When Did Education Become a Civil Right? An Assessment of State Constitutional Provisions for Education, 1776-1900

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by JOHN C. EASTMAN

I. INTRODUCTION

In the landmark school desegregation case of Brown v. Board of Education, Chief Justice Earl Warren, writing for a unanimous court, stated:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.2

Because of the importance of education, the Court ruled that the inequality inherent in segregated schools deprived minority children of equal educational opportunities, and was therefore a violation of the Equal Protection Clause of the Fourteenth Amendment.

Yet, in a series of per curiam decisions handed down shortly after Brown, the Court struck down segregation in a number of other contexts in which the fundamental importance of education was not at issue. In Mayor and City Council of Baltimore City v. Dawson,3 the Court summarily affirmed the judgment of the Fourth Circuit Court of Appeals invalidating a law segregating public beaches and bathhouses; in Holmes v. City of Atlanta,4 the Court summarily invalidated segregation in the use of a municipal golf course; and in Gayle v. Browder,5 the Court summari-


5. 352 U.S. 903 (1956).
ly affirmed a district court’s invalidation of a municipal law requiring segregation on city buses, merely citing to Brown for its rationale. These cases indicate that it was not the importance of education that was really at issue in Brown, but rather the fundamental inequality inherent in state-supported segregation. Education was just the most obvious embodiment of segregation’s inequality, and thus logically, though certainly not politically, the easiest case on which to rest such an important judicial decision as the invalidation of segregation.

Nearly twenty years later, the Court did address whether education was a fundamental right, this time in the context of the strict scrutiny apparatus it had developed in dealing with Fourteenth Amendment equal protection claims. In San Antonio Independent School Dist. v. Rodriguez, the Court expressly ruled that education was not a fundamental right because it was nowhere to be found, either directly or indirectly, in the federal Constitution. In effect, the Rodriguez court took a position similar to the holding in the Slaughter-House Cases. The right to education is not protected by the fundamental rights wing of strict scrutiny analysis because the right to education, if there be such a right, is a right, privilege or immunity of state citizenship and not of national citizenship.

If one applies the Rodriguez test to the States, one must conclude, at least on first glance, that education is a fundamental right so far as the States are concerned because the constitutions of each of the fifty States have provisions requiring the support of education in some manner. Closer scrutiny does not support this understanding, however, as public interest lawyers seeking to vindicate a “right” to a quality education are beginning to discover. Only recently have a few state courts held that the constitutional provisions supporting education were mandatory upon the legislature and, perhaps more important, enforceable by their intended beneficiaries. The overwhelming majority of States, even today, have not allowed such enforcement actions. To more fully appreciate the status of a right to education, by which I mean a right to state-financed education, a review of the State constitutional provisions for education is in order. This article traces the development of such provisions from the beginning of the republic to the twentieth century, and seeks to provide an analytical and historical context within which the current state of “right to a quality education” litigation can be placed.

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7. 83 U.S. (16 Wall.) 36 (1873).
9. See id. passim.
II. THE EARLY STATE CONSTITUTIONS: 1776-1800

Between 1776 and 1787, eleven of the original thirteen States adopted new constitutions, but only five of these mention education. The provisions, which deal with the full spectrum of formal education from elementary schools to universities, are general rather than specific in nature, and very little debate over the provisions is to be found in the recorded minutes of the State constitutional conventions. No explicit provision is made for education in any of the remaining thirteen original States, and by the turn of the century only one more of the original thirteen States, plus newly-admitted Vermont, had added educational provisions. Of these, only Pennsylvania's Constitution of 1790 contained explicit support for free education.

All told, of the twenty-five constitutions adopted or revised between 1776 and 1800, only twelve contain education provisions, and these represent only seven States of the then sixteen States in the Union. No education provisions are found contained in the State constitutions of Connecticut, Rhode Island, New York, New Jersey, Maryland, Virginia, South Carolina, Kentucky, and Tennessee.

A. The Hortatory Provisions

The twelve provisions enacted during this period are of two kinds—those that are clearly hortatory, on the one hand, and those that at least appear to require legislative action, on the other. The Massachusetts Constitution of 1780 provides the first example of a hortatory provision:

Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it


11. Connecticut and Rhode Island continued to operate under their colonial charters after deleting all references to the British King.

12. Pennsylvania (1776), North Carolina (1776), Georgia (1777), Massachusetts (1780), and New Hampshire (1784). New Hampshire's Constitution of 1776 contained no provision for education. The State constitutional provisions referenced in this article are drawn from The Federal and State Constitutions (Francis N. Thorpe ed., 1909).


15. Pennsylvania (1776 and 1790); North Carolina (1776); Georgia (1777 and 1798); Massachusetts (1780); New Hampshire (1784 and 1792); Vermont (1777, 1786, and 1793); and Delaware (1792).
shall be the duty of legislators and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools, and grammar schools in the towns; to encourage private societies and public institutions, rewards and immunities, for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and a natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, good humor, and all social affections, and generous sentiments, among the people.\footnote{16}

Save for a mid-nineteenth century amendment barring State aid to sectarian institutions,\footnote{17} this Massachusetts provision remains applicable today. Accordingly, a thorough review of its origin is in order.

After the first attempt to adopt a constitution in 1778 was rejected (in part because the constitution had not been drafted by a special convention),\footnote{18} a constitutional convention of delegates elected expressly for the purpose of drafting a constitution met at Cambridge on September 1, 1779.\footnote{19} The convention adjourned after only a week, having delegated the task of writing a draft constitution to a committee of thirty.\footnote{20} The committee further delegated the task to a subcommittee of three—comprised of convention president James Bowdoin, Samuel Adams, and John Adams—which in turn commissioned John Adams to prepare a draft.\footnote{21}

The draft of a new constitution which the committee of thirty reported to the convention contained many of the features of the rejected Constitution of 1778,\footnote{22} but with the addition of a declaration of rights and the above-quoted chapter on education. As described above, the report of the committee appears to have been largely the work of John Adams. Adams himself, in an 1812 account, wrote that his fellow subcommittee members only changed one inconsequential line.\footnote{23} While others have laid

\footnotesize{\begin{itemize}
\item Gregg L. Lint et al., \textit{Editorial Note, in 8 Papers of John Adams} 229 (Gregg L. Lint et al. eds., 1989).
\item The convention actually authorized a committee of thirty-one—twenty-seven from the various towns and counties throughout the state, and four at large. No delegate was in attendance, however, from the island counties of Nantucket and Duke. \textit{Id.} at 230.
\item 3 \textit{William V. Wells, The Life and Public Services of Samuel Adams} 85 n.1 (Boston, Little, Brown & Co. 1865).
\item Lint, \textit{in 8 Papers of John Adams}, \textit{supra} note 19, at 230.
\end{itemize}}
claim to the drafting of some parts of the constitution, there seems to be no doubt that the education provision quoted above is the work of John Adams.24

On January 27, the education chapter was taken up by the convention. As the journal of the convention records, the education provision was "read, . . . and accepted, without amendment."25 With no debate over the provision, our best source as to the intended purpose is the author himself, but even that proves a scarce resource. John Adams' diary, meticulously kept throughout his years of public service, is devoid of any entry during his attendance at the convention.26 We do have a non-contemporaneous description of the provision's origin from John Adams in 1809, however. Because it is the only source of information available regarding the purpose of the education provision, I cite at length:

In travelling from Boston to Philadelphia, in 1774, 5, 6, and 7, I had several times amused myself, at Norwalk in Connecticut, with the very curious collection of birds and insects of American production made by Mr. Arnold; a collection which he afterwards sold to Governor Tryon, who sold it to Sir Ashton Lever, in whose apartments in London I afterwards viewed it again. This collection was so singular a thing that it made a deep impression upon me, and I could not but consider it a reproach to my country, that so little was known, even to herself, of her natural history.

When I was in Europe, in the years 1778 and 1779, in the commission to the King of France, with Dr. Franklin and Mr. Arthur Lee, I had opportunities to see the king's collections and many others, which increased my wishes that nature might be examined and studied in my own country, as it was in others. In France, among the academicians, and other men of science and letters, I was frequently entertained with inquiries concerning the Philosophical Society of Philadelphia, and with eulogiums on the wisdom of that institution, and encomiums on some publications in their transactions. These conversations suggested to me the idea of such an establishment at Boston, where I knew there was as much love of science, and as many gentlemen who were capable of pursuing it, as in any other city of its size.

In 1779, I returned to Boston in the French frigate La Sensible, with the Chevalier de la Luzerne and M. Marbois. The corporation of Harvard College

24. Lint, et al., discuss the matter at length in id. at 271 n.138:

Although he does not mention it, [John Adams] may also have been encouraged to include this section [Encouragement of Learning] in his draft by a passage in Pennsylvania's constitution, which he had found so useful as a guide in listing the fundamental rights of all citizens. That document, in Sect. 44, not only called for the establishment of schools in each county but added "all useful learning shall be duly encouraged and promoted in one or more universities." Coincidentally, the General Court on 28 May 1779 had appointed a five-man committee, composed of Robert Treat Paine, John Pickering, Col. Loammi Baldwin, Theophilus Parsons, and Samuel Phillips Jr., to prepare a resolve "for the encouragement of learning in this State" (Mass., House Jour., 1779-1780, 1st sess., p. 10). Although no report appears to have been made, all of these legislators except Baldwin were later members of the convention, and Paine, Parsons, and Phillips were members of the committee of thirty assigned to draft the constitution. These possible influences in no way detract from JA's enlightened conception of government's positive role in promoting the intellectual, cultural, and technological advancement and well-being of its people, a conception that his son, as president, took for his own.


gave a public dinner in honor of the French ambassador and his suite, and did me the honor of an invitation to dine with them. At table, in the Philosophy Chamber, I chanced to sit next to Dr. Cooper. I entertained him during the whole of the time we were together, with an account of Arnold's collections, the collections I had seen in Europe, the compliments I had heard in France upon the Philosophical Society at Philadelphia, and concluded with proposing that the future legislature of Massachusetts should institute an academy of arts and sciences.

The doctor at first hesitated, thought it would be difficult to find members who would attend to it; but his principal objection was, that it would injure Harvard College, by setting up a rival to it that might draw the attention and affections of the public in some degree from it. To this I answered,—first, that there were certainly men of learning enough that might compose a society sufficiently numerous; and secondly, that instead of being a rival to the university, it would be an honor and advantage to it. That the president and principal professors would no doubt be always members of it; and the meetings might be ordered, wholly or in part, at the college and in that room. The doctor at length appeared better satisfied; and I entreated him to propagate the idea and the plan, as far and as soon as his discretion would justify. The doctor accordingly did diffuse the project so judiciously and effectually, that the first legislature under the new constitution adopted and established it by law.

Afterwards, when attending the convention for forming the constitution, I mentioned the subject to several of the members, and when I was appointed by the sub-committee to make a draught of a project of a constitution, to be laid before the convention, my mind and heart were so full of this subject, that I inserted the chapter fifth, section second.27

I was somewhat apprehensive that criticism and objections would be made to the section, and particularly that the 'natural history,' and the 'good humor,' would be stricken out; but the whole was received very kindly, and passed the convention unanimously, without amendment.28

In its first session under the new constitution, the State Legislature chartered the American Academy of Arts and Sciences pursuant to this provision, and by the turn of the century no other significant legislation had been adopted, save for the recodification of the 1647 "Old Deluder Satan Act," which required towns of fifty families to support a teacher and towns of one hundred families to build a grammar school.29

That this provision did not confer a right to education upon the children of the State, or their parents, is especially clear from a case decided by the Massachusetts Supreme Court in 1849. In Roberts v. The City of Boston,30 the court stated:

The proper province of a declaration of rights and constitution of government, after directing its form, regulating its organization and the distribution of its powers, is to declare great principles and fundamental truths, to influence and direct the judgment and conscience of legislators in making laws, rather than to limit and control them, by directing what precise laws they shall make. The provision, that it shall be the duty of legislatures and magistrates to cherish the interest of

27. Chapter VI in the committee draft.
literature and the sciences, especially the university of Cambridge, public schools, and grammar schools, in the towns, is precisely of this character. Had the legislature failed to comply with this injunction, and neglected to provide public schools in the towns, or should they so far fail in their duty as to repeal all laws on the subject, and leave all education to depend on private means, strong and explicit as the direction of the constitution is, it would afford no remedy or redress to the thousands of the rising generation, who now depend on these schools to afford them a most valuable education, and an introduction to useful life.\(^{31}\)

Roberts was an action on the case brought by a five-year-old black girl to recover damages incurred as a result of her being denied admission to the public school closest to her home. Charles Sumner represented Sarah Roberts. The action was brought under a Massachusetts statute, which provided that "[a]ny child, unlawfully excluded from public school instruction, in [the] Commonwealth, shall recover damages therefor, . . . against the city or town by which such public instruction is supported."\(^{32}\)

Regulations adopted by the Boston primary school committee provided:

Every member of the committee shall admit to his school, all applicants, of suitable age and qualifications, residing nearest to the school under his charge, (excepting those for whom special provision has been made,) provided the number in his school will warrant the admission.\(^{33}\)

Sarah Roberts was non-suited; she had not the right to be admitted to the school nearest her home, held the court, because a "colored" school had been provided elsewhere in the district. Neither, apparently, did anyone else have such a right if the school house was full. As the court stated, the great principles of the constitution, when applied to actual conditions in society,

will not warrant the assertion, that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law, for their maintenance and security. What those rights are, to which individuals, in the infinite variety of circumstances by which they are surrounded in society, are entitled, must depend on laws adapted to their respective relations and conditions.\(^{34}\)

In other words, in the view of the Massachusetts Supreme Court, the state constitutional provision did not confer a right to education at all, but rather gave to the legislature discretion to act as it saw fit.

The New Hampshire Constitution of 1784 followed the Massachusetts provision almost \textit{verbatim}, as did the constitutions of several States admitted to the Union in the nineteenth century, including Indiana in 1816, Tennessee in 1834, and Arkansas 1836. In addition, the Northwest Ordinance of 1787 also contained a hortatory provision:

Religion, morality, and knowledge being necessary to good government and the

\(^{31}\) Id. at 206-07.

\(^{32}\) Id. at 198; An Act Concerning Public Schools, ch. 214, 1845 Mass. Session Laws 545.

\(^{33}\) Roberts, 59 Mass. (5 Cush.), at 199.

\(^{34}\) Id. at 206.
happiness of mankind, schools and the means of education shall forever be encouraged.35

This provision was followed in numerous states, including Ohio in 1802, Missouri in 1812, Mississippi in 1817, Kansas in 1855, Nebraska in 1866, and North Carolina in 1868. These provisions will be discussed at greater length below. Like the Massachusetts provision, however, they do not seem to have been intended to declare a fundamental right to education; rather, they seem merely to have articulated a goal that the constitution drafters thought important to the protection of republican government.


The second class of early constitutional provisions are those that appear to require the state legislature to establish schools. Some, such as those provisions contained in the North Carolina and Pennsylvania Constitutions of 1776, and the Vermont Constitution of 1777, appear obligatory with respect to the common schools, but more hortatory with respect to higher education. The North Carolina provision reads:

That a school or schools shall be established by the Legislature, for the convenient instruction of youth, with such salaries to the masters, paid by the public, as may enable them to instruct at low prices; and all useful learning shall be duly encouraged, and promoted, in one or more universities.36

Similarly, the provision in the Pennsylvania Constitution of 1776 provides:

A school or schools shall be established in each county by the legislature, for the convenient instruction of youth, with such salaries to the masters paid by the public, as may enable them to instruct youth at low prices: And all useful learning shall be duly encouraged and promoted in one or more universities.37

And the provision in the Vermont Constitution of 1777 reads:

A school or schools shall be established in each town, by the legislature, for the convenient instruction of youth, with such salaries to the masters, paid by each town; making proper use of school lands in each town, thereby to enable them to instruct youth at low prices. One grammar school in each county, and one university in this State, ought to be established by direction of the General Assembly.38

On the other hand, the Georgia Constitution of 1777 simply appears obligatory:

Schools shall be erected in each county, and supported at the general expense of the State, as the legislature shall hereafter point out.39

In none of these States, however, did the legislature immediately establish common schools according to the constitutional provision. In Pennsylvania, only one bill relating to education was enacted before 1786, and that to revoke the charter of the College of Philadelphia and establish in

36. N.C. Const. of 1776, art. XLI (emphasis added).
37. Penn. Const. of 1776, § 44 (emphasis added).
its place a new institution—the University of the State of Pennsylvania.40 Beginning in 1786, the legislature did provide some aid to existing colleges, and set aside land for the purpose of endowing public common schools,41 but no schools had been established by the time the constitution was rewritten in 1790.

A similar fate befell the North Carolina and Georgia provisions. As historian Fletcher Green writes, “A long period was to elapse . . . before these provisions were to be given their fullest application.”42 In Georgia, a school fund for the poor was established in 1823,43 but it was 1837 before a bill establishing a common school system was actually passed by the legislature, and the law was quickly repealed due to public opposition.44 A common school system was not finally established in Georgia until 1873.45 A common school system was not established in North Carolina until 1839.46

Before the end of the century, Pennsylvania, Vermont, and Georgia had all moved away from the obligatory language and adopted more hortatory provisions.47 Thus, the Vermont Constitutions of 1786 and 1793 simply state that “schools ought to be maintained in each town,”48 and the Pennsylvania and Georgia Constitutions of 1790 and 1798, respectively, modify the previous obligatory language—“the legislature shall” provide for schools—with the phrase, “as soon as conveniently may be,”49 a phrase which is also found in the Delaware Constitution of 1792.50

The Pennsylvania Constitution of 1790 was the first to provide explicitly for free education, but only for the poor. Acts passed by the Pennsylvania legislature in 1802, 1804, and 1809 were utterly ineffective, however, because parents were required to declare themselves paupers in order for their children to attend the schools free of charge.51 The legislature actually passed a law in 1824 to provide education to poor children,

40. See Louise G. Walsh and Matthew J. Walsh, History and Organization of Education in Pennsylvania 85 (1930).
41. See Act of April 7, 1786, ch. 724, § 7, 12 The Statutes at Large of Pennsylvania from 1682 to 1801, at 221, 224; see also Walsh, supra note 40, at 85–86.
42. Fletcher M. Green, Constitutional Development in the South Atlantic States, 1776-1860, at 95 (1930).
44. Id. at 88, 97.
45. Id. at 101.
47. North Carolina did not revise its constitution again until 1868.
50. Del. Const. of 1792, art. VIII, § 12.
51. Walsh, supra note , at 94–95; see also Act of March 1, 1802, ch. 2236, noted in 3 Laws of Pennsylvania xxiii (1810); Act of March 19, 1804, ch. 2453, noted in 4 Laws of Pennsylvania vi (1810); Act of April 4, 1809, ch. 3116, 5 Laws of Pennsylvania 73 (1812).
but it created such controversy that it was repealed two years later.\textsuperscript{52} It was not until 1834 that the legislature established a public school system.\textsuperscript{53} 58 and 44 years, respectively, after the facially obligatory provisions in the Constitutions of 1776 and 1790 were adopted. It is thus hard to interpret those provisions as providing an enforceable right to public education.

III. EARLY NINETEENTH CENTURY: 1800-1834

During the first third of the nineteenth century, eight new States were admitted to the Union,\textsuperscript{54} and six existing States adopted new constitutions.\textsuperscript{55} Of these, the constitutions of Louisiana in 1817, Illinois in 1818, and Virginia in 1830 contained no provision for education. Four of the constitutions—Ohio in 1802, Mississippi in both 1817 and 1832, and Alabama in 1819—contained hortatory provisions that were nearly identical to, or a truncated version of, the provision in the Northwest Ordinance.\textsuperscript{56} Three others—Indiana in 1816, Maine in 1819, and Tennessee in 1834—contained hortatory provisions similar to that of the Massachusetts Constitution of 1780.\textsuperscript{57} New York, whose 1777 constitution had not mentioned education, merely added a provision ensuring that the income from the school fund would be “inviolably appropriated and applied to the support of common schools throughout this State.”\textsuperscript{58} Connecticut, which adopted its first constitution in 1818, also sought to protect its school fund.\textsuperscript{59} The Missouri Constitution of 1820 contained a truncated version of the hortatory provision in the Northwest Ordinance, as well as a “facially obligatory” provision that, like the provisions in the Pennsylvania Constitution of 1790 and the Georgia Constitution of 1798, required the establishment of schools in each township “as soon as practicable and necessary, where the poor shall be taught gratis.”\textsuperscript{60} Finally, the

\textsuperscript{52} Walsh, supra note 40, at 95–96.
\textsuperscript{53} Id. at 119; Jacob Tanger and Harold F. Alderfer, Pennsylvania Government, State and Local 281 (1939); William H. Egle, An Illustrated History of the Commonwealth of Pennsylvania 247 (1876).
\textsuperscript{54} Ohio (1802); Louisiana (1812); Indiana (1816); Mississippi (1817); Illinois (1818); Alabama (1819); Maine (1820); and Missouri (1820).
\textsuperscript{55} Connecticut (1818); New York (1821); Virginia (1830); Delaware (1831); and Tennessee (1834). In addition, Mississippi, which had been admitted in 1817, revised its constitution in 1832.
\textsuperscript{56} Ohio Const. of 1802, art. VIII, § 3; Miss. Const. of 1817, art. VI, § 16; Miss. Const. of 1832, art. VII, § 14; and Ala. Const. of 1819, art. VI. The Alabama Constitution also contained a provision regarding its school lands. See infra note 65.
\textsuperscript{57} Ind. Const. of 1816, art IX, § 1 (but see text accompanying notes 65 and 66, infra, for additional provisions); Maine Const. of 1819, art. VIII; Tenn. Const. of 1834, art. XI, § 10.
\textsuperscript{58} N.Y. Const. of 1821, art. VII, § 10.
\textsuperscript{59} Conn. Const. of 1818, art. VIII, § 2 (but see text accompanying note 67, infra, for additional provision).
\textsuperscript{60} Mo. Const. of 1820, art. VI, § 1.
Delaware Constitution of 1831 merely repeated the hortatory provision from the Constitution of 1792.\textsuperscript{61}

There are, however, two noteworthy developments during this period. First is the practical involvement of the Federal Government in education for the first time. In 1787, Congress had included in the ordinance establishing a government in the Northwest Territory the hortatory provision discussed above.\textsuperscript{62} In the first land sale consummated after the passage of the Northwest Ordinance, Congress had provided that section 16 of each township would be reserved for schools, and two whole townships in the large purchase by the Ohio Company would be reserved for the support of a university.

These school land reservations were formalized in the enabling acts of the three States admitted from the Northwest Territory during this period, and in the Missouri enabling act as well. In each case, however, the grants were expressly conditioned on the State's agreement, \textit{inter alia}, not to tax federal lands within the State.\textsuperscript{63} The condition was especially important for the States in the Northwest Territory, because the Federal Government was obliged, under the terms of the 1783 Virginia cession of that territory, to dispose of the lands only for the joint benefit of all the states of the union. Outright grants of land for the support of schools would have benefited only the State to which they were made, and thus would have violated the terms of the Virginia cession. Instead, the grants were provided as a negotiated term of sale, increasing the value of the surrounding lands and thereby benefiting all the States of the Union in conformity with the cession terms. Thus, although much is often made of these federal grants as support for the argument that the Federal Government has always had a role in education, the federal involvement ceased as soon as the grants were made. Nevertheless, the school lands become an important fixture in State constitutions from this point forward.\textsuperscript{64} The Indiana Constitution of 1816, the Alabama Constitution of 1819, and the Missouri Constitution of 1820 all include provisions for the preservation of the school lands.\textsuperscript{65}

The second development of note during this period is the inclusion of an equality principle in the constitutions of Indiana and Connecticut. The Indiana Constitution of 1816 provided:

\begin{quote}
It shall be the duty of the General Assembly, as soon as circumstances will per-
\end{quote}

\textsuperscript{61} Del. Const. of 1831, art. VII, § 11.

\textsuperscript{62} See text accompanying note 35, supra.

\textsuperscript{63} Ohio Enabling Act, ch. 40, § 7, 2 Stat. 173, 174 (1802); Indiana Enabling Act, ch. 57, § 6, 3 Stat. 289, 290 (1816); Illinois Enabling Act, ch. 67, § 6, 3 Stat. 428, 430 (1818); Missouri Enabling Act, ch. 22, § 6, 3 Stat. 545, 547 (1820).

\textsuperscript{64} And also in State statutes. See, for example, \textit{The State ex rel. Garnes v. McCann}, 21 Ohio St. 198, 206 (1871), discussing the statutory requirement that even in a segregation statute, the proportionate share of the school funds for black children had to be set aside for their education.

\textsuperscript{65} Ind. Const. of 1816, art. IX, § 2; Ala. Const. of 1819, art. VI; Mo. Const. of 1820, art. VI, § 1.
mit, to provide, by law, for a general system of education, ascending in a regular gradation from township schools to a State University, where tuition shall be gratis, and equally open to all.66

Although the provision is still essentially hortatory because of the clause, “as soon as circumstances will permit,” the provision appears to require that the school system, once established, would be open to all. Similarly, the Connecticut Constitution of 1818 contained the following provision:

The fund called the School Fund shall remain a perpetual fund, the interest of which shall be inviolably appropriated to the support and encouragement of the public or common schools throughout the State, and for the equal benefit of all the people thereof.67

“All” did not necessarily mean “all,” however. A statute enacted under the Indiana Constitution of 1816 provided that schools supported by the public school fund would be “open and free to all the white children resident within the [school] district, over five and under twenty-one years of age.”68 The statute contains three classifications that are not found within the constitutional provision: A residency requirement, an age requirement, and a racial requirement. In Lewis v. Henley, the Indiana Supreme Court held that “colored” children were not even permitted “to attend [the] public schools, paying their own tuition, where the resident parents of white children attending, or desiring to attend said schools, object.”69

In its opinion,70 the Indiana court quoted from a decision of the Ohio Supreme Court deferring to the legislature the question “as to whom the teacher may admit to the privileges of his school.”71 As we have already seen, however, the Ohio constitution in effect at that time merely provided that “schools and the means of instruction shall forever be encouraged by legislative provision.”72 It contained nothing like the “equally open to all” requirement contained in the Indiana Constitution of 1816. Nevertheless, the Indiana court made clear that a properly drafted mandamus petition, seeking to prevent the school from admitting blacks, even those paying their own tuition, would be granted. While neither party in the mandamus proceeding would have had occasion to raise the constitutional issue, the court went out of its way to recognize that the statute clearly limited “the right of attending [public] schools, . . . as recipients of the public bounty, to free white children,”73 without even mentioning that the state constitu-

66. INDIANA CONST. of 1816, art. IX, § 2 (emphasis added).
67. CONNECTICUT CONST. of 1818, art. VIII, § 2 (emphasis added).
68. An Act for Revising and Consolidating the Statutes of the State of Indiana, ch. 15, art. V, § 102, 1843 REV. STAT. of Ind. 65, 320.
69. Lewis v. Henley, 2 Ind. (2 Cart.) 332, 334 (1850).
70. This part of the opinion is technically dicta; the court actually denied mandamus relief because petitioner’s complaint had not alleged that the school officials were in fact aware that the plaintiffs objected to the attendance of colored children. Id. at 333–34.
71. Id. at 335 (quoting Chalmers v. Stewart, 11 Ohio R. 386, 388 (1842)).
72. OHIO CONST. of 1802, art. VIII, § 3.
73. Id. at 334.
tion required the schools to be free "and equally open to all." Thus, the equality principle contained in the constitution was either not understood to protect all persons by those who drafted it, or it was significantly narrowed by legislative enactments upheld by the courts so as to exclude certain classes. In either event, it did not suffice to elevate education to the status of a civil right.

IV. THE ANTEBELLUM PERIOD: 1835-1860

During the quarter century immediately preceding the civil war, nine new States were admitted to the Union, and fourteen prior constitutions were revised. Of these, Illinois and Virginia continued to have no constitutional provision relating to education. Arkansas, Rhode Island, and Texas followed the hortatory language of the Massachusetts Constitution of 1780, and Maryland enacted a similar hortatory provision. Florida and Kentucky sought to insure the inviolability of their school fund. Pennsylvania and Indiana continued the same provisions from earlier constitutions, and New York articulated in greater detail the preservation and assignment of its school fund. But five States—Michigan, Louisiana, Iowa, Wisconsin, and California—enacted provisions that contained obligatory language, and another four States—New Jersey, Ohio, Minnesota, and Oregon—also enacted provisions that were obligatory in tone, but that contained such ambiguous phrasing as "thorough and efficient" or "general and uniform," thereby giving enough discretion to the legislature to render them perhaps only hortatory.

A. Obligatory Constitutional Provisions

The first constitution since the founding era to contain obligatory

74. Michigan (1835); Arkansas (1836); Florida (1845); Texas (1845); Iowa (1845); Wisconsin (1846); California (1850); Minnesota (1857); and Oregon (1859).

75. Pennsylvania (1838); Rhode Island (1842); New Jersey (1844); Louisiana (1845 and 1852); New York (1846); Illinois (1848); Kentucky (1850); Virginia (1850); Indiana (1851); Maryland (1851); and Ohio (1851). In addition, the new states of Michigan and Iowa revised their constitutions in 1850 and 1857, respectively.

76. Ark. Const. of 1836, art. VII, § 1; R.I. Const. of 1842, art. XII, § 1; Tex. Const. of 1845, art. X, § 1 (but see § 2, making it the "duty" of the legislature to set aside one tenth of the State's revenues as a school fund); Md. Const. of 1851, Dec. of Rights, art. 41.

77. Fla. Const. of 1838, art. X, §§ 1-2; Ky. Const. of 1850, art. XI, § 1. Several states enacted such provisions during this period. See, for example, Ark. Const. of 1836, art. VII, § 1; Minn. Const. of 1857, art. VIII, § 2; and Ore. Const. of 1857, art. VIII, § 2.

78. Penn. Const. of 1838, art. VII, §§ 1-2; Ind. Const. of 1851, art. VIII, § 1.

79. N.Y. Const. of 1846, art. IX, § 1.

80. Mich. Const. of 1835, art. X, § 3; Mich. Const. of 1850, art. XIII, §§ 4-5; La. Const. of 1845, Title VII, art. 134; La. Const. of 1852, Title VIII, art. 136; Iowa Const. of 1846, art. IX, § 3; Iowa Const. of 1857, art. IX, § 12; and Wis. Const. of 1848, art. X, § 3.

81. N.J. Const. of 1844, art. IV, § 7, pt. 6; Ohio Const. of 1851, art. VI, § 2; Minn. Const. of 1857, art. VIII, § 1; and Ore. Const. of 1857, art. VIII, § 3.
language was that of Michigan in 1835.\textsuperscript{82} Article X, section 2 of the constitution contained the now-familiar language that the legislature “shall encourage” educational improvement and that the school fund was to remain “inviolably appropriated to the support of schools throughout the State,”\textsuperscript{83} but section 3 contained a new mandate:

The legislature shall provide for a system of common schools, by which a school shall be kept up and supported in each school-district at least three months in every year; and any school-district neglecting to keep up and support such a school may be deprived of its equal proportion of the interest of the public fund.\textsuperscript{84}

There are two interesting features of this provision. First, the provision appears to operate as a mandate upon the legislature, but the enforcement clause operates on the school districts. Second, unlike the Indiana and Connecticut provisions of 1816 and 1818,\textsuperscript{85} the clause requires the establishment of schools in each school district, not the provision of education to all children.

As the enforcement clause makes clear, the first feature is connected to the school fund, but the Michigan school fund contained a significant departure from those established in earlier States. Unlike the school fund provisions found in the enabling acts of Ohio, Indiana, and Illinois (the three States in the Northwest Territory whose admission to the Union preceded Michigan’s), title to the lands reserved by the Federal Government for the support of schools (the so-called section 16 land grants) was granted directly to the State as a common fund. Because of the importance of this development, a brief review is in order.

In Ohio the Section 16 land grants were made directly to the inhabitants of each township:

And be it further enacted, . . . That the section, number sixteen, in every township, and where such section has been sold, granted, or disposed of, other lands equivalent thereto, and most contiguous to the same, shall be granted to the inhabitants of such township, for the use of schools.\textsuperscript{86}

This pattern was followed when Indiana was admitted in 1816: Title to the Section 16 reservation was vested in each township, and title to the grants of two townships for the support of a university was vested in the State legislature.\textsuperscript{87} Two years later, when Illinois was admitted to the Union, title to the Section 16 school lands was vested in the State, but use

\textsuperscript{82} North Carolina, it will be remembered, did not revise its initial constitution of 1776 until after the civil war; its obligatory provision thus remained in effect throughout the period, though it appears not to have been treated as such. See text accompanying note 46, supra.

\textsuperscript{83} Mich. Const. of 1835, art. X, § 2.

\textsuperscript{84} Id. § 3.

\textsuperscript{85} See text accompanying notes 66 and 67 above.

\textsuperscript{86} Ohio Enabling Act, ch. 40, § 7, 2 Stat. 173, 174 (1802) (emphasis added).

\textsuperscript{87} Indiana Enabling Act, ch. 57, § 6, 3 Stat. 289, 290 (1816). See also George Knight, History and Management of Land Grants for Education in the Northwest Territory, in Papers of the American Historical Association, vol. 1, no. 3, at 38 (1885). The same provision is found in the Alabama Enabling Act, ch. 47, § 6, 3 Stat. 489, 491 (1819).
of the proceeds was restricted to the particular township in which the
lands were located:

Section numbered sixteen, in every township, . . . shall be granted to the state, for
the use of the inhabitants of such township, for the use of schools.88

Finally, when Michigan was admitted to the Union in 1837, title to
the Section 16 reserves was vested in the State for general use:

That section numbered sixteen in every township of the public lands, and where
such section has been sold or otherwise disposed of, other lands equivalent there-
to, and as contiguous as may be, shall be granted to the State for the use of
schools.89

Historians have often spoken of the importance of this development in the
creation of a centralized system of State education,90 and it likely was the
cause of the obligatory language in the 1835 Constitution. Once the con-
tral of the school lands and accompanying funds was removed from the
school districts (or townships) themselves and given to the state legisla-
ture, the legislature was given the means to establish a statewide public
school system. The funds were also a source of temptation for the legisla-
ture, and an obligatory provision of some kind was needed to keep the
school fund from being spent elsewhere. It does not seem, therefore, that
the clause was intended to establish a right to free education provided by
the legislature. On the contrary, as the enforcement clause indicates, the
remedy for failure to operate a school three months during the year was
not an action to compel the provision of education, but the forfeiture by
the school district of its share of the school fund proceeds.

Moreover, the second feature of the constitutional provision required
the establishment of schools, not the provision of education to all chil-
dren. As one looks to the legislation enacted under the provisions of the
Michigan Constitution of 1835, one finds that as far as the rights of indi-
vidual students were concerned, the constitutional provision merely gave
discretion to the legislature to enact such provisions as it deemed ap-
propriate. As Michigan Supreme Court Justice Campbell recognized in his
dissent in *The People ex rel. Workman v. The Board of Education of
Detroit*, “It cannot be claimed, that the legislature could not make or
authorize any regulation they should see fit, in regard to the management
of different scholars.”91 In 1841, the legislature had provided for a sepa-
rate school district within the city of Detroit, “not described by metes and
bounds, but composed of the colored children of said city, between the
ages of five and seventeen, inclusive,” so as to provide separate schools

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88. Illinois Enabling Act, ch. 67, § 6, 3 Stat. 428, 430 (1818); see also Knight, *Land
Grants, supra* note 87, at 38.
90. See, for example, Knight, *Land Grants* at 20, 38; JOHNSON MATZEN, *STATE
CONSTITUTIONAL PROVISIONS FOR EDUCATION* 98-99 (1931); JAMES W. HILLESHEIM AND
GEORGE D. MERRILL, *THEORY AND PRACTICE IN THE HISTORY OF AMERICAN EDUCATION* 298
(1971).
91. 18 Mich. 400, 418 (1869) (Campbell, J., dissenting).
for their benefit. In 1842, the legislature passed an act "relative to free schools in the city of Detroit" which made the entire city one school district under the control of a single board of education. Under the new arrangement, however, the Detroit Board of Education continued to require the segregation of the races in the schools under its control. Thus, the constitutional provision only required that schools be established; it left to the discretion of the legislature the terms and conditions under which children would be allowed to attend those schools. Moreover, it did not provide that the education provided would be free.

The drafters of the Michigan Constitution of 1850 added a clause providing that the schools to be established in each school district "shall be kept without charge for tuition at least three months in each year," but it gave the legislature five years in which to accomplish that end, and retained the forfeiture of school funds provision for any district failing to comply.

The provision in the Iowa Constitution of 1846 is quite similar to that of Michigan in 1835, and the section 16 lands in Iowa, like those in Michigan, were granted "to the State for the use of schools." In 1857, Iowa amended its constitution to establish a State Board of Education with this mandate:

The Board of Education shall provide for the education of all youths of the State, through a system of common schools, and such schools shall be organized and kept in each school district at least three months in each year. Any district failing, for two consecutive years, to organize and keep up a school, as aforesaid, may be deprived of their portion of the school fund.

However, the constitution also contained the following provision:

At any time after the year one thousand, eight hundred and sixty-three, the General Assembly shall have power to abolish or re-organize said Board of Education, and provide for the educational interest of the State in any other manner that to them shall seem best and proper.

The General Assembly abolished the Board of Education in 1864, thus rendering the mandate provision obsolete and reverting discretion over "the educational interest of the State" in the legislature.

California's Constitution of 1849 likewise required the legislature to

94. Workman, 18 Mich., at 419 (Campbell dissenting). The Michigan Supreme Court's holding in the case—requiring that the Detroit Board of Education admit "colored" children to "white" schools—was based not on the constitutional provision, but on an 1867 statute providing that "[a]ll residents of any district shall have an equal right to attend any school therein." See id. at 409 (Cooley, C.J.) (quoting S.L. 1867, Vol. 1, p. 43).
96. Id. § 5.
97. Iowa Const. of 1846, art. IX, § 3.
99. Iowa Const. of 1857, art. IX (1st), § 12.
100. Id. § 15.
provide for a "system of common schools, by which a school shall be kept up and supported in each district at least three months in every year,"101 rather than to provide for the education of all children. As we will see, this provision becomes extremely significant when combined with the Equal Protection Clause of the Fourteenth Amendment,102 but standing alone, it does not appear to confer upon individual children a right to education.

Only one of the State constitutions enacted during this period actually provided a mandate to educate all the children of the state. Article X of the Wisconsin Constitution of 1848 read:

Sec. 3: The Legislature shall provide by law for the establishment of District Schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition, to all children between the ages of four and twenty years; and no sectarian instruction shall be allowed therein.

Sec. 4: Each town and city shall be required to raise, by tax, annually, for the support of common schools therein, a sum not less than one half the amount received by such town or city respectively for school purposes from the income of the school fund.

Sec. 5: Provision shall be made by law, for the distribution of the income of the school fund among the several towns and cities of the State, for the support of common schools therein, in some just proportion to the number of children and youth resident therein, between the ages of four and twenty years, and no appropriation shall be made from the school fund to any . . . school district for the year in which a school shall not be maintained at least three months.103

Although section 5 contains the same enforcement clause limited to the forfeiture of state school funds by any district that does not maintain a school as contained in some of the other constitutions discussed above, sections 3 and 4 of the provision are much more specific in their mandate. The district schools were to be "as nearly uniform as possible," and "free . . . to all children between the ages of four and twenty years."104 Moreover, the State school fund proceeds were to be augmented by a local tax of at least 50% of the school fund amount received.105 The Supreme Court of Wisconsin had occasion to interpret this constitutional provision in The State ex rel. Comstock v. Joint School District No. 1 of Arcadia.106 The plaintiff in that case sought to send his son to an adjoining school district because there was no school in session in the district in which he resided. The defendant district sought to charge plaintiff tuition for the privilege, and when plaintiff refused to pay the tuition, the child was denied admission to the school. The court focused on the language in the constitutional provision providing for "the establishment of district schools,"107 and stated:

101. CAL. CONST. of 1849, art. IX, § 3.
102. See Part V(C), infra.
103. WIS. CONST. of 1848, art. X, §§ 3-5.
104. Id. § 3.
105. Id. § 4.
106. 65 Wis. 631 (1886).
107. Id. at 636 (emphasis in original).
We find ourselves unable to assent to the proposition that a child residing in one school district has any absolute right, under any circumstances, to the privileges of the common school of another district. One feature of [the district system] is, and, so far as we are advised, always has been, wherever the system has prevailed, that the absolute right to the privileges of the school in any given district is confined to children residing in such district, and having the prescribed qualifications.

The court did not address whether the constitutional mandate to establish schools in each district “as nearly uniform as possible” was violated; it only held that there was no absolute right to attend school in another district, and thus that the imposition of a tuition for the privilege was not a violation of the constitutional mandate that the schools be free. While the court’s language may appear to give a legally enforceable right to free education to children residing in the district, it must be remembered that the case arose only because no school was in session in the district where the Comstock child resided. One can only infer from the court’s language, together with the constitutional provision depriving districts of their share of the state school fund if they failed to keep a school open at least three months each year, that had Comstock sought to require school officials in his own district to open a school, he might have been non-suited on the ground that there was only an absolute right to attend a district school if, and to the extent that, the school officials saw fit to provide for one.

Louisiana also enacted an obligatory-type constitutional provision during this period. The Constitution of 1845 provided that “[t]he legislature shall establish free public schools throughout the State, and shall provide means for their support by taxation on property, or otherwise.” As was the case with the constitutions in Michigan, Iowa, and California discussed above, this provision dealt with schools rather than children. It did contain a taxation clause not found in the other three constitutions, but this may be a result of the fact that Louisiana had not been granted school lands to serve as a school fund. Seven years later, when the Louisiana constitution was revised, the same education provision was reenacted, but with a noteworthy addition. For the first time in a State constitution education provision, specific reference was made to race: “[A]ll moneys so raised or provided shall be distributed to each parish in proportion to the number of free white children between such ages as shall be fixed by the general assembly.” As we will see, this was the first of many constitutions to make such a distinction.

B. “Thorough and efficient” School Systems

New Jersey, Ohio, Minnesota, and Oregon also enacted obligatory-type constitutional provisions during this period. Each of the provisions

108. Id. at 635-36.
109. WISC. CONST. of 1848, art. X, § 5.
110. LA. CONST. of 1845, Title VII, art. 134.
111. LA. CONST. of 1852, Title VIII, art. 136.
contained the obligatory language, "the legislature shall," but each also contained a clause giving to the legislature great discretion in how it would fulfill that obligation. The constitutions of New Jersey, Ohio, and Minnesota required the establishment of a "thorough and efficient" school system. The Minnesota Constitution of 1857 additionally specified that the "thorough and efficient system" include "public schools in each township in the State." The Minnesota constitution also required that the system be "general and uniform"—a provision similar to that of Oregon, which required a "uniform and regular" system. The development of any right to education in these States thus depended upon the kind of statutes that the legislature saw fit to enact, and even statutes which appeared to provide for the education of all children were not so interpreted by the courts.

The provision enacted in New Jersey contains an additional feature worthy of note: The clause relating to the school fund requires that it be appropriated "for the equal benefit of all the people of the State"; and the "thorough and efficient" clause required that the system provide "free public schools for the instruction of all the children in [the] State between the ages of five and eighteen years." Legislation enacted under this provision required that all public schools in the State would be free to children living within the school district, and further "that no child . . . shall be excluded from any public school in this state on account of his or her religion, nationality or color." As the New Jersey Supreme Court recognized in Pierce v. Union District School Trustees, this legislation provided for "the legal right of [children residing in a school district] to enter [district] schools for free instruction," although the court recognized that a school board would be within its rights in refusing admission to a child if "the schools . . . were full." It is unclear from the opinion whether the refusal would be permissible if there was not a place for the

112. N.J. Const. of 1844, art. IV, § 7, pt. 6; Ohio Const. of 1851, art. VI, § 2; Minn. Const. of 1857, art. VIII, § 3.
113. Minn. Const. of 1857, art. VIII, § 3.
114. Id. § 1.
115. Ore. Const. of 1857, art. VIII, § 3.
116. See, e.g., Van Camp v. The Board of Education of Logan, 9 Ohio St. 406, 408–10, 415 (1859) (summarizing various Ohio statutes providing for the education only of white children, and holding that a statute providing for the separate education of "colored" children did not make "colored youth . . . as of right, entitled to admission into the [white] schools," even "where the number of colored youth is too small to justify . . . a school for colored youth").
118. Id. (emphasis added).
119. Act of March 27, 1874, art. X, § 94, N.J. Rev. Stats. 1070, 1097 (1877); see also Pierce v. Union District School Trustees, 46 N.J. Law (17 Vroom) 76, 77 (1884).
121. 46 N.J. Law (17 Vroom), at 77.
122. Id. at 78.
child at another school within the district. The case involved a mulatto child seeking admission to the school nearest his home, whom the court ordered to be admitted because the only reason evident in the record for his exclusion had been his color.

V. THE CIVIL WAR AND RECONSTRUCTION: 1860-1877

During the civil war and period of reconstruction immediately following, five new States were admitted to the Union and eight new constitutions were adopted in existing States, excluding those adopted in the States of the Confederacy. The Confederate State constitutions are treated separately below, in order that the natural (which is to say, not imposed by force of direct Civil War repercussions) historical development may first be ascertained.

A. The Union States

Two States—Kansas and West Virginia—were admitted to the Union at the outset of the Civil War. Both contain hortatory clauses similar to those discussed above: “The legislature shall encourage” in the Kansas Constitution of 1859; and “[t]he legislature shall provide, as soon as practicable, for the establishment of a thorough and efficient system of free schools” in the West Virginia Constitution of 1861. Nevertheless, both State constitutions define what is meant by those hortatory clauses, thus giving them an obligatory tone similar to that found in the constitutions of New Jersey (1844), Ohio (1851), Minnesota (1857), and Oregon (1857). The West Virginia Constitution of 1861 describes the means by which the legislature was expected to develop a “thorough and efficient system of free schools,” as follows:

They shall provide for the support of such schools by appropriating thereto the interest of the invested school-fund; the net proceeds of all forfeitures, confiscations, and fines accruing to this State under the laws thereof; and by general taxation on persons and property, or otherwise. They shall also provide for raising, in each township, by the authority of the people thereof, such a proportion of the amount required for the support of free schools therein as shall be prescribed by general laws.

Similarly, the Kansas Constitution defined what was meant by “encouragement”: The legislature would provide encouragement to education “by

123. Kansas (1861), West Virginia (1861), Nevada (1864), Nebraska (1866), and Colorado (1876).

124. Maryland (1864 and 1867), Missouri (1865 and 1875), Illinois (1870), and Pennsylvania (1873). In addition, the new states of West Virginia and Nebraska adopted revised constitutions in 1872 and 1875, respectively.

125. See Part V(B), infra.

126. KANS. CONST. of 1859, art. VI, § 2.


128. Id.
establishing a uniform system of common schools."

The Kansas Constitution represents much more than just a slight move forward in obligatory muscle, however. The provision was debated at length, and there was an attempt during the debates to exclude Negroes from its coverage. In fact, the three constitutions adopted in Kansas prior to statehood contain a hodge podge of the various hortatory provisions discussed above, but all three flirted with more obligatory-type language. The 1855 Constitution, adopted by a free-soiler convention in Topeka, contained in its Bill of Rights a section similar to the Northwest Ordinance. But the 1855 Constitution also contained a requirement similar to that of the Ohio Constitution of 1851: "The general assembly shall make such provision . . . as . . . will secure a thorough and efficient system of common schools throughout the State."

A pro-slavery constitution, adopted by a convention meeting in Lecompton in 1857, contained the following provision:

The legislature shall, as soon as practicable, establish one common school (or more) in each township in the State, where the children of the township shall be taught gratis.

As we have seen, the "as soon as practicable" clause waters down the obligatory nature of this provision significantly, but the provision reaches to children rather than just a system of schools, and provides that the schools shall be free. It is unclear whether in this constitution the "or more" parenthetical clause is significant, though in the post-war period a number of southern States used such a clause to signify that segregated schools were intended.

Finally, in the last of the constitutions unsuccessfully proposed to Congress, adopted at a convention which met at Leavenworth, it was deemed a

duty of the State to establish by law, at the earliest possible period, a uniform system of free schools, in which every child in the State shall be entitled to receive a good common-school education at the public expense.

Although the provision, like that of the Lecompton Constitution, contains an escape clause—"at the earliest possible period"—the school system was to be uniform, free, and available to every child in the State. More importantly, the provision declares that every child was entitled to a good education, the first time a qualitative element was included in any State constitutional provision.

In the end, however, only the "uniform system" language was

129. KANS. CONST. of 1859, art. VI, § 2.
130. 4 WILLIAM F. SWINDLER, ED., SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 98 n.3 (1973) (hereinafter "Swindler").
131. KANS. CONST. of 1855, art. I, § 7.
132. Id. art. VII, § 2.
133. KANS. CONST. of 1857, art. XIV, § 3.
134. See text accompanying notes 176 through 178, infra.
135. KANS. CONST. of 1858, art. VII, § 1.
retained in the Constitution of 1859 that was finally accepted by Congress, and none of the obligatory flirtations were approved. Moreover, the 1859 Constitution contained a forfeiture of funds enforcement clause similar to that of the Michigan Constitution of 1835, thus indicating that the provision as a whole was not intended to provide a right to education.

Two more states, Nevada and Nebraska, were admitted to the Union near the end of the Civil War, but as is evident from their enabling acts, a significant development in the history of American education had occurred in the interim. In every State admitted to the Union since Ohio in 1802 that had been formed out of United States territorial possessions (rather than carved from existing States or acquired by treaty), the Federal Government had provided land grants for the support of schools, 1/36 of each township for States admitted before 1848, and 2/36 for States admitted thereafter. In each case, the grants were made conditional upon certain favorable treatment by the State toward the Federal Government, such as the non-taxation of federal lands. Beginning with the Nebraska and Nevada enabling acts in 1864, however, the grants were no longer conditional. Sections 16 and 36 in each township were simply granted to the State “for the support of common schools.” The impetus for this change seems to have been, at least in part, the Morrill Land Grant Act signed by President Lincoln in 1862, which reflected the new view that direct federal aid to education was permissible. As one prominent agriculturist wrote at the time, the Morrill Act “recognizes the principle that every citizen is entitled to receive educational aid from the government.” While the Morrill Act provided for the grant of federal lands to support agricultural and mechanical colleges, the deletion of any conditions in subsequent enabling acts with respect to the common school land grants is based upon the same principle.

Despite the changed language of the enabling acts, the Nebraska and

136. KANS. CONST. of 1859, art. VI, § 2.
137. KANS. CONST. of 1859, art. VI, § 4.
138. See text accompanying note 84, supra.
139. Such as Kentucky, Tennessee, and Maine.
140. Such as Florida and Texas.
141. See discussion accompanying notes 63 through 65, supra.
142. Act of July 2, 1862, ch. 130, 12 Stat. 503. It may be that the conditions imposed on the grants of section 16 school lands had long since been mere legal fictions, but the claimed unconstitutionality of direct federal support for education warranted several vetoes of Morrill Act-type legislation by Presidents prior to Lincoln. The Morrill Act itself did contain a condition—namely, that the “leading object” of the colleges establishment under the provisions of the land grant be “to teach such branches of learning as are related to agriculture and the mechanic arts,” id. § 4, 12 Stat., at 504; see also Hamilton v. Regents of Univ. of Cal., 293 U.S. 245, 254 (1934). But this condition—and the “benefits” that would accrue to the Federal Government thereby—was a far cry from the tax exemption condition found in the earlier land grants.
Nevada constitutions themselves did not break new educational ground. The Nevada Constitution of 1864 provided:

The Legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year; and any school district neglecting to establish and maintain such a school, or which shall allow instructions of a sectarian character therein, may be deprived of its proportion of the interest of the Public School Fund during such neglect or infraction . . . .

The Nebraska Constitution of 1866 merely provided that the legislature "shall make such provisions . . . as . . . will secure a thorough and efficient system of common schools throughout the State," a clause similar to those in a number of prior constitutions.

Maryland adopted its first obligatory-type constitutional provision during this period, requiring that the legislature, "at its first session after the adoption of this constitution, shall provide a uniform system of free public schools, by which a school shall be kept open and supported free of expense for tuition in each school-district, for at least six months in each year." The language in the first clause was changed slightly three years later, with "uniform system" giving way to "thorough and efficient system," but the requirement of a school in each district was deleted altogether.

The most significant developments of the period are found in the Missouri Constitutions of 1865 and 1875, however. After a usual preamble, the 1865 Constitution provides that "the general assembly shall establish and maintain free schools for the gratuitous instruction of all persons in this State between the ages of five and twenty-one years." Only the constitutions of New Jersey in 1844 and Wisconsin in 1848, twenty years earlier, had similarly spoken in terms of "all" children rather than in terms of a "system" of schools, but beginning with the Missouri Constitution of 1865 such language becomes more common. The Illinois Constitution of 1870, the Pennsylvania Constitution of 1873, and the Nebraska Constitution of 1875 all contain similar language, as does the 1876 Constitution of newly admitted Colorado.

144. Nev. Const. of 1864, art. XI, § 2. Additionally, the constitution provided authority for the legislature to "pass such laws as will tend to secure a general attendance of the children," the first time any suggestion of compulsory education is found in the State constitutions.


148. Mo. Const. of 1865, art. IX, § 1 (emphasis added).

149. Ill. Const. of 1870, art. VIII, § 1; Penn. Const. of 1873, art. X, § 1; Nebr. Const. of 1875, art. VIII, § 6; Colo. Const. of 1876, art. IX, § 2. The Illinois provision also required that a "good" common school education be provided. Ill. Const. of 1870, art. VIII, § 1. And the Colorado Constitution required that one or more schools be maintained in each school district, but this requirement was mitigated by the now-familiar enforcement clause merely depriving non-compliant districts of their proportionate share of the State's school fund. Colo. Const. of 1876, art. IX, § 2.
The Missouri Constitution of 1865 contains an even more significant provision, however—one not found in any prior constitution:

Separate schools may be established for children of African descent. All funds provided for the support of public schools shall be appropriated in proportion to the number of children, without regard to color. 150

This is the first mention of segregation in a State constitution, though the Louisiana Constitution of 1852 had first injected race into a constitutional provision by providing that the school fund should be apportioned to each district according to the number of "free white children." 151 As we will see below, 152 only two of the Confederate States' constitutions enacted during the reconstruction period contained such a provision, although Missouri's status as a slave-holding Union State may make that observation less exceptional than at first appears. Within a decade, Missouri adopted another constitution, and this time the segregation clause, merely permissive in 1865, had become mandatory: "Separate free public schools shall be established for the education of children of African descent." 153

The new provision had been suggested in the 1875 constitutional convention by Mr. Hale, and was referred to the Committee on Education. 154 The clause as it appears in the 1875 Constitution was reported by the committee on July 2, and approved without debate on July 9. 155 West Virginia, another of the five Union and former slave-holding States, enacted an even more stark segregation provision in 1872: "White and colored persons shall not be taught in the same school." 156

The Missouri constitutional convention of 1875 also provides an insight into the general purpose of public education contemplated at the time. The primary purpose for public education described in several prior constitutional conventions had been to insure that the common citizenry was capable of exercising its republican obligations. 157 A provision offered during the Missouri convention of 1875, though not adopted, demonstrates that that purpose was still very much at the forefront of concern. Mr. Todd, a member of the Committee on Education, submitted a

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150. MO. CONST. of 1865, art. IX, § 2.
151. See text accompanying note 111, supra.
152. See text accompanying notes 167 and 186, infra.
153. MO. CONST. of 1875, art. XI, § 3.
154. 1 JOURNAL OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1875, at 190 (1920).
155. 2 id. at 524, 584. The education article as a whole was extensively debated during the convention, with five days devoted to the subject. See id. at 576-600, 675-682.
156. W. VA. CONST. of 1872, art. XII, § 8.
157. Lee Garber, in his doctoral dissertation, found that four purposes of public education were discussed during the state constitutional conventions of the nineteenth century. The safety and well-being of republican institutions was clearly the primary purpose offered by proponents of education provisions. Other purposes were: The economic well-being of the state; the elimination of the root causes of pauperism and crime; and the provision of charity to individuals in need. There was a minority which viewed education as a merely private concern, and not properly of state concern. Lee O. Garber, THE LEGAL IMPLICATIONS OF THE CONCEPT OF EDUCATION AS A FUNCTION OF THE STATE 3-34 (1932).
minority report in which he offered the following additional section:

There shall be taught at public expense in the free public schools of the State only the following studies: spelling, reading and writing in the English language, grammar, arithmetic, geography and the history of the United States.\textsuperscript{158}

In his report, Mr. Todd described why he thought the clause important:

It is now admitted by every intelligent and patriotic American citizen that the nature of our government requires for its consistent support and perpetuation an universal education of citizens, that there is as much necessity for this as there is for universal taxation, it being an admitted necessity the State should provide for and secure it. But as in the case of taxation, it should not require and provide for more than requisite for its proper support and continuance. In the judgment of the undersigned the amount of education that the State should provide for is that and that only which shall enable the citizen to read the laws of the land and to learn their fundamental sources; to become acquainted with the history of his country; to possess the art of preserving and communicating his own thoughts and knowledge; to learn the geographical position of his own locality to the rest of his country, and that of his country to the rest of the world; to be able to make the arithmetical calculations required for the business and transactions of ordinary life and to use and express the English language with general correctness. For accomplishing this it would be in my opinion, sufficient to teach the following things: Spelling, reading and writing the English language, common arithmetic, geography, grammar and the history of the United States. Such an education . . . will satisfy all the reasons of the State for providing for a public education, the chief of which are to secure intelligent voters and to prevent pauperism and crime.\textsuperscript{159}

Todd's proposal first came up on July 8 in floor debate over section one of the education article, by way of a substitute amendment offered by Mr. Shackelford incorporating the list of subjects into the general provision calling for the legislature to establish and maintain free public schools. An amendment to Mr. Shackelford's substitute, striking the clause, was offered by Mr. Cotley and passed by a slim 32-30 margin, however.\textsuperscript{160} Eleven days later, Mr. Todd offered his proposal again, as a self-standing section in the education article, but his motion was tabled by a vote of 26-21, and never taken up again.\textsuperscript{161}

Although the Todd proposal was not adopted, the limited debate that we have indicates that the security of a republican government which comes from an educated citizenry, and to a lesser extent the prevention of pauperism and crime, continued to be the motivating purpose behind public education. The individual's right to an education appears not to have been contemplated.

\textsuperscript{158} 2 Missouri Convention Journal, supra note 154, at 527. The provision had initially been referred to the Committee on Education by resolution of Mr. Todd. 1 id. at 186.

\textsuperscript{159} 2 id. at 526-27.

\textsuperscript{160} Id. at 580-82.

\textsuperscript{161} Id. at 675. Todd's proposal on July 19 contained the following additional clause: "but other additional studies may be taught in the same school house, if without any State expense therefor."
B. The Confederate States

In the eleven States of the Confederacy, new constitutions or amendments were adopted in 1861 that severed ties with the United States, though in most cases the educational provisions, as indeed the whole constitutions, were otherwise retained intact. Following the war, each of the Confederate States adopted new constitutions or amendments between 1864 and 1866. Three States—Mississippi, North Carolina, and Tennessee—merely adopted amendments or ordinances rescinding the secession actions of 1861, and thus are not relevant for the present study. Five States—Arkansas and Virginia in 1864, and Florida, Georgia and South Carolina in 1865—retained the same education provisions as existed in their respective prewar constitutions, and the constitution of a sixth State, Alabama, contained a hortatory provision similar to its prewar constitution of 1819. Only the Louisiana Constitution of 1864 and the Texas Constitution of 1866 contained noteworthy developments.

The Louisiana Constitution of 1864, like the Missouri Constitution of 1865 discussed above, required the legislature to “provide for the education of all children of the State.” The constitution also dropped the reference to “the number of free white children” as the basis for apportionment of the school funds that was present in the 1852 Constitution. As we will see, the reference to “all children” is the first of many contained in the new constitutions of the old Confederacy.

The Texas Constitution of 1866 contained a major development of a different sort: The income derived from the perpetual school fund was limited “exclusively for the education of all the white scholastic” of the State. As if to mitigate the apparent harshness of the provision, the constitution also provided:

The legislature may provide for the levying of a tax for educational purposes . . . provided, That all the sums arising from said tax which may be collected from Africans, or persons of African descent, shall be exclusively appropriated for the maintenance of a system of public schools for Africans and their children; and it shall be the duty of the legislature to encourage schools among these people.

By implication, of course, this latter provision may have insured that all tax proceeds raised from whites would be used exclusively for white schools, especially when the provision is read together with the Article X,

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162. Arkansas (1864), Louisiana (1864), Virginia (1864), Alabama (1865), Florida (1865), Georgia (1865), South Carolina (1865), Mississippi (1865 amendments), North Carolina (1865 ordinance), Tennessee (1866 amendments), and Texas (1866).

163. ARK. CONST. of 1864, art. VIII, § 1; FLA. CONST. of 1865, art. X, §§ 1-2. The Georgia, Virginia and South Carolina constitutions continued to have no provision for education.

164. ALA. CONST. of 1865, art. IV, § 33.

165. See text accompanying note 148, supra.

166. LA. CONST. of 1864, Title XI, art. 141 (emphasis added).

167. TEX. CONST. of 1866, art. X, § 2 (emphasis added).

168. Id. art. X, § 7.
section 2 requirement that the school fund was to be applied only to the education of white children.

None of these first post-war constitutions was long-lived. The constitutions and contemporaneous appeals to reenter the Union were rejected by Congress, and the Confederate States were instead placed under the control of military governors. Under this reconstruction-era regime, constitutional conventions were called in each of the Confederate States save for Tennessee, and new constitutions designed primarily to deny office and the franchise to the leaders of the Confederacy were ratified between 1867 and 1870 as one of the conditions of the Confederate States' return to Congress.

As might be expected, the educational provisions in these reconstruction constitutions are strikingly similar. Obligatory provisions similar to that of the Wisconsin Constitution of 1848 were adopted in every State except Virginia, requiring the legislature, by various formulations, to establish and maintain a uniform or thorough system of free schools, for the gratuitous instruction of all children in the State. The Virginia Constitution of 1870 merely required the legislature to establish "a uniform system of public free schools," but provided in a separate section that the literary fund should be applied to the "equal benefit of all the people of the State." The constitutions of two of the States—Arkansas and Mississippi—contained clauses like that in the Wisconsin Constitution of 1848 providing for the forfeiture of school funds by districts that failed to maintain free schools for a specified number of months in any given year. One State—North Carolina—went so far as to provide for the indictment of county school commissioners who failed to maintain a public school in each school district four months in the year.

Despite such inclusive language, there is some evidence to suggest that the "uniform" systems contemplated under the reconstruction constitutions were not necessarily to be integrated systems. In seven of the ten States which adopted reconstruction constitutions, the constitutional mandate allowed for the legislature to establish "one or more schools" in each district. As William Swindler points out in his discussion of the

169. See text accompanying note 186, infra.

170. Alabama (1867) and Virginia (1870). The remaining states of the Confederacy, except Tennessee, all enacted new constitutions in 1868.

171. See text accompanying note 103, supra.

172. Ala. Const. of 1867, art. XI, § 6; Ark. Const. of 1868, art. IX, § 1; Fla. Const. of 1868, art. IX, §§ 1–2; Ga. Const. of 1868, art. VI, § 1; La. Const. of 1868, Title VII, art. 135; Miss. Const. of 1868, art. VIII, § 1; N.C. Const. of 1868, art. IX, § 2; S.C. Const. of 1868, art. X, §§ 3 & 10; Tex. Const. of 1868, art. IX, § 1.


174. Ark. Const. of 1868, art. IX, § 6; Miss. Const. of 1868, art. VIII, § 5.

175. N.C. Const. of 1868, art. IX, § 3.

176. Ala. Const. of 1867, art. XI, § 6; Ga. Const. of 1868, art. VI, § 3; N.C. Const. of 1868, art. IX, § 3; and S.C. Const. of 1868, art. X, § 3. See also Fla. Const. of 1868, art. IX, § 8 ("school or schools"); La. Const. of 1868, Title VII, art. 135 ("at least one" school in each parish); Miss. Const. of 1868, art. VIII, § 5 ("school or schools").
Alabama Constitution of 1867: "Segregation was tacitly made possible by the provision in Section 6 that the state Board of Education should establish 'one or more schools' in each township or other school district throughout the state."\(^{177}\) Not all such provisions could have signalled a segregated school system, however, since the reconstruction constitutions in Louisiana and South Carolina contained both "or more" clauses and express prohibitions against the establishment of segregated schools, and the Florida reconstruction constitution intimated as much.\(^{178}\)

Another feature common to the reconstruction constitutions was a provision establishing a state superintendent of education. While such provisions had become commonplace in the North before the war, beginning with the Michigan Constitution in 1835,\(^{179}\) more than just the pedagogical trend toward centralized public school systems seems to have been behind the inclusion of such provisions in the reconstruction constitutions. As William Swindler points out, the inclusion of sections providing for state superintendents and boards of education was "in part a reflection of the awakening national interest in universal public schooling and in part a Radical [Republican] device to create a major division of government independent of the legislature."\(^{180}\) Indeed, as the provision in the Alabama reconstruction constitution illustrates, a separate "education legislature," complete with authority to override a gubernatorial veto, was envisioned:

The Board of Education shall exercise full legislative powers in reference to the public educational institutions of the State, and its acts, when approved by the governor, or when re-enacted by two-thirds of the Board, in case of his disapproval, shall have the force and effect of law, unless repealed by the General Assembly.\(^{181}\)

Sections providing, for the first time, for a state school superintendent were also included in the reconstruction constitutions of Arkansas, Florida, Georgia, Mississippi, North Carolina, South Carolina, and Virginia.\(^{182}\) Texas moved from an appointed superintendent to an elected

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177. I Swindler, supra note 130, at 100 n.6 (citing Journal of the Alabama Constitutional Convention of 1867, at 153-56).

178. La. Const. of 1868, Title VII, art. 135 ("There shall be no separate schools or institutions of learning established exclusively for any race by the State of Louisiana"); S.C. Const. of 1868, art. X, § 10 ("All the public schools, colleges, and universities of this State, supported in whole or in part by the public funds, shall be free and open to all the children and youths of the State, without regard to race or color"); Fla. Const. of 1868, art. IX, § 1 ("It is the paramount duty of the State to make ample provision for the education of all the children residing within its borders, without distinction or preference").


180. I Swindler, supra note 130, at 99 n.6 (describing Ala. Const. of 1867, art. XI, §§ 1-5).


182. Ark. Const. of 1868, art. IX, § 2; Fla. Const. of 1868, art. IX, § 3; Ga. Const. of 1868, art. VI, § 2; Miss. Const. of 1868, art. VIII, § 2; N.C. Const. of 1868, art. III, § 1 and art. IX, §§ 7-9; S.C. Const. of 1868, art. X, § 1; and Va. Const. of 1870, art. VIII, § 1.
one.\textsuperscript{183} In Louisiana, the superintendent was charged with the "supervision and the general control of all public schools throughout the State,"\textsuperscript{184} a provision which provided for more independence from the legislature than was provided in the 1864 Constitution.\textsuperscript{185}

Tennessee was the only Confederate State not to adopt a constitution while under military rule; it had been readmitted to the Union in July, 1866, and thus escaped the military rule of the reconstruction regime. Nevertheless, it did adopt a new constitution in 1870. The education article was the same hortatory provision found in the 1834 Constitution, but with the addition of the following clause:

No school established or aided under this section shall allow white and negro children to be received as scholars together in the same school.\textsuperscript{186}

Unlike the Missouri Constitution of 1865, which merely allowed for segregation, this provision was the first to require segregation. As we have already seen, the slave-holding Union States of West Virginia and Missouri followed Tennessee's lead in 1872 and 1876, respectively.\textsuperscript{187} The remaining States of the old Confederacy were not to be far behind.

C. The Fourteenth Amendment

As was intimated above in the discussion of the California Constitution of 1849,\textsuperscript{188} the adoption of the Fourteenth Amendment in 1868 plays a significant role in the interpretation of State constitutional provisions relating to education. In the case of \textit{Ward v. Flood},\textsuperscript{189} the California Supreme Court stated that "the exclusion of colored children from schools where white children attend as pupils, cannot be supported, . . . except where separate schools are actually maintained for the education of colored children."\textsuperscript{190} This was not because any such law would be forbidden by the State constitution, by the Thirteenth Amendment to the U. S. Constitution, or by either the Privileges or Immunities Clause or the Due Process Clause of the Fourteenth Amendment.\textsuperscript{191} Rather, the court argued, it could not be supported because such an exclusion would be contrary to the Equal Protection

\textsuperscript{183} Compare \textsc{Tex. Const.} of 1866, art. X, § 10, with \textsc{Tex. Const.} of 1868, art. IX, § 2.
\textsuperscript{184} \textsc{La. Const.} of 1868, Title VII, art. 137.
\textsuperscript{185} \textsc{La. Const.} of 1864, Title XI, art. 140 (the superintendent's "duties shall be prescribed by law").
\textsuperscript{186} \textsc{Tenn. Const.} of 1870, art. XI, § 12.
\textsuperscript{187} See text accompanying notes 153 and 156, \textit{supra}.
\textsuperscript{188} See text accompanying note 102, \textit{supra}.
\textsuperscript{189} 48 Cal. 36 (1874).
\textsuperscript{190} \textit{Id.} at 56-57.
\textsuperscript{191} \textit{Id.} at 49-50. While the court was specifically addressing the segregation statute at issue and not an outright denial of education, the arguments it adopts would seem to be equally applicable to the latter case as well.
Clause of the Fourteenth Amendment. Said the California court:

The public law of the State—both the Constitution and Statute—having established public schools for educational purposes, to be maintained by public authority and at public expense, the youth of the State are thereby become pro hac vice the wards of the State, and under the [Equal Protection Clause of the Fourteenth Amendment], equally entitled to be educated at the public expense.

Thus, for the first time, we see how an obligatory-type provision for education in a State constitution and an actual statute enacted under it providing for free education, on the one hand, and the Equal Protection Clause of the Fourteenth Amendment, on the other, combined to create a right to education. If education under the laws and constitution of the State is provided to some, it cannot be denied to others based upon some invidious classification such as race. This same combination analysis was hinted at by the Supreme Court of the United States nearly a century later in San Antonio Independent School Dist. v. Rodriguez:

Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where—as is true in the present case—no charge could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.

But the equal protection analysis does not by itself serve to guarantee all children the right to education. There is nothing in this analysis, for example, that would prevent the State of California, in meeting its constitutional mandate, to establish only one school in each school district wholly inadequate to educate all the children therein, as long as the limited number of admission slots available were not apportioned in a discriminatory fashion. Nor is there anything in this analysis that would prevent States without mandatory constitutional language from abolishing their entire educational system. In State ex rel. Garnes v. McCann, the Ohio Supreme Court stated:

If the general assembly should pass a law repealing all laws creating and regulating the system, it cannot be claimed that the 14th amendment could be interposed to prevent so grievous an abridgement of the privileges of the citizens of the State, for they would thereby be deprived of privileges derived from the State, and not of privileges derived from the United States.

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192. Id. at 50.
193. Id. at 51.
195. See, for example, Grove v. School Inspectors of Peoria, 20 Ill. 532, 535, 543 (1858), where the Illinois Supreme Court held that a local school board's provision of education to only 1,150 of the 4,000 children residing in the district would not violate the board's statutory duty to provide education for all the children unless the board's action was accompanied by "oppression, corruption, or act of gross injustice."
196. 21 Ohio St. 198, 210 (1871); cf. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).
It is thus the combination of the State provisions, both constitutional and statutory, with the Equal Protection Clause of the Fourteenth Amendment, that provides a right to education. But, as the decision in *Ward v. Flood* indicates, such a combination did not at first provide a right to an integrated education. Many years of segregation were still to come.

VI. POST-RECONSTRUCTION TO PLESSY: 1874-1900

Between the close of reconstruction and the end of the century, seven new States were admitted to the Union, the existing States of California, Kentucky, New York, and Delaware adopted new constitutions, and every one of the ten Confederate States that had adopted reconstruction constitutions replaced them with “home rule” constitutions. All of the new States except Idaho contained education provisions requiring the legislature to provide for a system of public schools equally open to all the children of the State. New York also added such a clause. California retained its language requiring the establishment of a school in each district, while Kentucky and Delaware merely required the establishment of an efficient system of public schools.

While a few of the old Confederate States deleted their references to “all children,” the most important development of the period was the wholesale inclusion of provisions requiring segregation. Every one of the

197. Reconstruction is generally understood as coming to an end with the Compromise of 1877, in which Rutherford B. Hayes was elected President on the strength of highly suspect electoral votes from South Carolina, Florida, Louisiana, and Oregon, but which resulted in the withdrawal of the last federal troops from the old Confederacy. Nevertheless, as the old guard in the Confederate States gradually regained control of their legislatures from the “radical Republicans” who had governed since the war, they adopted new “home rule” constitutions, thus signaling an effective end to reconstruction *seriatim*. Accordingly, I include in this section all the “home rule” constitutions, beginning with that enacted by Arkansas in 1874.


199. California in 1879, Kentucky in 1890, New York in 1894, and Delaware in 1897.

200. Arkansas (1874), Alabama (1875), Texas and North Carolina (1876), Georgia (1877), Louisiana (1879 and 1898), Florida (1885), Mississippi (1890), South Carolina (1895), and Virginia (1902).

201. MONT. Const. of 1889, art. XI, § 7; N.D. Const. of 1889, art. 8, § 147; S.D. Const. of 1889, art. VIII, § 1; WASH. Const. of 1889, art. IX, § 1; WYO. Const. of 1889, art. VII, § 9; and UTAH Const. of 1895, art. X, § 1. Idaho merely provided for the establishment of a “general, uniform and thorough system of public, free common schools. IDAHO Const. of 1889, art. IX, § 1.

202. N.Y. Const. of 1894, art. IX, § 1.

203. CAL. Const. of 1879, art. IX, § 5.

204. KY. Const. of 1890, § 183; DEL. Const. of 1897, art. X, § 1.

205. FLA. Const. of 1885, art. XII, § 1 (“uniform system”); TEX. Const. of 1876, art. VII, § 1 (“efficient system”).
old Confederate States, except Arkansas, as well as the old Union States of Kentucky and Delaware, added mandatory segregation provisions similar to that of the Tennessee Constitution of 1870. Some constitutions, like that of Alabama in 1875, required the school system to give "equal benefit" to all the children of the State, but the fact remained that "equal" did not preclude the establishment of "separate schools for the children of citizens of African descent." The Kentucky Constitution went so far as to proclaim that "no distinction . . . on account of race or color" was to be made in the distribution of the school fund, but then completed the sentence by requiring that "separate schools for white and colored children shall be maintained." Only in the constitutions of newly-admitted Washington and Wyoming was segregation expressly prohibited.

Two other developments in the period are worth noting. Several of the southern States restricted the independence of the state school superintendents somewhat. The Louisiana Constitution of 1879 is illustrative of the point: The clause giving the superintendent authority for "supervision and the general control of all public schools throughout the State" was deleted, and the superintendent's annual salary was reduced from five thousand dollars to two thousand dollars.

The last major development of the period was the inclusion in the Mississippi Constitution of 1790 of a provision that effectively barred blacks from voting. In the article entitled "Franchise," it was provided that "every elector shall . . . be able to read any section of the constitution of this State; or he shall be able to understand the same when read to him, or give a reasonable interpretation thereof," before being allowed to vote. This highly subjective literacy test enabled southern political leaders to exclude most blacks from the polls, without at the same time excluding poor, illiterate whites as well. The mechanism, followed throughout the south after the turn of the century, is beyond the scope of this paper; ironically, however, it may have contributed to the notion implicitly adopted by the Brown Court in 1954 that education was so fundamentally important in the exercise of constitutional rights as to require the dismantling of segregation.

206. Ala. Const. of 1875, art. XII, § 1; Tex. Const. of 1876, art. VII, § 7; N.C. Const. of 1876, art. IX, § 2; Ga. Const. of 1877, art. VIII, § 1; Fla. Const. of 1885, art. XII, § 12; Ky. Const. of 1890, § 187; Miss. Const. of 1890, art. 8, § 207; S.C. Const. of 1895, art. XI, § 7; Del. Const. of 1897, art. X, § 2; La. Const. of 1898, art. 248; Va. Const. of 1902, art. IX, § 140. See also text accompanying note.

207. Ala. Const. of 1875, art. XII, § 1.

208. Id.


210. Wash. Const. of 1889, art. IX, § 1 (provision of education to be "without distinction or preference on account of race, color, caste or sex"); Wyo. Const. of 1889, art. VII, § 10 ("In none of the public schools so established and maintained shall distinction or discrimination be made on account of sex, race or color").

211. Compare La. Const. of 1868, Title VII, art. 137, with La. Const. of 1879, art. 225.
VII. CONCLUSION

The education articles contained in State constitutions developed historically from provisions that were hortatory in nature, to those that required the establishment of a centralized state educational system which provided for schools in every district throughout the state, and finally to those that required that education be provided to all the children of the state. As we have seen, however, the courts gave great deference to legislatures in the interpretation of what the constitutional mandates actually required. “All” did not necessarily mean “all,” though some courts did find a right to education in such language when it was combined with specific constitutionally-mandated time frames. Even then, the courts were often willing to allow the legislature the discretion to limit the word “all” to in-district residents and to permit other types of so-called administrative classifications, including race.

If many of the State constitutional provisions, even those that appeared obligatory, did not create in children a right to free education, the combination of those constitutional provisions and the statutes enacted under them, together with the Equal Protection Clause of the Fourteenth Amendment, did provide a right, not to education per se, but to an education equal to that being provided to others. Thus, the question set out at the outset of this article should probably be rephrased from “When did education become a civil right?” to “When DOES education become a civil right?”

It is possible that the passage of the Morrill Act in 1862 marked the 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. Before that view could be developed, however, the Supreme Court restricted the Privileges or Immunities Clause of the Fourteenth Amendment to rights of national citizenship, and education, if a right at all, was clearly a right as against the State governments. Thus, by the time most States had expressly provided in their State constitutions for the education of all children, the “privileges or immunities” door for enforcement against a recalcitrant State had been closed, and the “equal protection” door had been opened in its stead. The development of a right to education was in a sense frozen in time by this switch to equal protection analysis, and for more than a century now courts have quibbled over whether a particular kind of education, or attendance at a particular facility, is truly equal to that provided others, while the question of whether, and to what extent, free public education is a right and privilege the State governments are bound to respect, has remained unanswered. While it may be difficult to envision a State withdrawing all support for education, there is nothing

212. MISS. CONST. of 1890, art. XII, § 244.
213. The Slaughter-house Cases, 83 US (16 Wall.) 36 (1873).
in the equal protection analysis that would prevent it from doing so,\textsuperscript{214} and the equal protection analysis has so subsumed the judicial interpretation of State constitutional provisions that it is unclear to this day whether a constitutional requirement that "the legislature shall provide for a uniform, thorough and efficient system so that all the children of the state may be educated free of charge" actually affords any individual a right to anything. So when does education become a civil right? At the end of the nineteenth century, at least, the answer was: "Perhaps never, if the State is so inclined."

\textsuperscript{214} See, e.g., \textit{Brown v. Board of Education}, 347 U. S. 483, 493 (1954) ("[T]he opportunity of an education], where the state has undertaken to provide it, is a right which must be made available to all on equal terms") (emphasis added).