1992); Steven K. Green, *Blaming Blaine: Understanding the Blaine Amendment and the No-Funding Principle*, 2 FIRST AMEND. L. REV. 107 (2004).

83. Tyack & James, *supra* note 61, at 54.

84. *Id.* at 53. See generally Albert Fishlow, *Levels of Nineteenth-Century American Investment in Education*, 26 J. ECON. HIST. 418 (1966).

85. Tyack & James, *supra* note 61, at 53–54.

86. Professors Tyack and James note, “[t]o stress elements of consensus and forces leading toward centralization is not to deny diversity and conflict, for education was a domain in which growing agreement over purpose coexisted with sharp disagreement over means.” *Id.* at 55.

centralization, funding, local control, and the public versus private distinction.⁸⁷ Accordingly, nineteenth-century politicians and educators well understood that the educational laws and constitutional educational guarantees were themselves works in progress. Colorado Territory's own inaugural Superintendent of Common Schools reflected on the legal history of public education in the United States. According to Curtice, in spite of "mature deliberation" and countless amendments "from year to year," public education laws "are still far from perfect. Time and experience . . . will also suggest many improvements, better adapting it to the *peculiar requirements of popular education in our new Territory.*"⁸⁸

Indeed, just a few years earlier, delegates to Illinois's state constitutional convention argued persuasively that the phrase "a common school education" was too specific and might limit the power of future legislatures to pass school laws that were appropriate by the standards of the era.⁸⁹ As the following Section will show, by the middle of the nineteenth century, most politicians and educators seemed to be in agreement that the particular constitutional guarantees of a state's education clause would depend on the time and circumstance of a particular territory's or state's condition, though its precise application by educators, policymakers, and the courts would still be the subject of considerable debate.

B. The Right to Education in State Constitutional Statecraft

There are countless differences in wording between the particular provisions of the education clauses of the nineteenth-century state constitutions. Nevertheless, almost all struggled to implement a statewide system of education in relation to an equally compelling desire to retain flexibility and local control. In the years in and around statehood for Colorado, "[n]early all of the states provided legally for a state superintendent, local school trustees, a public school fund, local

87. Eastman, *supra* note 60, at 8–31; Tyack & James, *supra* note 61, at 55–56.

88. HALE, *supra* note 5, at 13 (emphasis added) (quoting W.J. Curtice).

89. "The standard of 'common school education' is liable to undergo great changes, and its degree and limited character should not be fixed in a Constitution." ELY, BURNHAM & BARTLETT, DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ILLINOIS 1733 (Springfield, E.I. Merritt & Brother 1870) [hereinafter ILLINOIS CONSTITUTIONAL CONVENTION].

(county or township) school taxes, teacher certification, and a defined school age.”⁹⁰ Moreover, as public schooling became more institutionalized throughout the United States, state educational constitutional guarantees became much more substantive than philosophical. According to one study:

Whereas the eight new state constitutions written between 1841–1860 contained an average of 6.3 educational provisions, the seven approved by Congress between 1881–1900 had an average of 14.0. These latter constitutions often contained elaborate blueprints of their *own version* of the one best system, creating bureaucracies even while there were sometimes only a few thousand schoolchildren within state borders.⁹¹

Consequently, this Section will give voice to many of the themes explored in Part I.A of this Article. In so doing, it will highlight the different approaches that nineteenth-century statesmen brought to drafting education clauses that provided for a statewide system of education.⁹²

Useful in this regard are the debates surrounding the education clauses in Illinois’s 1870 and Indiana’s 1851 constitutions. This Section will examine Illinois first, largely due to the fact that Illinois’s constitutional convention was convened only six years before the ratification of Colorado’s constitution and the State was once the home to several members of Colorado’s Constitutional Convention Committee

90. Tyack & James, *supra* note 61, at 60.

91. *Id.* at 59 (emphasis added). For a useful, if largely ahistorical, study of different state education provisions and the constitutional debates surrounding their adoption, see generally John Dinan, *The Meaning of State Education Clauses: Evidence from Constitutional Convention Debates*, 70 ALB. L. REV. 927 (2007).

92. Every state’s constitution includes an education clause, and twenty-five states other than Colorado constitutionally require that their legislatures provide an education that is “uniform,” “thorough,” or both. State constitutions with a “uniform” provision include: ARIZ. CONST. art. XI, § 1; FLA. CONST. art. IX, § 1; IND. CONST. art. VIII, § 1; MINN. CONST. art. XIII, § 1; MISS. CONST. art. VII, § 201; NEV. CONST. art. XI, § 2; N.M. CONST. art. XII, § 1; N.C. CONST. art. IX, § 2; N.D. CONST. art. VIII, § 2; OR. CONST. art. VIII, § 3; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TEX. CONST. art. VII, § 1; WASH. CONST. art. IX, § 2; WIS. CONST. art. X, § 3; WYO. CONST. art. VII, § 1. State constitutions with a “thorough” provision include: GA. CONST. art. VIII, § 1; ILL. CONST. art. X, § 1; MD. CONST. art. VIII, § 1; N.J. CONST. art. VIII, § 4; OHIO CONST. art. VI, § 2; PA. CONST. art. III, § 14; W. VA. CONST. Art. XII, § 1. State constitutions with a “uniform and thorough” provision include: IDAHO CONST. art. IX, § 1; MONT. CONST. art. X, § 1. Colorado was the first state in the Union to include both of the words “uniform” and “thorough” in its constitutional education clause.

on Education, many of whom had been educators in Illinois before moving to Colorado.⁹³ Accordingly, it would not be a stretch to conclude that Illinois's relatively recent experience in the drafting of its education clause shaped how Colorado's constitutional delegates approached the issue.⁹⁴ Also salient is the experience of Illinois's neighboring state, Indiana. In 1851, residents of Indiana chose, in their constitutional document, to provide for a "uniform system of schools."⁹⁵ By 1870, Illinois adopted its third constitution, providing for "a thorough and efficient system of free schools whereby all children . . . may receive a good common school education."⁹⁶ Both the 1870 Illinois and 1851 Indiana conventions, therefore, provide a window into understanding how Framers in each state attempted, in very different ways, to give substantive meaning to the constitutional guarantees of providing a "thorough" and "uniform" system of public education in the years and decades leading to Colorado's statehood.

1. "Thorough and Efficient" in 1870 Illinois

The effort to create a constitutional mandate for public education in Illinois began as early as 1847, when the State adopted a second constitution. Although an education clause was debated during Illinois's constitutional convention, the final document remained "singularly silent on educational provisions."⁹⁷ Nevertheless, education had emerged by 1870 as one of the largest sectors of the Illinois government. To be sure, "the total sums raised for education in 1869 amounted to over \$7 million—more than the entire revenue" collected by the State.⁹⁸ Given the 1870 constitutional convention's size and importance, delegates made the issue of education a consistent part of the debate. Early in the convention, for instance, a delegate suggested that the Committee on Education prepare

93. See *infra* notes 219–21 and accompanying text.

94. To be sure, the first draft of the education clause in the Colorado Constitution provided, like the Illinois Constitution, that the General Assembly provide a "thorough and efficient" system of public education. See *infra* note 221 and accompanying text.

95. IND. CONST. art. VIII, § 1.

96. ILL. CONST. art. VIII, § 1.

97. THE INST. OF EDUC. EQUITY & OPPORTUNITY, EDUCATION IN THE 50 STATES: A DESKBOOK ON THE HISTORY OF THE STATE CONSTITUTIONS AND LAWS ABOUT EDUCATION 72 (2008).

98. JANET CORNELIUS, CONSTITUTION MAKING IN ILLINOIS: 1818–1970, at 72 (1972).

an education clause that provided for “a uniform, thorough and efficient system of free schools throughout the State.”⁹⁹ What “uniform,” “thorough,” or “efficient” would precisely mean, however, was subject to considerable debate.

At issue for many of Illinois’s Framers was the importance of education to the advancement of certain social goals. Delegate John Abbott, for instance, referred a resolution to the committee that contended “that the moral elevation of human society[] depend[s] upon the general dissemination of early education; that as education is early and generally distributed among the masses of the people, the spirit of evil is curbed, and crime proportionally diminished.”¹⁰⁰ Likewise, delegate W.G. Bowman argued that “this Convention ought to provide every rational means to encourage schools, colleges, universities, academies and every institution for propagating knowledge, virtue and religion, among all classes of the people . . . as the only means of preserving our Constitution from its natural enemies.”¹⁰¹ Delegate John Haines, on the other hand, identified an affirmative obligation of the State to provide for the educational right of the individual.¹⁰² According to Haines, the state’s education clause should “affirm[] the naked principle of the right of all citizens or inhabitants of the State of Illinois to partake of and enjoy a civil right—that of deriving from the common school fund a share thereof.”¹⁰³

Importantly, the delegates appeared to recognize the state’s paramount role in distributing the school fund equitably across districts that were not similarly situated. One delegate asserted, “[t]he only principle by which we can justify taxing all the property of the country for educational purposes is, that the benefits of those taxes, like the tax itself, reach and spread out over all ranks and classes of society.”¹⁰⁴ Illustrative of this attitude were the comments from the delegates representing Chicago. Although noting that Cook County paid nearly \$100,000 more in school taxes than it received, one Chicago delegate did not “begrudge the constituents of any gentleman

99. ILLINOIS CONSTITUTIONAL CONVENTION, *supra* note 89, at 176.

100. *Id.* at 965.

101. *Id.* at 211.

102. *Id.* at 281.

103. *Id.* at 321. Haines initially put forth a resolution that proposed that “the Committee on Education be instructed to consider and report a proposition, as an amendment to the Constitution, securing the advantages of the Public School Fund to all inhabitants of the State.” *Id.* at 281.

104. *Id.* at 1733.

from any part of the State, what they draw from that surplus fund of one hundred thousand dollars from Cook county, which we pay for the support of the schools in other portions of the State.”¹⁰⁵ Though the delegates’ proposals and rhetoric varied as to the purpose of the education clause, all the delegates were generally united in their view that the funding of education was to be extensively and uniformly shared.¹⁰⁶

Despite these broad affirmations of support for a general system of public education, it was only during the final debate over the phrasing of “thorough and efficient” that delegates specifically explained their detailed expectations for the future of public education and the nature of the free schools. Delegate William Underwood assessed whether section 1 of article VIII should omit any reference to a common-school education and should only state that “the General Assembly shall provide a thorough and efficient system of free schools.”¹⁰⁷ Delegate Lawrence Church argued that the terminology of “a common school education” was too specific and might limit the power of future legislatures to pass school laws appropriate to the standards of the era.¹⁰⁸ He later went on to say:

[T]he definition of a “common school education” may be very much misunderstood, and reference must be had, sometimes, to some particular law in force at some particular time . . . ; whereas, providing here for a good education, leaves the matter to the improvements and advancements that the age may suggest and require.

I can well remember when a common school education meant, simply, “to read, write and cypher [sic].” I have no doubt that that is so understood by some people to this day, even, notwithstanding all the advancement on the subject of education. I want this provision so broad that whatever

105. *Id.* at 326.

106. A historian would later argue that Illinois constitutional delegates agreed that “the well-being of the children was the concern of the state rather than of the individual counties . . . for they instituted the principle of equalization in state support of common school education.” CORNELIUS, *supra* note 98, at 73 (internal quotation marks omitted). Illinois subsequently determined the rate of the property tax in support of the schools and collected that amount from each county. The revenue was placed in the school fund, and the school fund was then distributed to each county on the basis of school-age children. Hence, counties in Illinois with high property values and few children partially paid for the education of children in counties with lower property values. Illinois’s funding scheme engendered some intrastate strife, particularly on behalf delegates from the northern counties where property values were generally higher. *Id.*

107. ILLINOIS CONSTITUTIONAL CONVENTION, *supra* note 89, at 1733.

108. *Id.*

education the spirit of the age may demand, that all the citizens and people of the State shall receive in common, they may receive under the system of free schools here sought to be perpetuated.¹⁰⁹

Concurring with delegate Church was delegate William Vandeventer. He hoped “to see this system left in such shape that, if, hereafter in the further development of civilization, the Legislature should see fit to authorize all of the higher branches to be taught, in these common schools, there should be no constitutional impediment in the way.”¹¹⁰

Nonetheless, not all of the delegates agreed with the principle that educational standards were fluid and that future legislatures ought not to be bound by outdated educational standards that no longer applied. Rather, some hoped to constitutionally limit the education clause to more modest ends. William Underwood, for instance, argued that “[t]he 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 . . . [T]he common school is designed for the many, and affords a knowledge of those indispensable branches to all ranks of society.”¹¹¹ He later argued, “the people of the State are not yet prepared to establish free schools for any other branches than those required in all kinds of business, to enable one to perform his duties as a good citizen.”¹¹² Underwood did not contest the importance of the public schools. Moreover, he argued that a degree of education in certain branches was uniformly “indispensable” for rich and poor alike. Nevertheless, he did not wish to grant future legislatures the leeway to craft school laws that provided for a more expansive education. He believed that the only constitutionally permissible educational provision ought to be one that conformed to 1870 standards.¹¹³

Delegate Moore voiced his assent to Underwood’s position. He maintained:

These [school] taxes are large, and very burdensome, and there are complaints in some portions of the State, that the poor people are taxed much more than their proportion,

109. *Id.*

110. *Id.* at 1734.

111. *Id.* at 1733.

112. *Id.*

113. *Id.* at 1734.

because their children go only three or four months, while the children of the wealthier people go eight or nine months.

I insist that the system should be limited . . .¹¹⁴

He continued to argue that the State should be constrained in the education that it provided. Moore believed the State should provide

an education which every child can reach, but [it] should certainly include, and it will always include a common education good enough for all ordinary business—what is called a good English education. The poor men owning lots and little homesteads ought not to be taxed in order that other children may learn Latin or music.¹¹⁵

One issue that threatened to divide the convention was the issue of racial integration. Delegate James Washburn introduced a resolution that offered to submit the question of separate schools for White and Black students to a public vote.¹¹⁶ According to Washburn, it would be

impolitic and unjust to appropriate any part of the taxes paid by the colored people of this State to the education of the white children of the State, and that it is equally impolitic and unjust to appropriate any part of the taxes paid by the white people of the State to the education of the colored people of the State.¹¹⁷

Washburn further declared that his resolution was “so manifestly just and equal” that the delegates should forgo extended discussion on an issue that had so “agitated” the public.¹¹⁸ Though most Democrats from the southern part of the state favored the resolution, it was tabled, and the convention took no further action.¹¹⁹

114. *Id.*

115. *Id.*

116. *Id.* at 679.

117. *Id.*

118. *Id.*

119. *Id.* at 703. A similarly divisive debate took place over a resolution to permit the reading of the Bible in public schools. See CORNELIUS, *supra* note 98, at 74. Although delegates prohibited the use of public funds in the aid of religious schools, delegate James Bayne argued that the Bible was perhaps the most important book that Illinois students should know. Several other delegates challenged this assertion, arguing, among other things, that “neither the federal constitution nor the constitutions of any of the other states carried such a provision.” *Id.*

The Illinois delegates eventually agreed that the State ought to provide a “thorough and efficient system of free schools, whereby all children of this State may receive a good common school education.”¹²⁰ As a result of this provision, “school boards immediately made arrangements for the education of hundreds of black children where this had not been previously provided.”¹²¹ Much the same could be said about the impact of the state’s education clause more generally. Though the delegates disagreed over the scope and specific content that would comprise such a system, almost all indicated that some level of education was necessary to achieve societal goals of extending civic education, virtue, and socially desirable skills to all of the state’s residents. Perhaps for this reason, the delegates achieved general consensus over the equitable distribution of the taxes, funds, and other monies that would be used to meet the state’s constitutional obligations. Whatever education the state did provide, the 1870 constitutional debates in Illinois made evident that education should be available to all.

2. The Duty to Encourage “Uniform” Schools in 1850 Indiana

In contrast to Illinois in 1870, the Indiana constitution ratified in 1851 mandates a “uniform” system of public schools.¹²² As one of the earliest states to deploy the word “uniform” in its education clause,¹²³ Indiana’s constitutional

120. ILL. CONST. art. VIII, § 1.

121. CORNELIUS, *supra* note 98, at 73.

122. IND. CONST. art. VIII, § 1 (“Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and *uniform* system of Common Schools, wherein tuition shall without charge, and equally open to all.”) (emphasis added).

123. The Wisconsin Constitution of 1847 was the first to use the word “uniform” in reference to education. WIS. CONST. art. X, § 3 (“The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable”). Regrettably, the debates of Wisconsin’s constitutional convention were not recorded, and so understanding the Framers’ reasoning for using the word “uniform” is not immediately accessible. A brief analysis of the struggle for the education clause in the Wisconsin Constitution is found in ALBERT ORVILLE WRIGHT, AN EXPOSITION OF THE CONSTITUTION OF THE STATE OF WISCONSIN 136–44 (Madison, Wis., Midland Publ’g 1884). For other states that deploy the word “uniform” in their education clauses, see *supra* note 92.

debates confirm the emerging consensus about the importance of education to the perpetuation and preservation of democracy among the state's residents.¹²⁴ And, just as in Illinois, Indiana delegates framed the issue of education as one related to the equitable distribution of resources.

Indiana delegates initially framed the education debate, and the issue of "uniformity," as one related to the centralization of administrative authority. Delegate Read, for instance, responded to the vagueness of the language in the state's education clause in its 1816 constitution.¹²⁵ He argued that the state's education clause should require the State to elect a superintendent of public instruction.¹²⁶ According to Read:

The education of every child in the State has become simply a political necessity. . . . We *must*—yes, sir, I repeat it, we *must* have a better devised and more efficient system of general education. On this subject, there can be but one opinion in this body, and indeed, among the people of the State at large.¹²⁷

He further indicated that the current system of education was in poor shape and specifically said, "[w]e have had no system, no uniformity of action, no well directed general effort on the great subject of education."¹²⁸ Another delegate indicated that the state needed a standard curriculum. This delegate emphasized, "[t]he truth is, we have no uniform system. In one county, a particular course of instruction is pursued; and in an adjoining county, the course is altogether different."¹²⁹ A state superintendent of education, accordingly, would have authority

124. See RICHARD G. BOONE, A HISTORY OF EDUCATION IN INDIANA 10–42 (Ind. Historical Bureau 1941) (1892); JAMES H. MADISON, THE INDIANA WAY: A STATE HISTORY 108–15, 179–80 (1986).

125. IND. CONST. of 1816, art. IX, §§ 1–2 ("Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government, and spreading the opportunities and advantages of education through the various parts of the country being highly conductive to this end . . . [i]t shall be the duty of the General Assembly, as soon as circumstances will permit, to provide, by law, for a general system of education, ascending in a regular gradation from township schools to a State University, wherein tuition shall be gratis, and equally open to all.").

126. H. FOWLER, REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 1858 (Indianapolis, A.H. Brown 1850).

127. *Id.*

128. *Id.* at 1859.

129. *Id.* at 1861.

to manage the vast amount of resources required to run a statewide system of schools while also effectuating a standard curriculum.¹³⁰

The issue of “uniformity” turned into a robust discussion about funding the state’s schools, especially given limitations in the 1816 constitution.¹³¹ Of particular importance was how the state would be able to support a system of common schools “wherein tuition shall be without charge, and equally open to all.”¹³² Delegate Foster, for instance, spoke against the centralization of a common school fund that threatened to divert monies set aside for higher education.¹³³ He argued, “the fund amounts to about fifty-four thousand dollars, as I have said; and if the interest on that sum should be divided among the children of the State, between the ages of five and twenty-one, it would amount to one cent and two-thirds to each.”¹³⁴ In his rebuttal to Foster, Delegate Shoup clarified that he was strongly in favor of the State spending whatever funds were necessary to support the common schools. He maintained that providing a common school education could never be accomplished “unless we collect together and husband all the various funds within our reach.”¹³⁵ Further, Shoup argued for distributing the university fund to the common schools “in order that *all* may participate in its advantages, though ever so small.”¹³⁶

130. Delegate Read asked, “[s]hall the management of this vast [school] fund, its preservation and disbursement, and the system which it will support, have no controlling head?” *Id.* at 1859. The final Indiana Constitution ultimately created a state superintendent of education. IND. CONST. art. VIII, § 8 (“There shall be a State Superintendent of Public Instruction, whose method of selection, tenure, duties and compensation shall be prescribed by law.”).

131. IND. CONST. of 1816, art. IX, § 1 (“[I]t shall be the duty of the general assembly to provide, by law, for the improvement of such lands as are, or hereafter may be, granted by the United States to this State for the use of schools, and to apply any funds which may be raised from such lands, or from any other quarter, to the accomplishment of the grand object for which they are or may be intended. But no lands granted for the use of schools or seminaries of learning shall be sold, by authority of this State, prior to the year eighteen hundred and twenty; and the moneys which may be raised out of the sale of any such lands, or otherwise obtained for the purposes aforesaid, shall be and remain a fund for the exclusive purpose of promoting the interest of literature and the sciences, and for the support of seminaries and the public schools.”).

132. IND. CONST. art. VIII, § 1.

133. FOWLER, *supra* note 126, at 1864.

134. *Id.*

135. *Id.*

136. *Id.* (emphasis added).

Delegate Hawkins consented to Shoup's position and stated, "I have no objection to offer; on the contrary, I am in favor of diverting that fund from its present channel, and bidding it flow out in such a manner as that *all* may reap the advantages in an equal degree."¹³⁷ He continued by affirming that he was

as much the friend of that system of schools that has for its object the education of all the children of the State at the public expense, out of one common, general fund, as, perhaps, any man in the State. I would like to see that fund large enough to furnish a constant school in every district in the State, dispensing its blessings upon all alike.¹³⁸

Delegate Colfax also agreed that the State should "increase the resources of the common school fund, as far as possible, that the blessings of education may be increased and widened."¹³⁹

For many of the delegates, the funding of a "uniform" system of education was substantively connected to the purpose of creating a statewide system in the first place. As Delegate Allen summed up:

[I]f there is any cause that should call to its aid the universal sympathies and unflinching support of this people, it is the cause of common schools. We should cherish it as one of the strongest safeguards of human freedom; we should encourage it by every legitimate means in our possession; and we should not stay our efforts until we shall have placed within the reach of every child within the State, poor or rich, the means of a common school education.¹⁴⁰

Delegate McClelland, likewise, articulated his belief that "uniform" education was perhaps the most important function of state government: "[O]ur government owes to every child in the land the education which should be given it . . . I hold, sir, that all the schools endowed by the public—all sources of

137. *Id.* at 1868 (emphasis added).

138. *Id.*

139. *Id.* at 1867. Delegate Clark was the only delegate who seemed to challenge the consensus emerging around the school fund. He argued that "[a]ny contrivance by which the ability of the parent is diminished, (even though it be to create a *sacred* school fund,) . . . operates as a discouragement and hindrance to the business of education." *Id.* at 1881.

140. *Id.* at 1892.

education should be within the reach of the meanest individual in the community as well as the wealthiest.”¹⁴¹

Adopted nearly twenty years prior to Illinois’ 1870 constitution, Indiana’s education clause had different language and different provisions to effectuate a statewide system of common schools. Nevertheless, its delegates identified very early the primary role that a centralized system would have in achieving a “uniform system of education.” Whether it was the constitutional requirement for a state superintendent of public instruction¹⁴² or the constitutional authorization that extended to the General Assembly the power to tax for the common schools,¹⁴³ the drafters of Indiana’s 1851 constitution gave substantive meaning to its “duty” to provide a “uniform” education.

The 1870 Illinois and 1850 Indiana constitutional debates over the scope and meaning of proposed education clauses, particularly in relation to how “thorough” or “uniform” the system would be, are revealing in two respects. First, they demonstrate that education created an affirmative obligation of state government that was different in scope and degree from any other constitutional right. From Illinois Delegate Bowman’s passionate plea that education was the only bulwark against tyrannical government¹⁴⁴ to Indiana Delegate McClelland’s argument that the government’s unique obligation to provide education to all of the state’s residents,¹⁴⁵ debates surrounding the education clauses in each state highlight the privileged role that education would play as a function of state government. While some scholars have raised the question of whether the Framers of these constitutions contemplated the commitment to a “thorough” or “uniform” system as an individual’s constitutional right to education,¹⁴⁶

141. *Id.* at 1885.

142. IND. CONST. art. VIII, § 8.

143. *Id.* § 2.

144. See *supra* text accompanying note 101.

145. See *supra* text accompanying note 141.

146. This debate has been framed as contrasting education clauses that are hortatory in scope to education clauses that, on their face, appear to be much more substantive in their orientation. See Eastman, *supra* note 60, at 3–20. While this might be a helpful tool to understand the scope of the education clause, there is little evidence to indicate that the Framers of the various constitutional conventions themselves understood such a distinction. See generally William E. Thro, *The Role of Language of the State Education Clauses in School Finance Litigation*, 79 EDUC. L. REP. 19 (1993) (surveying differences in the wording of the education clauses in state constitutions).

the debates nevertheless highlight the extent that the Framers of all of these constitutions expected the State to provide an education that was substantive and, to some degree, approximated a level of equity for all of the state's students. Second, the Framers of these constitutions also demonstrated not only that words matter but that context does as well. What a "thorough" education system meant to the Framers of the Illinois constitution was substantively different from what a "uniform" system of education was for Indiana. For some, such as Illinois Delegate Church, it meant ensuring that all residents were given the tools of that day and age to be productive citizens;¹⁴⁷ for others, like Indiana Delegate Read, it meant equalization of resources and standardization of curriculum and textbooks.¹⁴⁸ Regardless, time, circumstance, and the peculiar and particular needs of the residents of a particular state shaped both the debate and the content that would emerge in the education clause that appeared in the final constitutional document.

II. TERRITORIAL ANTECEDENTS TO THE CONSTITUTIONAL RIGHT TO PUBLIC EDUCATION

From Colorado's inception, its gold-rush pioneers attempted to legally prescribe a sovereign duty to provide for the creation and maintenance of a system of public schools. In one sense, this was an extraordinarily ambitious exercise. At the time that gold was discovered in 1858, the land was under the jurisdictional control of the territory of Kansas.¹⁴⁹ Recognizing that their interests were extremely distinct, prospectors and speculators to the Front Range of the Rockies in the spring of 1859 began clamoring for statehood. Although "no great mines had been opened, farming had not been successful, the population was almost wholly transient [and male], and the legal status of local government was most uncertain," Colorado's newest settlers convened for the purpose of creating a constitution for the proposed State of Jefferson.¹⁵⁰

This Part details the various ways that education emerged in Colorado Territory's legal and political machinery. While the constitutional right to education was contemplated from the

147. See *supra* text accompanying notes 108–10.

148. See *supra* text accompanying notes 125–28.

149. Hensel, *supra* note 3, at 20–21.

150. *Id.* at 22.

start, Colorado's multicultural and multiracial pioneer students, parents, educators, and statesmen struggled mightily to build a system that met the often divergent needs of all of these groups. As in other states, education emerged in Colorado Territory as one of the most important functions of government. In attempting to operationalize this role, Coloradans established early in their history that the territory's education system should be both "thorough" and "uniform" in orientation. Yet the lack of people, a poorly conceived and inadequately funded infrastructure, and the importation of racial attitudes that created the conditions for separate and unequal schools made the goal of attaining a "thorough" and "uniform" system of public education elusive. Nevertheless, Colorado's territorial experience with education created the contours of the statewide system that would emerge in 1876.

A. Education at the Margins of Sovereign Control

Colorado's first experience with state constitution-making occurred in 1859, when Colorado's gold rush pioneers united to form "here in our golden country, among the ravines and gulches of the Rocky Mountains, and the fertile valleys of the Arkansas and Platte," the State of Jefferson.¹⁵¹ These pioneers believed from the beginning that the area and the constitutional matters to be taken up therein would constitute the literal and symbolic "*real* centre of the Union."¹⁵² By most accounts, the final draft of the Constitution for the State of Jefferson that was submitted before voters on September 5, 1859, was modeled after Iowa's 1857 constitution.¹⁵³ When it came to education, however, Colorado's pioneer founders provided for a constitutional provision that was substantively different from its Iowa counterpart. Of particular note was article XI, section 4 of the Constitution for the State of Jefferson, which declared: "The General Assembly shall provide for a uniform system of common schools *and for a uniform distribution of the school fund.*"¹⁵⁴ Drafted fewer than ten years

151. H.P.A. Smith et al., *Address of the Preliminary Convention, to the Electors of the Intended State of Jefferson*, ROCKY MOUNTAIN NEWS WEEKLY, May 7, 1859, at 3.

152. *Id.* (emphasis added).

153. Hensel, *supra* note 3, at 26.

154. *Constitution of the State of Jefferson*, ROCKY MOUNTAIN NEWS, Aug. 20, 1859, at 2 (emphasis added).

after Indiana's constitution, which itself contained one of the first provisions for "uniform" schools, the education clause in the proposed Constitution for the State of Jefferson attempted to explicitly ensure equal economic support for local schools—a provision not at all common to state constitutions.¹⁵⁵ That early migrants to what would become Colorado should explicitly ensure equal economic support for local schools is a sign that, to some degree, they supported the equitable distribution of resources across school districts. In spite of such ambitions, however, voters in the territory rejected the proposed constitution at the polls, and this section never had the force of law.¹⁵⁶

Later that year, delegates assembled again to form a government that was distinct from that of Kansas. This time, however, delegates were much less ambitious in their aims and instead sought territorial status for the fledgling mining empire. On October 10, 1859, approximately eighty-seven delegates, "most of whom had not been members" of the convention for the State of Jefferson, convened to draft another constitution—this time for the territory of Jefferson.¹⁵⁷

Despite having a completely different group of delegates, the territory of Jefferson retained a similar commitment to public education in its draft territorial constitution. Article VII of the Constitution for the Provisional Government of the Jefferson Territory similarly called for the General Assembly to "provide at its first session for a uniform system of common schools, and for the creation of a school fund, and take such action as shall be for the interest of education in the Territory."¹⁵⁸ The document also provided for a state superintendent of public instruction.¹⁵⁹

The voters approved the document on October 24, 1859, and, in so doing, chose a full set of territorial officers. Henry H. McAfee was "duly elected Superintendent of Public Instruction."¹⁶⁰ McAfee, it must be noted, had publicly called for citizens of the fledgling mining cities to establish schools as rapidly as possible. In a letter to the *Rocky Mountain News* in

155. See Tyack & James, *supra* note 61, at 55–56, 60.

156. *State vs. Territory—The Election and the Missouri Republican*, ROCKY MOUNTAIN NEWS, Sept. 17, 1859, at 2; Hensel, *supra* note 3, at 26–27.

157. Hensel, *supra* note 3, at 30.

158. *Constitution of the Provisional Government of Jefferson Territory*, ROCKY MOUNTAIN NEWS, Oct. 20, 1859, at 2.

159. *Id.*

160. Fynn & Hafen, *supra* note 57, at 19.

August of that same year, he identified the “School House” as the “watch-tower of social advancement of our day.”¹⁶¹

The First General Assembly of Jefferson Territory met in November 1859, though the “sluggish ineptitude of the provisional government” prevented any substantive legislation from being passed.¹⁶² This assembly, in particular, “ignored Article VII of the Constitution” and thus failed to pass any legislation establishing public schools throughout the territory.¹⁶³ Yet, in the law that incorporated and consolidated the fledgling towns of Denver, Auraria, and Highland, the territorial legislature “authorized and required” the newly constituted Denver to “provide for the support of the common schools . . . at the expense of the city.”¹⁶⁴ The law further provided that the city purchase lots and erect public school houses; extended to the city the ability to levy a one-mill tax on property; called for an election for a Board of Trustees for the schools that would in turn provide for examination and certification of teachers; and, most notably, allowed for segregated schools.¹⁶⁵ No doubt influenced by the number of Missourians who comprised Colorado’s early pioneers, and prefiguring the sectional split that would soon send the nation into Civil War, Colorado’s pioneer statesmen provided a legal mechanism by which it could racially segregate its schools.¹⁶⁶ Although a territory-wide system of education in the State of Jefferson was aborted almost immediately after its conception,

161. Editorial, ROCKY MOUNTAIN NEWS, Aug. 27, 1859, at 2.

162. Hensel, *supra* note 3, at 33, 41; *see also* PROVISIONAL LAWS AND JOINT RESOLUTIONS PASSED AT THE FIRST AND CALLED SESSIONS OF THE GENERAL ASSEMBLY OF JEFFERSON TERRITORY (Omaha, Robertson & Clark 1860) [hereinafter LAWS OF JEFFERSON TERRITORY].

163. Fynn & Hafen, *supra* note 57, at 19. There are likely several reasons that the General Assembly of Jefferson failed to enact any school law. First, the legislature was largely concerned with legitimizing itself among the miners in the area. *See* Hensel, *supra* note 3, at 33–35. Second, there were very few children living in, much less attending school in, Jefferson’s “jurisdiction.” The 1860 census identified approximately 2000 children and young adults under the age of twenty living in Colorado Territory, with nearly half of those being young men and some young women between the ages of fifteen and twenty. JOSEPH C.G. KENNEDY, BUREAU OF THE CENSUS LIBRARY, POPULATION OF THE UNITED STATES IN 1860; COMPILED FROM THE ORIGINAL RETURNS OF THE EIGHTH CENSUS 546 (Washington, Government Prtg. Office 1864).

164. LAWS OF JEFFERSON TERRITORY, *supra* note 162, at 277.

165. *Id.* at 277–79.

166. It appears that the Denver City Council, acting under the power of the “People’s Government of Denver,” attempted to establish segregated public schools for the city in October 1860, but the efforts were aborted. *See* Hensel, *supra* note 3, at 42; *see also* Fynn & Hafen, *supra* note 57, at 23.

Jefferson educators empowered local school districts to fill the void. Without a legitimate form of government to provide for “uniform” schools, the foundations for the “watch-tower of social advancement” would remain stunted and subject to the whims and will of local government.

B. The Pursuit of a “Thorough and Uniform” System of Education in Colorado Territory

The government of Jefferson was short lived and rapidly dissolved. Indeed, disgusted by the General Assembly’s failure to pass a territorial school law, Superintendent McAfee resigned on January 26, 1860, on the premise that he held “an empty office.”¹⁶⁷ In early 1861, Congress authorized the creation of Colorado Territory.¹⁶⁸ According to one study:

The rapid withdrawal of Southern members from Congress [in 1861 as a result of the Civil War] removed the most persistent obstacle to organization of the West. Kansas was admitted as a state with its present boundaries on January 29, 1861, compelling Congress to cope with the Pikes Peak part of Kansas Territory, now completely set adrift.¹⁶⁹

167. ROCKY MOUNTAIN NEWS, Feb. 8, 1860, at 1.

168. Act of Feb. 28, 1861, ch. 59, 12 Stat. 172.

169. Hensel, *supra* note 3, at 51. A more nuanced account of the creation of Colorado Territory points out the interdependent roles that the sectional crisis, mineral wealth, and manifest destiny played in its creation. According to Professor Schulten:

The creation of the Colorado Territory occurred at the convergence of these three stories: a political crisis coincided with the discovery of mineral wealth and a more optimistic view of the region’s pastoral potential. No single factor “caused” the creation of Colorado Territory, but the absence of any of these would have delayed it further. Without the *gold rush*, there would have been little urgency to organize this region. Migration to the region would have come with the Homestead Act, but the character of that growth would have been slow and agricultural rather than rapid and urban. Without *secession*, the legislature simply could not have organized these territories without inciting violence over slavery. Both of these events occurred alongside increasingly optimistic assessments of the region’s potential to support settlement. Without the *new assessments* of the areas east of the Rocky Mountains, the end of the gold rush—which drained thousands away from the front range in the 1860s—might have left few settlers to this semi-arid region.

Susan Schulten, *The Politics of Space and the Origins of Colorado Territory* 3–4 (2011) (unpublished manuscript) (on file with author).

As part of the creation of Colorado Territory, Congress provided that two sections in “each township in said Territory shall be and the same are hereby reserved for the purpose of being applied to schools in the States hereafter to be erected out of the same.”¹⁷⁰ Colorado Territory, carved out of the territories of Kansas, Utah, and New Mexico, convened its first territorial assembly on September 9, 1861.¹⁷¹

In his address to this assembly, Territorial Governor William Gilpin articulated a mid-nineteenth-century sensibility about the importance of education in the lives of the territory’s citizens. Importantly, amidst the variety of concerns facing the territory at the commencement of the Civil War, Gilpin dedicated a significant portion of his speech to a discussion of the “pre-eminent” importance of education. Gilpin articulated his belief that an educated electorate was the strongest safeguard of the nation’s republican institutions.¹⁷² To that end, he called upon the legislature to establish schools where all the children of the territory would “receive generous instruction, *uniform and thorough* in its character.”¹⁷³ Animated no doubt by the spirit of state-constitution-making in the earlier years and decades of the nineteenth century, Gilpin’s words and the subsequent acts of the territorial and state legislature reflected a nineteenth-century understanding that broad and equitable education was an essential element of an informed and engaged citizenry.

Within two months of Governor Gilpin’s speech, the Colorado Territorial Legislature passed and Governor Gilpin approved “An Act to Establish the Common School System.”¹⁷⁴ Section 3 of this act explicitly ordered the territorial superintendent to “see that the school system is, as early as practicable, put into uniform operation.”¹⁷⁵ Pursuant to that goal, the superintendent was authorized to prescribe a single set of textbooks to the various school districts and to authorize any additional rules or regulations necessary to ensure their

170. Ch. 59, 12. Stat. at 176.

171. See FIRST LEGISLATIVE ASSEMBLY OF COLORADO TERRITORY, *supra* note 4; Schulten, *supra* note 169, at 22.

172. HOUSE JOURNAL OF THE LEGISLATIVE ASSEMBLY OF THE TERRITORY OF COLORADO 10 (Denver, Colo. Republican & Herald Office 1861) [hereinafter HOUSE JOURNAL OF TERRITORIAL ASSEMBLY].

173. *Id.* (emphasis added).

174. FIRST LEGISLATIVE ASSEMBLY OF COLORADO TERRITORY, *supra* note 4, at 154.

175. *Id.*

uniform operation. His only other enumerated duty was that of compiling data on the schools and then relaying that information to the legislature.¹⁷⁶

The 1861 school law also created significant power for district electors. Among the privileges that section 29 gave to the electors were the powers to determine the number of schools in a district, how long each school should be in session, and which subjects should be taught, and also “to lay such tax on the taxable property of the district, as the meeting shall deem sufficient.”¹⁷⁷ Moreover, districts and counties were not required to levy a school tax or to provide for public schooling. Section 75, for instance, provided that “[t]he provisions of this act shall not extend to districts, communities or counties, when, in the opinion of the people residing in such localities, they shall not deem it expedient to establish common schools.”¹⁷⁸ Nevertheless, where a district did establish a public school, it needed to conform to territorial law.¹⁷⁹

Denver was the first city to take advantage of the law. Under “Professor Goldrick,” who was superintendent for Arapahoe County, school districts were established in East Denver (District No. 1), West Denver (District No. 2), and Highland, stretching up and down the Platte River for three miles (District No. 3).¹⁸⁰ Moreover, the first territorial superintendent of common schools corroborated the relationship between the critical importance of a uniform system of public education for the territory and the emphasis on both local control and responsibility.¹⁸¹ Indeed, to identify education as more important than the gold and the fortune-seeking men that brought the territory into fruition signaled the central place that a broad-based system of public education would have for Colorado’s emerging statesmen.¹⁸²

At the second session of the territorial legislature in 1862, the assembly attempted to supplement school revenue by linking education to the territory’s singular mineral wealth. Accordingly, the assembly enacted a law that for “any new mineral lode . . . discovered in this Territory, one claim of one hundred feet in length on such lode shall be set apart and held

176. *Id.* at 154–55.

177. *Id.* at 158.

178. *Id.* at 164–65.

179. *Id.*

180. Goldrick, *supra* note 57, at 74.

181. HALE, *supra* note 5, at 13.

182. *Id.*

in perpetuity for the use and benefit of schools in this Territory, subject to the control of the Legislative Assembly.”¹⁸³ Although there were two aborted attempts at statehood in 1864 and 1865, the constitutional commitment to statewide public education, to be operationalized by local school districts, found its way into each document.¹⁸⁴

In 1865, the Fourth Territorial Legislature abolished the position of superintendent of public instruction. With a salary of only \$500 per year, the position of territorial superintendent had “degenerat[ed] into [an] ex-officio practice.”¹⁸⁵ The attempt to streamline the office by placing the responsibilities of education under the territorial treasurer, however, proved for the most part to be a failure, and in 1870, a new school law recreated the position.¹⁸⁶ Importantly, a system of territory-wide schools was neither “thorough” nor “uniform” in the years leading to statehood. In 1867, for instance, Columbus Nuckolls, the Territorial Treasurer and Superintendent of Public Instruction, lamented the failure of most counties and school districts in the state to comply with the territorial law.¹⁸⁷ He also strongly criticized the territorial assembly for not properly creating, maintaining, or supervising the general school fund.¹⁸⁸ According to one contemporary account, it was “no uncommon thing for the school funds to be misappropriated by

183. *Id.* at 12.

184. The proposed 1864 education clause “encouraged” the Legislative Assembly to promote the “intellectual, moral, scientific and agricultural improvement [sic]” of the proposed state by “establishing a uniform system of common schools.” COLO. CONST. of 1864, art. XIV, § 3. The proposed 1865 education clause was nearly identical. COLO. CONST. of 1865, art. XIII, § 3.

185. Barrett, *supra* note 7, at 126; see also THE REVISED STATUTES OF COLORADO: AS PASSED AT THE SEVENTH SESSION OF THE LEGISLATIVE ASSEMBLY, CONVENED ON THE SECOND DAY OF DECEMBER, A.D. 1867, at 573 (Central City, David C. Collier 1868) [hereinafter REVISED STATUTES OF SEVENTH LEGISLATIVE ASSEMBLY] (indicating that the territorial treasurer is “*ex officio* superintendent of public instruction”).

186. Barrett, *supra* note 7, at 127. By 1867, the territorial treasurer (who had assumed the duties of the secretary of public instruction) began to argue that the two positions were each too important to be carried out by one person. Moreover, the treasurer argued that the duty for maintaining effective schools did not solely belong to the districts and that the state had a responsibility to compel districts and counties to comply with the provisions of the school law. COLUMBUS NUCKOLLS, ANNUAL REPORT OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION OF COLORADO (1867), *reprinted in* HALE, *supra* note 5, at 17–18.

187. NUCKOLLS, *supra* note 186, at 17.

188. COLUMBUS NUCKOLLS, SCHOOL SUPERINTENDENT’S REPORT (1869), *reprinted in* HALE, *supra* note 5, at 19–20.

both county and district officers.¹⁸⁹ Noticeably, the superintendent's reports repeatedly lamented the same problems:

"Lack of interest," "My predecessor in office has left no records," "I hope to get matters in shape so as to render a complete account next year," "School matters here are in a very bad condition; for the past two years the County Commissioners have neglected to levy a school tax, hence we have no money," etc., etc.¹⁹⁰

Notably, the territory's superintendents of public instruction who had been reestablished under the 1870 School Law identified two issues that would animate Coloradans in their final push for statehood in 1875 and 1876. First was concern over the role that religious institutions would play in the territory's system of education. In 1872, for example, then-Superintendent William C. Lothrop sought to distinguish the importance of education for moral purposes, as opposed to religious purposes. For this reason, he argued that "as all contribute to the common school fund, no sectarian views should be advanced" by the schools.¹⁹¹ Two years later, Lothrop's successor, Horace Hale, argued quite passionately against the enemies of public education. He expressed a great deal of anxiety about those who would "level to dust, at one fell swoop, every *public non-sectarian* school house on the face of the earth."¹⁹² Without ever mentioning religious schools, his statement implicated an acrimonious national debate over the public funding of "sectarian" schools.¹⁹³

Second and related was concern over the appropriate balance between state and local control. In order to respond to

189. HALE, *supra* note 5, at 21.

190. *Id.*

191. FIRST BIENNIAL REPORT OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE TERRITORY OF COLORADO, FOR THE SCHOOL YEARS ENDING SEPTEMBER 30, 1870, AND SEPTEMBER 30, 1871, at 17 (Central City, D.C. Collier 1872) [hereinafter FIRST BIENNIAL TERRITORY REPORT].

192. SECOND BIENNIAL REPORT OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE TERRITORY OF COLORADO, FOR THE TWO YEARS ENDING SEPT. 30, 1873, at 14 (Denver, Wm. N. Byers Public Printer 1874) [hereinafter SECOND BIENNIAL TERRITORY REPORT] (emphasis added).

193. Though various states had constitutionally proscribed the funding of religious schools, the issue came to a head in the early 1870s with the so-called "Blaine Amendments" to the U.S. Constitution. Though these efforts failed, they had widespread support, including that of President Ulysses S. Grant. See Goldenziel, *supra* note 82, at 63–64.

the system's critics, each of the superintendents called for reform that would ensure a "thorough system of instruction" and a "systematic course" of study.¹⁹⁴ Indeed, one superintendent argued that "[t]here is no reason why the country schools cannot or should not adopt a course of instruction similar to that adopted by city schools. *Uniformity* in the character and modes of teaching is feasible . . .".¹⁹⁵ Therefore, proposed reforms included minimum educational requirements for county and district superintendents as well as teachers, "uniformity of textbooks," compulsory attendance laws, and better local and state financing of public schools.¹⁹⁶

Another item that continued to vex public education in the territory was the issue of segregated schools. Although the first school in the region was integrated,¹⁹⁷ racial antipathies continued to rear their ugly heads and, indeed, were prescribed by territorial legislation that gave school districts the ability to prevent "colored" students from attending publicly financed schools.¹⁹⁸ In 1864, Black parents in Central City "objected to paying the school tax since they were not legal voters and their children were not at the time admitted to the public schools."¹⁹⁹ Two years later, the presence of Black students in District No.

194. See SECOND BIENNIAL TERRITORY REPORT, *supra* note 192, at 101.

195. *Id.* (emphasis added).

196. See FIRST BIENNIAL TERRITORY REPORT, *supra* note 191, at 17 ("Uniformity of text-books is of great importance in a system of public free schools."); *id.* at 22 (discussing "Compulsory Education"); SECOND BIENNIAL TERRITORY REPORT, *supra* note 192, at 11–12 (discussing the need for a "School Tax" for better local and state financing of schools); *id.* at 19 ("So far as this department is able to exercise an influence in the selection of teachers, either directly, or indirectly, through county superintendents and district officers, *it will not countenance the employment of incompetent persons.*"); *id.* at 18 ("School officers are elected by the people, and that any candidate may be elected he must, in a certain degree, reflect the average intelligence, and morality, and political principles of those who give him their votes."); THIRD BIENNIAL REPORT OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE TERRITORY OF COLORADO, FOR THE TWO YEARS ENDING SEPT. 30, 1875, at 17–18 (Denver, Rocky Mountain News Steam Prtg. House 1876) [hereinafter THIRD BIENNIAL TERRITORY REPORT] (lamenting frequent teacher attrition as well as frequent changes in school administration).

197. See *supra* text accompanying note 57.

198. See GENERAL LAWS, JOINT RESOLUTIONS, MEMORIALS, AND PRIVATE ACTS PASSED AT THE FIFTH SESSION OF THE LEGISLATIVE ASSEMBLY OF THE TERRITORY OF COLORADO 83 (Central City, David C. Collier 1866) ("The secretary shall keep a separate list of all colored persons in the district, between the ages of five (5) and twenty-one (21) years, . . . and shall report the same to the president, who shall issue warrants on the treasurer in favor of such colored persons . . . for educational purposes.").

199. Perrigo, *supra* note 59, at 86.

1 (East Denver) prompted White parents to open a private school in Denver. William Byers, the editor and publisher of the territory's most influential paper, editorialized: "We do not propose to eat, drink or sleep with one, and neither do we believe it right that our children should receive their education in Negro classes."²⁰⁰ His solution, that each group contribute proportionally to its own educational needs, would ensure that Black schools would receive no funding given the Black community's small size.

The issue of unequal funding among the state's poorest and increasingly smaller communities of color, especially those of the Spanish-speaking Latinos in the Southern half of the territory, were implicitly addressed in the reports of the territorial superintendents.²⁰¹ In partial response to some of these concerns, the territorial assembly amended the School Law in 1868, giving school districts the discretion to open separate "colored" schools.²⁰² Black parents in Central City, meanwhile, secured admission for their children to the city's schools in 1869 after their attorneys "demanded admission on the basis of the Civil Rights Act of Congress and the equality of treatment granted by the local coach line since 1865."²⁰³

Despite the existence of a system that was wrecked by financial mismanagement, simmering religious tensions, and de facto inequality, Coloradans nevertheless continued to advocate for public schools. The *Rocky Mountain News* in 1867 identified "common schools" as the "ground work of our society" and advocated for generous financial support of the system.²⁰⁴ Indeed, the paper argued that in "the future interests and prosperity of the west . . . [t]he first duty of our authorities should be to provide for the maintenance of common schools."²⁰⁵ To educate the more than 20,000 school-age children residing in the territory on the eve of statehood, school districts were formed in Pueblo, Trinidad, Colorado City,

200. ATHEARN, *supra* note 3, at 54 (quoting Editorial, ROCKY MOUNTAIN NEWS, Jan. 31, 1866).

201. See JOSEPH SHATTUCK, FIRST BIENNIAL REPORT OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF COLORADO, FOR THE TWO YEARS ENDING AUGUST 31, 1878, at 24–25 (Denver, Tribune Steam Prtg. House 1878) (discussing "Our Mexican Population").

202. REVISED STATUTES OF SEVENTH LEGISLATIVE ASSEMBLY, *supra* note 185, at 580.

203. Perrigo, *supra* note 59, at 87.

204. *Our Schools and Seminaries*, ROCKY MOUNTAIN NEWS, Sept. 12, 1867, at 1.

205. *Id.*

Central City, Black Hawk, Boulder, San Luis, and Nevada City, some with impressive physical structures.²⁰⁶ Though most students were grouped according to ability and not grade through the territorial period, two public high schools in Denver and Boulder were established, heralding a shift to a system where children were grouped in grades according to age.²⁰⁷ A School of Mines was purchased by the territorial assembly in 1874, while the same assembly began the process of building infrastructure for an agricultural college.²⁰⁸ A University of Colorado had long been planned, but most university education during the territorial period was provided by the religiously affiliated University of Denver, established in 1864, and Colorado College, established in 1874.²⁰⁹ Finally, in 1876, the last of the territorial legislatures passed “An Act to Amend, Revise, and Consolidate the Acts Relating to Public Schools.”²¹⁰ Anticipating that statehood would soon follow, this Act became the framework that would guide the implementation of the constitutional guarantees to education that were hashed out by delegates to the Constitutional Convention in the cold months of 1875 and 1876.

III. EDUCATION IN COLORADO’S 1875–76 CONSTITUTIONAL CONVENTION

On a cold December morning in 1875, the fifth and last constitutional convention of what would become the State of Colorado met in Denver.²¹¹ In his speech to the convention, President of the Convention Joseph Wilson, a Republican from El Paso County, addressed his fellow delegates. Thanking each of them in advance for the seriousness with which each of the delegates would discharge their duties, Wilson indicated that “[t]he eyes of not only the people of Colorado are upon this Convention, but the whole Nation is watching it with an

206. ATHEARN, *supra* note 3, at 55; HALE, *supra* note 5, at 21–24; THIRD BIENNIAL TERRITORY REPORT, *supra* note 196, at 5 (identifying school age as males and females between five and twenty-one years of age); Barrett, *supra* note 7, at 132; Perrigo, *supra* note 59, at 82–83.

207. Barrett, *supra* note 7, at 132.

208. *Id.* at 135.

209. *Id.* at 138–39.

210. Act of Feb. 11, 1876, pt. 1, 1876, Colo. Sess. Laws 127 (“An Act to Amend, Revise, and Consolidate the Acts Relating to Public Schools”).

211. PROCEEDINGS OF THE COLORADO CONSTITUTIONAL CONVENTION, *supra* note 20, at 18.

interest—an unusual degree of interest.”²¹² Wilson’s speech was not pure hyperbole. Indeed, considering the territory’s importance in potentially putting a literal and psychological end to the sectional crisis that had divided the nation,²¹³ how Colorado’s constitutional delegates dealt with the complex and delicate issues that would emerge in the document for statehood was of considerable national importance.

Perhaps because so many embraced education’s role in transforming politics, just days after the convention convened and after Education and Educational Institutions was identified as one of the constitutional convention’s twenty-four standing committees,²¹⁴ superintendents of school districts throughout the territory, as well as teachers and “friends of public schools,” convened a three-day meeting only blocks away from the site of the Constitutional Convention.²¹⁵ Though the ostensible purpose of the meeting was to form a State Teachers’ Association, the group was designed to chart “some course that would tend to unify the school system of the State,” most immediately, to advocate for “liberal provisions incorporated into the State Constitution that should render the school system secure and efficient.”²¹⁶ Over the course of several days, the participants to the meeting passed resolutions that a constitutional requirement be inserted for the “maintenance of a uniform system of schools,” that Spanish be taught in the public schools with sizeable Mexican-American populations, that a school fund be established and subsequently financed and maintained through land and property taxes, that local school boards were to retain authority over content and curriculum, and, finally, that education was to be secular in its orientation.²¹⁷

In this regard, attendees felt confident that they would find sympathetic allies from the members of the Committee on Education: Daniel Hurd (chair), Byron Carr, Wilbur Stone, John Wheeler, and Robert Douglas.²¹⁸ Hurd was a Denver businessman who had served as the director of the public

212. *Id.* at 19.

213. See *supra* note 3 and accompanying text.

214. PROCEEDINGS OF THE COLORADO CONSTITUTIONAL CONVENTION, *supra* note 20, at 36–37.

215. HALE, *supra* note 5, at 30.

216. *Id.* at 31.

217. *Id.* at 31–40.

218. PROCEEDINGS OF THE COLORADO CONSTITUTIONAL CONVENTION, *supra* note 20, at 36; see also Hensel, *supra* note 3, at 404–26 app.

schools of Cairo, Illinois.²¹⁹ He joined the Denver school board in May 1874 and became president of the board in 1876.²²⁰ Carr had been a pioneer for education in Illinois and was elected to the position of superintendent of public schools for Lake County in 1868. After moving to Colorado, Carr established the first public school in Longmont in 1871.²²¹ After moving to Colorado from Connecticut, Wilbur Stone both worked as a teacher and served as a county commissioner in Pueblo County. In 1876, he was elected president of the Pueblo County School Board.²²² Wheeler was the only member with no obvious connection to education, as he served as a Weld County judge between 1865 and 1868.²²³ Douglas was a member of the 1864 Colorado Constitutional Convention. He also served as county superintendent of El Paso County in 1868, where he directed six school districts and 235 school-age children.²²⁴

This Part examines the work of the Committee on Education and the subsequent debate around the education clause during the constitutional convention. While the separation of church and state catalyzed the most visible discord among the delegates and the state's residents, it obscured the rigor with which the education clause came to be drafted. Whether the issue was the prohibition of racial discrimination or the appropriate balance between centralization and local control, Colorado's constitutional Framers inscribed education as a broadly conceived constitutional right.

A. *The Framers Debate for the Right to Public Education*

On January 5, 1876, delegates referred a comprehensive resolution for the Committee on Education to consider. The resolution in its entirety read as follows:

Resolved, That the State of Colorado shall never pass any law respecting an establishment of religion or prohibiting the exercise thereof; but Church and State shall

219. *The Teachers' Ticket*, DENVER DAILY TIMES, May 2, 1874, at 4.

220. *Id.*; Hensel, *supra* note 3, at 415 app.

221. Hensel, *supra* note 3, at 407–08 app.

222. FIRST BIENNIAL TERRITORY REPORT, *supra* note 191, at 62–63 (noting Stone's "early and long experience as a teacher of every grade" and his subsequent role in examining applicants to become a teacher in Pueblo County).

223. Hensel, *supra* note 3, at 424 app.

224. HALE, *supra* note 5, at 22; Hensel, *supra* note 3, at 410 app.

forever be separate and distinct, and each be free within its proper sphere.

Neither the Legislature, nor any county, city, town, township, school district or other municipal or public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or literary or scientific institution controlled by any church or sectarian denomination whatever, nor shall any grant or donation of land, money or other personal property ever be made by the State or by any county, city, town, township, school district or other municipal or public corporation, to any church or for any sectarian purpose.

The Legislature shall provide for the establishment and maintenance of a *thorough and efficient* system of free schools, whereby all children of the State between the ages of six and twenty-one years, irrespective of *color*, birthplace or religion, shall be afforded a good *common school* education.

No theological, religious or sectarian tenets or instructions shall ever be imparted; nor shall any theological or religious book or any version of the Bible be introduced as a text book, or read as a school exercise; nor shall any religious services or worship be permitted in any school, college, academy, seminary or university supported in whole or in part by taxation or by money or property derived from public sources.²²⁵

The scope of the resolution and its initial focus on a “thorough and efficient” public system of education that was both non-sectarian and nondiscriminatory identified the pillars that would animate the work of the Committee on Education. In a symbolic sense, the committee’s determination of such issues was a microcosm of the tensions that would come to animate educational disputes in Colorado and the rest of the nation then and into the twenty-first century.

Perhaps no issue was as controversial as whether the constitution should draw a sharp distinction between public and private schools, especially religious, primarily Catholic schools.²²⁶ That this issue should be handled delicately was an

225. PROCEEDINGS OF THE COLORADO CONSTITUTIONAL CONVENTION, *supra* note 20, at 43 (emphasis added).

226. Importantly, this issue was debated and recorded with the same vigor, passion, and sense of urgency regarding how rights would be allocated to perhaps the territory’s most precious resource: water. See Hensel, *supra* note 3, at 165–74, 182.

understatement. While Baptist, Episcopal, Congregational, and Presbyterian settlers of Colorado comprised a sizeable number of settlers to the territory, an organized and vocal group of Roman Catholics—who counted as their dutiful parishioners miners in the north of the territory and long-settled Latinos in the southern valleys—threatened to scuttle any constitution that attempted to trammel upon religious rights.²²⁷

The relationship of this issue to the work of the Committee on Education emerged when delegates proposed to tax church property, including parochial schools. While Chairman Hurd led an unopposed effort to exempt public schools from taxation, Bryon Carr and other delegates were of the opinion that “anyone sending his children to a parochial school had [no] right to ask the public to contribute to its support through tax relief, with the consequent increase in taxes elsewhere.”²²⁸ Not long after the Committee on Education took up its work, the “convention was flooded with petitions. The church-goers tended to defend the traditional immunity from taxation In extreme opposition to them was a group of fifty-six petitioners who took a thoroughly anti-clerical approach and sought to end all tax privileges for churches.”²²⁹ In the end, the delegates voted to exempt both private and public schools from taxation.²³⁰

Arousing even more intense discord among the populace was what the *Rocky Mountain News* termed “the everlasting school fund question.”²³¹ According to one study, the answer to this question put at stake nearly \$9 million of the monies that would initially be available to fund the common schools of the state.²³² In their initial resolution that was sent to the

227. Goodykoontz, *supra* note 3, at 6.

228. Hensel, *supra* note 3, at 186.

229. *Id.* at 183; see also PROCEEDINGS OF THE COLORADO CONSTITUTIONAL CONVENTION, *supra* note 20, at 83, 138, 146, 152; Goodykoontz, *supra* note 3, at 6–8.

230. PROCEEDINGS OF THE COLORADO CONSTITUTIONAL CONVENTION, *supra* note 20, at 547.

231. *Constitutional Convention: The Petitions Still Rolling In*, ROCKY MOUNTAIN NEWS, Feb. 11, 1876, at 3.

232. Goodykoontz, *supra* note 3, at 8. Section 7 of the Enabling Act of Congress provided that sections 16 and 36 of every township surveyed in the territory were to be granted to the state for the support of the common schools. In turn, Section 14 provided that these two sections were not to be sold for less than \$2.50 an acre. By Goodykoontz’s calculation, “[i]f all this land were sold at that minimum price the school fund would be enriched by nearly \$9,000,000.” *Id.* Hensel, however, suggests a more modest figure of \$5 million as a result of much of the public land “being depleted by sale.” Hensel, *supra* note 3, at 189.

Committee on Education in January, the Convention delegates signaled their strong preference for a rigid separation of public as opposed to private, religious schools.²³³ Bishop Joseph P. Machebeuf of the Roman Catholic Church ignited a firestorm when he suggested that Catholics, “as American citizens,” would “oppose any Constitution which shall show such contempt of our most valued rights, both political and religious.”²³⁴ Delegate Jon Hough likewise argued that a ban on private schools receiving public funds would pit the whole Catholic vote in opposition to the constitution.²³⁵ While various denominational orders stood together in the fight to prevent the taxation of private parochial schools and other religious properties, Bishop Machebeauf’s threats aroused a deeper-rooted discord between Protestants and Catholics in the territory, invoking the ire of former Territorial Governor John Evans and several newspapers in the state.²³⁶ Over the course of the convention, “45 petitions were presented to the Convention on this subject. Seven of these, with about 1,100 signatures, asked that the Legislature be left free to divert the school funds; thirty-eight, with over 1,500 names attached, urged that the use of public money for sectarian education be forever prohibited.”²³⁷

For Protestants and, indeed, most Catholics in the constitutional convention, the larger issue was the rigid separation of church and state—almost all seemed to be in agreement that it should exist.²³⁸ The Committee on

233. See *supra* text accompanying note 226.

234. PROCEEDINGS OF THE COLORADO CONSTITUTIONAL CONVENTION, *supra* note 20, at 235 (quoting Jos. P. Machebeauf). To be fair, Bishop Machebeauf was likely rooting his objections in the Enabling Act’s mandate that “perfect toleration of religious sentiment shall be secured.” Enabling Act, § 4, *supra* note 20, at 10. That provision is modified by the following phrase: “[A]nd no inhabitant of said State shall ever be molested in person or property, on account of his or her mode of religious worship” *Id.* Outside of this “freedom of religious exercise” clause, there is nothing in the Enabling Act to suggest that this provision was meant to apply to the funding or public provision of religious schools.

235. *Constitutional Convention*, DENVER DAILY TRIB., Feb. 21, 1876, at 4; *The School Fund and the Constitution*, ROCKY MOUNTAIN NEWS, Feb. 2, 1876, at 4.

236. Hensel, *supra* note 3, at 192.

237. Goodykoontz, *supra* note 3, at 10. That historians would use such precision to note support for and opposition to the prohibition of the school fund is interesting given Chairman Hurd’s “official” declaration that “these petitions for and against such division [of the school fund] contain nearly an equal number of names.” PROCEEDINGS OF THE COLORADO CONSTITUTIONAL CONVENTION, *supra* note 20, at 310 (quoting Daniel Hurd).

238. Hensel, *supra* note 3, at 194–98. But, the Colorado Constitution’s preamble (which has no legal force) nevertheless speaks of the “profound

Education's first draft of what would become the education clause of the constitution adopted almost verbatim as section 7 the initial January 5 referendum's broad-based prohibition against funding private education.²³⁹ Though section 8 of the draft education clause signaled the delegates' concern with religious discrimination by prohibiting any "religious test or qualification" as a "condition of admission into any public educational institution of this State,"²⁴⁰ there was near-unanimous consensus that the proposed constitution retain its ban on granting public funds—in any way, shape, or form—to private institutions.²⁴¹ When the final education clause was submitted to the Committee of the Whole, section 7 of article IX remained virtually unchanged from its original draft.²⁴²

B. A Right That Is as Broad as Colorado's Boundless Prairies and as High as Its Snowcapped Peaks

The public consternation caused by the school funding controversy overshadowed three important developments in the evolution of the education clause during the convention. First and most remarkable was the Committee on Education's expansion of section 8. Whereas the section was originally written to forbid religious discrimination in the state's public schools,²⁴³ by February 14, 1876, the Committee on Education expanded its scope to prohibit not only religious discrimination

reverence for the Supreme Ruler of the Universe." COLO. CONST. pml. In this sense, Colorado's constitution, like the sixty-two state constitutions written between 1840–1900, "revealed an evangelical characteristic of Christianity, not present when states wrote constitutions" earlier in the nineteenth century. Hensel, *supra* note 3, at 202.

239. PROCEEDINGS OF THE COLORADO CONSTITUTIONAL CONVENTION, *supra* note 20, at 186. It is also important to note that the Colorado Teachers' Association resolved in its parallel meeting that the convention adopt article VIII, § 3 of the Illinois Constitution that banned the public funding of private schools. HALE, *supra* note 5, at 38. According to Hensel, "[w]ith one very minor exception the Colorado provision, Article IX, section 7, is identical to the provision the Colorado teachers favored." That provision was also part of the initial draft resolution sent to the Committee on Education. Hensel, *supra* note 3, at 195 n.40.

240. PROCEEDINGS OF THE COLORADO CONSTITUTIONAL CONVENTION, *supra* note 20, at 361.

241. Hensel, *supra* note 3, at 195; see also ROCKY MOUNTAIN NEWS, Feb. 13, 1876.

242. PROCEEDINGS OF THE COLORADO CONSTITUTIONAL CONVENTION, *supra* note 20, at 361.

243. *Id.* at 186.

but “any distinction or classification of pupils . . . on account of race or color.”²⁴⁴

The education clause, like the school funding clause, remained unchanged throughout the remainder of the convention. Unlike the school funding issue, however, this provision provoked neither debate nor mass citizen commentary, largely because such a provision was a requirement of the 1875 Enabling Act.²⁴⁵ Moreover, the explicit antidiscrimination provisions of the Enabling Act and its inclusion in article IX suggested that the Framers understood the entire education clause of the Colorado Constitution to be a civil right.²⁴⁶ With the clause’s adoption during the convention, the delegates rejected soundly the territorial urge for *de jure* segregation. Educators in the state wholeheartedly endorsed the antiracism provisions, as most generally agreed that “a proper school system” should be available to “all our children and youth, of whatever rank, race or sect.”²⁴⁷

Racial animosities, however, lingered under the surface. Most prominent was the recognition by many that Colorado’s territorial system of education “is practically inoperative among a large portion of the Spanish speaking people of Southern Colorado.”²⁴⁸ For this reason, Colorado’s educators endorsed provisions that the Spanish language not only be taught in the public schools but that a “compendium” be published in Spanish as well.²⁴⁹ This issue came to a head during the constitutional convention in the heated discussion over what became article XVIII, section 8’s mandate to print all laws of the state in Spanish and German until 1900. In the debate over the precise wording and application of this clause,

244. *Id.* at 318, 353.

245. Enabling Act, § 4, *supra* note 20, at 10 (“[T]he constitution shall . . . make no distinction in civil or political rights on account of race or color, except Indians not taxed . . .”).

246. See *id.* The question about whether the state’s education clause, like other education clauses adopted by other states, is a civil, political, or fundamental right is generally explored and put into context by Professor Eastman, *supra* note 60. The fact that Colorado’s Enabling Act mandated an explicit nondiscrimination principle for all parts of the constitution relating to civil or political rights suggests an answer to the question that Eastman poses in his article of whether “free public education is a right and privilege the State governments are [judicially] bound to respect.” *Id.* at 33. If nothing else, it indicates the importance of reading education clauses of state constitutions in relation to such documents as a state’s enabling act or other national and contextual legislation.

247. HALE, *supra* note 5, at 38–39.

248. *Id.* at 39.

249. *Id.*

one delegate proposed an amendment that translations be constitutionally required, specifically for the reports produced by the Superintendent of Public Instruction.²⁵⁰ The defeat of this amendment and resistance to acknowledging the multiracial and multicultural reality of the state, however, would foreshadow more contemporary concerns about foreigners, assimilation, and integration of the state and nation.²⁵¹

The second development was the fairly rapid shift in identifying the broad constitutional mandate for public schools from one that was “thorough and efficient” to one that was “thorough and uniform” in its operation.²⁵² In the first weeks of the convention, Committee on Education member and Delegate Byron L. Carr congratulated the constitutional convention for beginning the process of establishing a “thorough and efficient system of popular education, whereby every child and youth of this vast commonwealth shall receive regular and free instruction.”²⁵³ Carr noted, in particular, that the education clause his committee and fellow delegates drafted would work “to erect a superstructure upon a solid and lasting foundation, . . . a system of education as high as our snow capped mountains, as broad as our boundless prairies, . . . and as free to all as the air of heaven.”²⁵⁴

A few weeks later, the Committee on Education submitted its report to the Committee of the Whole on January 29, and at that time, article IX, section 2 read, “[t]he General Assembly shall, as soon as practicable, after the adoption of this Constitution, provide for the establishment and maintenance of a *thorough and uniform* system of free public schools

250. PROCEEDINGS OF THE COLORADO CONSTITUTIONAL CONVENTION, *supra* note 20, at 283.

251. See Hensel, *supra* note 3, at 214–15. For an assessment of the legal meaning of race and color, see Tom I. Romero, II, *¿La Raza Latina?: Multiracial Ambivalence, Color Denial, and the Emergence of a Tri-Ethnic Jurisprudence at the End of the Twentieth Century*, 37 N.M. L. REV. 245, 249–54, 273 & nn.193–94 (2007).

252. Prior to the Colorado Constitutional Convention, the constitutions of Illinois, Minnesota, Nebraska, New Jersey, Ohio, and West Virginia included the terms “thorough and efficient” in their education clauses. See ILL. CONST. of 1870, art. VIII, § 1; MINN. CONST. of 1857, art. VIII, § 3; NEB. CONST. of 1866, art. VII, § 1; N.J. CONST. of 1844, art. IV, § 7; OHIO CONST. of 1851, art. VI, § 2; W. VA. CONST. of 1861, art. X, § 2.

253. *The Banquet*, Scrapbook of Daniel Hurd, Scrapbook of Newspaper Clippings (newspapers unidentified) (1868–1952) (Denver Public Library, W. History Collection).

254. *Id.*

throughout the State.”²⁵⁵ Less than a month later, on February 19, the convention considered and adopted this language.²⁵⁶ With almost no comment, Colorado became the first state in the Union to constitutionally mandate a system that was both “thorough” and “uniform” in its operation. To give further effect to this requirement, article IX, section 2 required that one or more schools be maintained in each school district.²⁵⁷ While other state constitutions included terms such as “thorough and efficient” to describe the state’s constitutional guarantee to education, the rejection of the particular term “efficient” from the initial draft indicates that Colorado’s constitutional delegates understood the state’s constitutional duty to be more than a matter of bureaucratic administration or centralization. To be sure, this was an issue addressed largely in other sections of the education clause.²⁵⁸ Rather, “thorough and uniform” suggested a qualitative element in the state’s education clause that continued a course of action that had animated the region from almost the inception of its territorial days.²⁵⁹

The third and related development was the commitment to local control that became sections 15 and 16 of article IX in the final constitution. While the official proceedings of the constitutional convention do not report any controversy about these provisions, tension underlying their drafting certainly existed. For instance, on February 12, the *Denver Daily Times* included excerpts from the debate over the statewide adoption of uniform textbooks. William Bromwell contended “that the schoolbook question was a mine of bribery and corruption, and should be taken entirely out of politics, and put as near the people as possible.”²⁶⁰ Bryon Carr concurred and argued “that every school district should adopt whatever text books it desired, particularly as the teachers’ institutes generally discussed those matters pretty thoroughly.”²⁶¹ Another

255. PROCEEDINGS OF THE COLORADO CONSTITUTIONAL CONVENTION, *supra* note 20, at 185 (emphasis added).

256. *Id.* at 354, 360.

257. COLO. CONST. art. IX, § 2.

258. See, e.g., *id.* § 1 (creating a state board of education); *id.* § 16 (prohibiting the state board of education from prescribing textbooks).

259. See HOUSE JOURNAL OF TERRITORIAL ASSEMBLY, *supra* note 172, at 10; see also *supra* text accompanying notes 172–73.

260. *Constitutional Convention*, DENVER DAILY TIMES, Feb. 12, 1876, at 1.

261. *Id.* Another delegate argued that “allowing the state board to control text book selection would create a system ‘whereby school officers could line their pockets with money derived from the taxes of the people.’” Owens v. Colo. Cong.

delegate argued that the proposed draft of article IX, section 1 “gave the [State] Board the direction of the schools, therefore making the whole thing a political affair; there ought to be no possibility of a suspicion that politics should run the schools of the territory.”²⁶² Ultimately, the delegates chose to confer responsibility for instruction and curriculum (including textbooks) on the local school districts while entrusting the state board of education with “general supervision” of the public schools.²⁶³

With its final adoption of the local control provisions, Colorado became only the second state, after Kansas, with an express constitutional local control requirement.²⁶⁴ Together, these two provisions ensured for district-wide autonomy over the content of education delivered to a school district’s students. Given Colorado’s territorial experience with local control, this was no small leap of faith.²⁶⁵ And so it was that, as article IX was initially drafted, it vested responsibility for the selection of content for public school instruction, including textbook selection, in the state board of education.

Article IX emerged out of a contentious and sometimes colorful history over the meaning of scope of education to Colorado’s pioneers. While the historical records around the convention itself only provide a small and often unreported sample of this history,²⁶⁶ it nevertheless highlighted the place that education would have for the new State. The Colorado Constitution, like most of its mid-nineteenth-century predecessors, was adopted in an atmosphere of deep distrust of

of Parents, Teachers & Students, 92 P.3d 933, 938 (Colo. 2004) (quoting *The Constitutional Convention*, DENVER DAILY TRIB., Feb. 14, 1876). The delegate insisted that “the best way to avoid such corruption was to distribute decision making authority ‘to as small a degree as possible, and bring it home to each district. It should be left to the people at home.’ *Id.* at 939 (quoting *The Constitutional Convention*, *supra*).

262. *Owens*, 92 P.3d at 938 (alteration in original) (quoting *The Constitutional Convention*, *supra* note 261).

263. *Id.* at 939 (citing COLO. CONST. art. IX, §§ 1, 15, 16).

264. See KAN. CONST. art. VI, § 5 (providing that local public schools “shall be maintained, developed and operated by locally elected boards”).

265. See *supra* notes 194–203 and accompanying text.

266. Because of the paucity of original sources pertaining to education in the convention, most of the secondary material on the constitutional convention neglects the subject of education entirely. In addition to the sources that I have cited *supra* notes 3 and 7, reference was made in E.T. Wells, *State Constitutional Convention, in LEGISLATIVE, HISTORICAL AND BIOGRAPHICAL COMPENDIUM OF COLORADO* 147 (C.F. Coleman ed., Denver, 1887), and H.P.H. Bromwell, *Constitutional Convention, in 2 HISTORY OF THE STATE OF COLORADO*, 288 (Frank Hall ed., Chicago, Blakely Prtg. Co. 1890).

centralized authority.²⁶⁷ For this reason, much of the document reflects the “assiduous” precision by which delegates “wrote provisions that took away much of [the General Assembly’s] discretionary authority.”²⁶⁸ There is no doubt that this distrust of state government animated the shape and form of the school fund and local control provisions of article IX.

Yet the totality of the education clause, also like its mid-nineteenth-century predecessors, reflected a substantively more positivist vision of the state educational guarantee for public education. In its sixteen sections, article IX of the Colorado Constitution provided for a state board of education as well as a superintendent of public instruction; it ensured the creation and maintenance of a school fund that would help to get public schools in every county started; it included a principle of nondiscrimination; and it put into place the components that would allow the state to have a distinguished university.²⁶⁹ Perhaps most significantly, Colorado became the first state to commit itself to provide an education that was “thorough and uniform” both in its design and substantive scope. More important than the gold of its mountains, the education clause of the Colorado Constitution provided the state the opportunity, or so the founders hoped, to build a system that matched the peaks and prairies that had made it such a desirable place to live.

IV. THE MEANING OF EDUCATION IN COLORADO’S POST-CONSTITUTIONAL SCHOOL LAWS

The hopes undergirding article IX were carried over into the first session of the Colorado General Assembly. In 1877, the general assembly sought to operationalize many of the provisions of article IX by passing “An Act to Establish and Maintain a System of Free Schools.”²⁷⁰ Based in large measure

267. Tyack & James, *supra* note 61, at 50–53.

268. OESTERLE & COLLINS, *supra* note 3, at 2. Professors Oesterle and Collins point out that that constitution drafted in 1876 was designed to “protect citizens from legislative misbehavior.” *Id.* at 1. One study argues that the educational clauses, along with other “social clauses” in the Colorado Constitution, “were more relentlessly written than either their political or economic counterparts.” Hensel, *supra* note 3, at 215–16 (emphasis added).

269. See COLO. CONST. art. IX, §§ 1–3, 8, 12–14.

270. Act to Establish and Maintain a System of Free Schools, ch. 92, 1877 Colo. Gen. Laws 807.

upon the 1876 territorial law, the Act had some important additions.

First, it created a state board of education in sections 2 through 6.²⁷¹ In addition, the law also gave county superintendents much more direct supervisory authority over the schools. Section 15 granted them the authority to examine teacher qualifications and issue teaching certificates.²⁷² Section 16 further required that the superintendents issue first-, second-, and third-grade certificates based on applicants' performance. Section 20 required county superintendents to maintain "careful supervision" of their district schools and required that they visit each school in a district once a term to see that there was compliance with the school law.²⁷³

Despite the increased responsibility granted to both state and county superintendents, much authority still remained with locally elected school boards.²⁷⁴ Under section 50, the legislature authorized and required the school boards to employ and fix salaries of teachers; fix the course of study, exercises, and textbooks; determine how many teachers to hire; determine how many months (beyond three) should be in the school year; set the beginning and end of the school day; provide books for indigent children; and exclude sectarian tracts from the curriculum and libraries.²⁷⁵ Section 51 gave authority to the school boards to determine the expediency of opening a high school; provide for the teaching of the subjects enumerated in section 15; decide upon the number of schools; and, crucially, determine the amount of additional revenue to be raised by special taxation if a district was willing to fund beyond its original appropriation.²⁷⁶

In the ten years following the ratification of the Colorado Constitution, the general assembly made very few major amendments to the school law. A notable exception occurred in 1881, when the legislature amended section 8 of the public school law so that county superintendents were no longer

271. *Id.* at 807–08.

272. *Id.* at 811–12.

273. *Id.* at 813.

274. Much of the school law was procedural, and most of sections 25–50 pertained to specifics regarding the process of forming districts and electing school boards. *See id.* at 814–23.

275. *Id.* at 823–25.

276. *Id.* at 825.

allowed to examine teachers with their own questions.²⁷⁷ Instead, the legislature required the state superintendent to prepare “uniform” exams.²⁷⁸ In 1887, the legislature amended section 64 of the school act so that county commissioners could only levy a tax between two and five mills for the support of schools.²⁷⁹

From 1870 thereon, the school law mandated that every state superintendent make a biennial report on the condition of the public schools.²⁸⁰ The basic statistics, which collected a vast swath of comparative data—such as aggregate attendance, teacher-student ratios, average number of school days, and aggregate school taxes from every county—paint an informative picture of the actual uniformity of Colorado’s public schools in the 1870s.

The effects of the law were evident fairly rapidly. Most apparent was the fact that every county in the state elected a superintendent of public instruction within months of the 1877 law’s passage.²⁸¹ In turn, the state built upon its territorial precedent to support 313 school districts and 219 schoolhouses and educate greater than sixty percent of the children who were eligible for public education within two years of the law’s passage.²⁸² Nevertheless, building a “thorough and uniform” system that simultaneously respected local autonomy and control had its many challenges.

First, and not surprisingly, was the issue of effectively funding a statewide public education system. With article IX and the constitutional debates decisively settling the question of whether public funds should be used for private schools, there was still the question of how to provide all of the resources that a public school needed. As Shattuck made clear in his 1881 report, “[o]ur entire free school system is based on two ideas; first that property must support the schools, and next, that these schools shall be so planted and managed as to afford, as nearly as possible, equal advantages to *all* people

277. Act to Establish and Maintain a System of Free Schools, ch. 92, sec. 8, § 3, 1881 Colo. Sess. Laws 211, 212.

278. *Id.*

279. Schools, ch. 97, sec. 64, § 28, 1887 Colo. Sess. Laws 379, 398.

280. GENERAL LAWS, JOINT RESOLUTIONS, MEMORIALS, AND PRIVATE ACTS PASSED AT THE EIGHTH SESSION OF THE LEGISLATIVE ASSEMBLY OF THE TERRITORY OF COLORADO 95–96 (1870).

281. See SHATTUCK, *supra* note 201, at 28 (listing the school superintendent for each county).

282. *Id.* at 32–33 tbl.II, 36–37 tbl.IV.

. . . .”²⁸³ The fact of the matter, at least from Shattuck’s perspective, was that schools were inequitably funded. Of immediate concern was the mill levy. As local school districts attempted to raise revenue after statehood, counties kept their taxes low, and wealthier districts then levied their own higher taxes to support the public school districts that were formed. The superintendents’ reports are revealing in this regard. Whereas Elbert County, for instance, collected about \$38 per student, La Plata County collected less than \$2 per student.²⁸⁴

The impact of this, moreover, was understood to have more than just economic ramifications. Shattuck, for instance, quoted liberally from a letter he received from the superintendent of public instruction for Costilla County. In his letter, the Costilla County superintendent questioned the state’s funding scheme:

Cannot the State do something to assist the Mexican people, who strain every nerve to have imparted to their children . . . such knowledge as can be procured by the scanty means of county taxes . . . and perhaps a special tax; the latter a burden hardly to be borne by the impoverished half-starved people . . . ?²⁸⁵

Costilla County, to be sure, expended considerably less per student than other counties and had attendance rates well below the state average.²⁸⁶

In 1878, Superintendent Shattuck proposed that the law be changed so that county commissioners would be required to levy a tax of at least four mills. He argued that doing so would “distribute educational expenses more equitably upon all taxable property, strengthen weak districts, and *not increase the burdens of the people as a whole.*”²⁸⁷ Shattuck, in fact, indicated that increasing the taxation rate would particularly aid poorer counties with significant Latino populations where, because of circumstance, the people could not afford to levy a

283. JOSEPH SHATTUCK, SECOND BIENNIAL REPORT OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF COLORADO, FOR THE YEARS ENDING AUGUST 31, 1879, AND AUGUST 31, 1880, at 44 (Denver, Tribune Publ’g Co. 1881) (emphasis added).

284. See SHATTUCK, *supra* note 201, at 32–33 tbl.II, 38–39 tbl.V.

285. *Id.* at 24–25 (quoting Costilla County Superintendent Charles John).

286. Specifically, Costilla County spent less than \$8 per student, see SHATTUCK, *supra* note 283, at 126 tbl.IV, 130 tbl.VII, and achieved an attendance rate of only 40%, *see id.* at 125–26 tbls.III & IV.

287. SHATTUCK, *supra* note 201, at 13.

special tax. In making this argument, Shattuck hoped that a more comprehensive funding scheme would better equalize the support of schools upon all classes of property and render a special tax unnecessary.²⁸⁸ Despite Shattuck's assessment, the general assembly in the formative years of the state kept this system intact.²⁸⁹

Second, Superintendent Shattuck's reports also highlight the early emergence of state standards in education and the tensions they produced. One of Shattuck's first tasks as state superintendent of public instruction was to issue a statewide teacher examination that covered subjects mandated by the school law. Though he did not require county superintendents to deploy this exam, he argued that his exam would ensure some degree of consistency in the education offered by the state.²⁹⁰ In his second biennial report, he argued that experience proved that his "examinations, uniform in questions and in methods, are in every way superior to those having as many processes and grades as there are counties."²⁹¹

288. *Id.* at 10–11.

289. *Id.* at 13. Until 1935, Colorado financed its public schools through locally levied property taxes and state contributions. See Burton K. Chambers, *The Colorado Centennial of Public School Finance: A One-Hundred Year History* (Dec. 3, 1976) (unpublished Ph.D. dissertation, University of Colorado) (on file with author). The state's contribution was initially limited to the revenue generated through the interest, rentals, and leases on the state-owned school lands as detailed in article IX, section 3 of the Colorado Constitution. In 1935, the first direct state support of local school districts was enacted. It was challenged and found to be constitutional in *Wilmore v. Annear*, 65 P.2d 1433 (Colo. 1937). Since that time, a combination of local property tax levies and direct state contributions has been the principal source of financial support for public schools in the state, though with significant modifications. For instance, in 1952, the general assembly passed the first Public School Finance Act after a legislative report detailed systemic financial inequity among the school districts in the state. See COLO. LEGIS. COUNCIL, STATE AID TO SCHOOLS IN COLORADO, Gen. Assemb. 46-117 (1966). The Act provided each school district with an equalization "support level" or set amount of money for each district in each calendar year. *Id.* Twenty years later, in response to criticism that the Act failed to eliminate the spending disparities among the school districts, the general assembly enacted the Public School Finance Act of 1973, Colo. Rev. Stat. §§ 22-50-101 to -105 (1973) (repealed 1989) [hereinafter PSFA], giving the general assembly power to supplement poorer property districts with state subsidies. Its constitutionality was affirmed in *Lujan v. Colorado State Board of Education*, 649 P.2d 1005, 1011 (Colo. 1982). The PSFA has subsequently been amended several times since this time. See *Lobato v. State*, 218 P.3d 358, 364–66 (Colo. 2009). In addition, Colorado voters in 2000 adopted Amendment 23, prescribing minimum increases for state funding of education. See COLO. CONST. art. IX, § 17.

290. See SHATTUCK, *supra* note 283, at 29.

291. *Id.*

Similarly, Shattuck advocated for a uniform course of study in Colorado's many ungraded schools. Largely because these schools tended to attract teachers who had no formal training in education and thus featured high turnover, Shattuck hoped that such a curriculum would ameliorate weaknesses in a system that was neither thorough nor uniform.²⁹² Though he contended that he was merely trying to aid County Superintendents and local school districts and not "control" them,²⁹³ his enthusiasm nevertheless pointed to the enduring tension between the state and its local governments over the content, meaning, and quality of education.

By 1880, the foundation for a "thorough and uniform" system of education in Colorado had been laid. From the time article IX was adopted, the general assembly, the state superintendent of public instruction, and local educational bureaucrats all struggled with questions about how schools would be financed and maintained, the inequitable distribution of resources to multiracial public schools, and the wisdom of state standards in relation to the needs and capacities of local communities.²⁹⁴ More than a century of school laws, jurisprudence, constitutional amendments, and changes in demography and pedagogy have created a modern system of public education operating in response to the challenges of our contemporary age that would make Colorado's constitutionally required system of public education scarcely recognizable to its founders.²⁹⁵ Nonetheless, even in its formative stages in the nineteenth century, it was a system that was rapidly besieged by problems that continue to this very day.

292. See *id.* at 33–38.

293. See *id.*

294. The early decades of schooling in each Colorado county is recounted in 1 HISTORY OF COLORADO 588–602 (Wilbur Fisk Stone ed., 1918).

295. The basic numbers tell a vivid story. As of the 2009–10 academic school year, 832,368 students attended public schools in 182 School Districts comprising 1792 schools. These schools served a student body that was 61% White, 29% Latino, 6% Black, 4% Asian-Pacific Islander, and 1% American Indian. Of these students, nearly 40% are economically disadvantaged, while approximately one in ten has limited English proficiency or a documented disability. *2011 Summer EDFacts: State Trends Profile—Colorado*, COLO. DEPT. EDUC., <http://www.schoolview.org/documents/2011StateProfile.pdf> (last visited Apr. 7, 2012). This has created dramatic differences in how schools are funded, experimentation in charter and magnet schools, struggles to meet the needs of individual students through Individual Education Plans, and the challenges of meeting both state and federal mandates, such as No Child Left Behind.

CONCLUSION

Article IX, the education clause of the Colorado Constitution, was firmly rooted in the nineteenth-century movement to provide public schools for a rapidly changing Untied States. Not merely a check upon burgeoning and suspect administrative power of state government and its legislative assemblies, the education clause in Colorado's 1876 Constitution, like so many other clauses that existed in other state constitutions, reflected the hopes, aspirations, and sensibilities of providing a substantive and meaningful education that would benefit the nation's future citizens, workers, mothers, and fathers. While Colorado's struggle for public education mirrored efforts of other territories and states, it also provided unique innovations that created its own set of challenges for the future. Particularly in attempting to balance the pursuit of a "thorough *and* uniform" system of public education in relation to the distinct needs and concerns of students, parents, and educators in local school districts with vastly disparate resources and abilities, article IX provided a dynamic framework for the future. Without a doubt, this balance is the core issue at the center of both the *Lobato* school financing and *Larue* school choice suits.²⁹⁶

As Colorado courts provide guidance to the legislature, school administrators, parents, and voters about what the appropriate legal balance should be, we should recall why understanding both the context and spirit of the drafting of article IX in 1876 is and should remain important. The delegates who crafted the Colorado Constitution believed that it would enable the state to be a leader in a rapidly changing United States. The education clause was central to this vision by making a positive and forward-looking constitutional commitment to public education in the state. Article IX was not merely a check on state government nor a hortatory constitutional commitment to "thorough and uniform" public schools. Rather, its prominence in the Colorado Constitution indicates that it was designed to empower students, parents, and educators to grow the State and achieve success in the world they encountered. By making public education both a constitutional commitment and a right to be enjoyed by residents of the state, the delegates to the Colorado

296. See *supra* notes 22–43 and accompanying text.

Constitutional Convention also suggested the corresponding duty of courts to give legal meaning to its scope and application. Given all the challenges that faced the state's pioneer founders, the task of educating students across widely disparate landscapes, abilities, and resources was likely viewed with the same determination and ingenuity required to cross the state's treacherous mountain peaks or making whole communities grow in a semi-arid state.²⁹⁷

The pursuit for innovative and substantive commitments to public education animated Colorado lawmakers almost from the erection of the very first school house. Since its inception as a territory, Colorado was one of the first states to attempt to balance a system of public schools that was "thorough and uniform" while at the same time recognizing important differences in funding, temperament, culture, and ability between local districts. First as a territory and then as a new state, Colorado's early inhabitants who drafted its constitutions, wrote its laws, and enacted its provisions recognized the centrality of statewide public education to engaged citizenship and social—as well as economic—opportunity among a diverse and disparate student body. That commitment rings just as true today, as when Colorado's pioneers discovered gold in its snowcapped peaks and, in turn, chose to make the state's boundless prairies, mountains, and deserts home.

297. Here I am reminded of the innovation shown in the protection of the right to prior appropriation guaranteed in the Colorado Constitution. COLO. CONST. art. XVI, § 7. See generally Gregory J. Hobbs, Jr., *Colorado Water Law: An Historical Overview*, 1 U. DENV. WATER L. REV. 1 (1997); Tom I. Romero, II, *Uncertain Waters and Contested Lands: Excavating the Layers of Colorado's Legal Past*, 73 U. COLO. L. REV. 521, 532–40 (2002). While it is well beyond the scope of this Article, the complex jurisprudence surrounding article XVI, including the organization of water courts and water commissioners in the state, suggest the critical role that courts have played in identifying, detailing, and protecting the constitutional right. Water, like education, was understood by the state's founders as essential to Colorado's growth and development. See *id.* at 537–40; see also Coffin v. Left Hand Ditch Co., 6 Colo. 443, 446–47 (1882).